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EDWARD THOMPSON CO., Publishers,
Northport, Long Island, N. Y.

THE
AMERICAN AND ENGLISH
ENCYCLOPÆDIA
OF
LAW.

COMPILED UNDER THE EDITORIAL SUPERVISION OF

JOHN HOUSTON MERRILL,

*Late Editor of the American and English Railroad Cases and the American and
English Corporation Cases.*

VOLUME IX.



NORTHPORT, LONG ISLAND, N. Y.:
EDWARD THOMPSON COMPANY, LAW PUBLISHERS.
1889.

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1. **Definition.**—A body of men, generally consisting of not less than twelve, nor more than twenty-three, selected in the manner prescribed by law, summoned and returned by the sheriff or other proper officer to every session of the peace, oyer and terminer, and general gaol delivery,¹ and sworn to inquire and make presentment of all offences against the authority of the State, committed and triable within the county for which they are impanelled.²

1. 2 Hale P. C. 154; 4 Blk. Comm. 302.

2. **United States Grand Jury.**—In the national courts they are sworn to inquire and present all offences committed against the authority of the national government, within the State or district for which they are impanelled, or elsewhere, within the jurisdiction of the national government. 3 Story Const. 1784.

Constitutional Provisions.—The Constitution of the United States provides that, "No person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a grand jury, except in

cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger." U. S. Const. Art. 5.

The constitutions of most of the States contain a similar provision. Ark. C. 2, 8; Ariz. Bill of Rights, 14; Conn. C. 1, 9; Col. C. 2, 8; Dak. C. Cr. Pr. 7; Fla. C. Dec. of Rts. 8; Ida. Cr. Pr. 6; Iowa C. 1, 11; Ill. C. 2, 8; La. C. 5; Me. C. 1, 7; Minn. C. 1, 7; Mo. C. 2, 12; Mont. Cr. Pr. 5; N. J. C. 1, 9; N. Y. C. 1, 6; Neb. C. 1, 8; N. M. 50, 6; Ohio C. 1, 10; R. I. C. 1, 7; Tenn. C. 1, 14; Tex. C. 1, 10; Utah Cr. Pr. 3; W. Va. C. 3, 4; Wash. 764.

By the constitutions of five it is pro-

2. **Organization.**—(a) *Selection and Summoning.*—At the common law the grand jury was "returned by the sheriff or other proper officer without the nomination of any other person whatsoever."¹ In other words, the sheriff or other returning officer selected the grand jurors.² The practice in our States is regulated by statutes providing for the selection of grand jurors and the method of bringing them into court. In most of the States a list is prepared by a board of officers appointed by law, from which the requisite number is drawn by lot, and a venire issued to the sheriff, by whom they are summoned. In the following States and Territories they are selected by the jury commissioners of each county: Arkansas,³ Georgia,⁴ Indiana,⁵ Kentucky,⁶ New Mexico,⁷ North Carolina,⁸ Pennsylvania,⁹ South Carolina¹⁰ and Texas.¹¹

In the following by the board of county commissioners or supervisors: Arizona,¹² California,¹³ Colorado,¹⁴ Dakota,¹⁵ Florida,¹⁶ Idaho,¹⁷ Illinois,¹⁸ Minnesota,¹⁹ Mississippi,²⁰ Nebraska,²¹ New York,²² Washington,²³ Wisconsin²⁴ and Wyoming.²⁵

In the New England States they are chosen by the selectmen

vided that no person shall be proceeded against criminally by information. Pa. C. 1, 10; Del. C. 1, 8; Ky. C. 13, 13; Ala. C. 1, 9; Miss. C. 1, 31.

And that of Wisconsin provides that no person shall be held to answer for a criminal offence without due process of law. Wis. C. 1, 8 and Amt.

In California offences may be prosecuted by indictment or by information after examination and commitment by a magistrate.

In some States the constitution gives the legislature authority to make laws dispensing with a grand jury in any case. Ind. C. 7, 17; Ill. C. 2, 8; Iowa C. Amt. 3; Neb. C. 1, 10; Ore. C. 7, 18; Col. C. 2, 23.

The provision of the Federal Constitution as to prosecutions by indictment or presentment of a grand jury has been held to apply only to offences against the United States and not to offences against the individual States. *State v. Boswell*, 104 Ind. 541; *Hurtado v. California*, 110 U. S. 516; *Kalloch v. Superior Court*, 56 Cal. 229; *People v. Hurtado*, 63 Cal. 288; *Rowan v. State*, 30 Wis. 129; s. c., 11 Am. Rep. 559; *State v. Barnett*, 3 Kan. 250; *Brown v. Board of Levee Commissioners*, 50 Miss. 468; *Missouri v. Lewis*, 101 U. S. 22.

Origin.—There is reason to believe that this institution existed among the Saxons. (Crabb. Eng. Law 35.) By the constitution of Clarendon, enacted 10 Hen. II. (A. D. 1164) it is provided that, "if such men were suspected

whom none wished or dared to accuse, the sheriff being thereto required by the bishop, should swear twelve men of the neighborhood to declare the truth" respecting such supposed crime, the jurors being summoned as witnesses or accusers rather than judges. It seems to be pretty certain that this statute either established grand juries if this institution did not exist before, or reorganized them if they already existed. 1 Spence. Eq. Jur. 63; Bouv. Law Dict. Tit. Grand Jury.

1. 2 Hawk. P. C. c. 25, § 15.
2. 1 Bish. Cr. Pr. § 850.
3. Ark. Dig. 1884, § 3976.
4. Ga. Code, § 3910 (a.)
5. R. S. Ind. § 1393.
6. Gen. Stat. Ky. p. 571, § 1.
7. R. S. N. M. § 564.
8. Code N. C. § 1727.
9. Purd. Dig. (Pa.) p. 958, §§ 1, 2.
10. Gen. St. S. C. § 2236.
11. Pen. Code Tex. § 357.
12. Rev. Stat. Ariz. § 2177.
13. Code Cal. § 10,204.
14. Gen. St. Col. § 1903.
15. Pol. Code Dak. ch. 19, § 1.
16. McC. Dig. (Fla.) ch. 127, § 7.
17. R. S. Ida. § 3947.
18. R. S. Ill. ch. 78, § 9.
19. St. Minn. p. 938, § 5.
20. Rev. Code Miss. § 1664.
21. Cr. Code Neb. § 658.
22. R. S. p. 720, § 1.
23. Code Wash. § 2080.
24. R. S. Wis. § 2527.
25. R. S. Wy. § 3379.

or town council.¹ In Maryland,² Missouri,³ Oregon,⁴ Tennessee,⁵ Virginia⁶ and West Virginia⁷ by the county court. In Delaware⁸ by the levy court. In Iowa⁹ by the judge of election, or on his failure to select, by the county canvassers.

In Kansas,¹⁰ by the trustees of the townships. In Louisiana,¹¹ by the parish judge, sheriff and two electors. In Nevada,¹² by the county judge and one county commissioner. In New Jersey,¹³ by the sheriff. In Ohio,¹⁴ by the councilmen of the wards and trustees of the townships. In Utah,¹⁵ by the clerk and probate judge. In Michigan, by the supervisor and township clerk.¹⁶

The provisions of the statutes must be substantially observed,¹⁷

1. Rev. Stat. Conn. p. 24; Pub. Stat. Mass. ch. 170, § 6; Rev. Stat. Me. ch. 106, § 1; Gen. Laws N. H. ch. 213, § 1; Pub. Stat. R. I. ch. 200, § 1; Rev. Laws Vt. § 2730.

2. Rev. Code Md. Art. 62, § 2.

3. Rev. Stat. Mo. § 2784.

4. Gen. Laws Ore. p. 344, § 31.

5. Tenn. Code § 4756.

6. Va. Code § 3976.

7. Code W. Va. ch. 157, § 2.

8. Rev. Code Del. ch. 109, § 2.

9. Rev. Code Iowa § 238.

10. Comp. Laws Kan. § 3174-5.

11. Rev. Laws La. § 2136.

12. Comp. Laws Nev. § 1058.

13. Rev. N. J. p. 533, § 44.

14. R. S. O. § 5164.

15. Act. U. S., June 23, 1874.

16. How. Ann. St. (Mich.) § 7554.

17. The courts are strict in discountenancing irregularities in selecting and impanelling the grand jury. *Edmonds v. State*, 34 Ark. 720; *Wilburn v. State*, 21 Ark. 198; *State v. Williams*, 5 Port. (Ala.) 130; *Battle v. State*, 54 Ala. 93; *Finley v. State*, 61 Ala. 201; *Cross v. State*, 63 Ala. 40; *Empson v. People*, 78 Ill. 248; *Meiers v. State*, 56 Ind. 336; *Williams v. State*, 86 Ind. 400; *State v. Brandt*, 41 Iowa 593; *State v. McNamara*, 3 Nev. 70; *State v. Lawrence*, 12 Ore. 297.

An indictment found by a grand jury summoned by a sheriff without process, will be quashed on motion. *Nichols v. State*, 2 South. (N. J.) 539.

The exclusion by the supervisors of persons who are competent is no ground of challenge to the array. *People v. Jewett*, 3 Wend. (N. Y.) 314.

If a grand jury is wholly illegal without color of authority, its indictments may be stricken from the files. *People v. Southwell*, 46 Cal. 150; *Harrell v. State*, 26 Tex. App. 692.

Selecting persons to fill vacancies on the panel of a grand jury is the duty of the sheriff and cannot be directed in the first instance by the judge, but he may pass upon the qualifications of the persons selected. *Preuit v. People*, 5 Neb. 377.

Summoning persons to fill a panel from the body of the county instead of from the names still left in the grand jury box is authorized by Cal. Code §§ 226, 242. *Levy v. Wilson*, 69 Cal. 105.

Slight Irregularities in selecting, drawing and summoning, and in the names of the grand jurors, where none of the substantial rights of the accused are affected, do not affect the validity of the panel. *Sylvester v. State*, 72 Ala. 201; *People v. Kelley*, 46 Cal. 356; *Willingham v. State*, 21 Fla. 761; *Hayes v. State*, 50 Ga. 35; *People v. Duff*, 92 N. Y. 128; s. c., 65 How. Pr. (N. Y.) 365; *People v. Hooghkirk*, 96 N. Y. 149; s. c., 67 How. Pr. (N. Y.) 256; *State v. Jeffcoat*, 26 S. Car. 114; *State v. Mahan*, 12 Tex. 283; *State v. Champeau*, 52 Vt. 313; *U. S. v. Collins*, 1 Woods (U. S.) 499; *U. S. v. Rondeau*, 16 Fed. Rep. (U. S.) 109; *State v. Mellor*, 13 R. I. 666; *State v. Collyer*, 17 Nev. 275; *Commonwealth v. Moran*, 130 Mass. 281.

The False Impersonation of a Grand Juror by a person not drawn according to law, is fatal to the organization. *Nixon v. State*, 68 Ala. 535.

Voluntary Appearance of Juror Drawn but not Summoned; Summons of Person not Drawn.—A person who was regularly drawn and selected as a grand juror, but was not summoned, may voluntarily appear, and thereby subject himself to the control of the court as if he had been summoned; and if a person is summoned who was not drawn and selected, and who does not appear,

such summons does not work any irregularity in the organization of the grand jury. *Sylvester v. State*, 72 Ala. 201.

The statute requiring the grand jury to meet on the first day of the term is merely directory. *State v. Dillard*, 35 La. Ann. 1049.

Selection of Grand Jurors.—The grand jurors are selected and drawn by a body of officers appointed by the statutes, and not under any order or process made or issued under the authority of the court of which the jury is a constituent part. *State v. Lightbody*, 38 Me. 200; *Finley v. State*, 61 Ala. 201.

Any order of court confining the sheriff in summoning grand jurors to only a portion of the persons from whom the statute declares the panel shall be drawn, is illegal, and the body so organized is not a legal grand jury. *Finley v. State*, 61 Ala. 201.

A sheriff has no authority to summon grand jurors, except they have been selected regularly. *State v. Williams*, 5 Port. (Ala.) 130.

The essential matter to constitute a grand jury in *Alabama* when chosen by the board of county officers, seems to be that they shall select the jury from the citizens at large out of a list obtained biennially by the sheriff. Every matter beyond this seems nothing more than direction as to the manner in which the officers shall perform their duties. *Roe v. State*, (Ala.) 2 So. Rep. 459.

Common Law Method not Excluded by Statutes.—Where a statute provides the manner in which grand juries shall be selected and drawn, it does not necessarily exclude the common law method, and if an exigency arises a court may direct an open venire to the sheriff for the selection and summoning of a new panel. *Mackey v. People*, 2 Col. 13; *Levy v. Wilson*, 69 Cal. 105; *Wilson v. State*, 32 Tex. 112; *Stone v. People*, 2 Scam. (Ill.) 328; *White v. People*, 81 Ill. 333; *State v. Marsh*, 13 Kan. 596.

The Drawing is not invalid because of the absence of the judge. *Levy v. Wilson*, 69 Cal. 105.

United States Grand Jurors.—The act of July 20, 1840, prescribing how jurors of the courts of the United States shall be designated does not require a minute adherence to the state practice on that subject by the U. S. Courts. *United States v. Collins*, 1 Woods (U. S.) 499.

A plea in abatement seeking to at-

tack the manner in which a grand jury was organized, must show not only that the question presented by it was not raised by a challenge to the array, but also that the defendant had no suitable opportunity of challenging the array. Where a defendant has challenged the array of a grand jury, alleging certain facts in support thereof, he cannot afterward plead the same facts in abatement. *McClary v. State*, 75 Ind. 260.

Supplying Deficiency of Original Panel.—In the organization of the grand jury, when less than fifteen of the original panel appear and are accepted, the deficiency should be supplied by summoning twice the requisite number "from the qualified citizens of the county" (Code, § 4754); and when the record shows that they were summoned, under the order of the court, "from the bystanders," the irregularity will work a reversal of a judgment of conviction under an indictment found by the grand jury thus constituted. *Couch v. State*, 63 Ala. 163.

When twelve of the persons originally summoned as grand jurors appear and are accepted by the court, there is no error in requiring the sheriff to summon twelve other persons for the completion of the jury (Code, § 4754), although a grand jury may be composed of only fifteen persons; nor is it error to direct the summons of "good and lawful citizens from the body of the people of the county, who possess the qualifications specified in the statutes of Alabama in such case made and provided," instead of using the exact words of the statute, "qualified citizens of the county." *Yancy v. State*, 63 Ala. 141. For practice in Alabama see also *Berry v. State*, 63 Ala. 126; *Scott v. State*, 63 Ala. 59; *Abernathy v. State*, 78 Ala. 411; *Billingslea v. State*, 68 Ala. 486.

In case of a deficiency in a grand jury, arising from the fact that some of the number named in the venire issued to the sheriff or other officer have not been summoned, or that a portion so summoned have been excused by the court for the term, it is discretionary with the court to order that such deficiency be filled, either from the list furnished by the county commissioners, by drawing from the box, or from the body of the county. *Jones v. State*, 18 Fla. 889.

Where, upon the calling of the grand jury, some of the jurors fail to appear, the court may under Iowa Code, § 4256,

and irregularities may usually be objected to by challenge to the array or by motion to quash.¹ This must be done before the general issue unless the defect appears on the face of the record.² The organization will be presumed to be regular until the contrary is shown by plea.³ In some States it is provided by statute that the persons impanelled shall be the grand jury notwithstanding

orally direct the sheriff to fill up the panel; it is not necessary that a precept should be issued. *State v. Miller*, 53 Iowa 84, 154.

Talesmen; Error, Not Assumed.—In *Kansas* the statute provides that in case any grand juror fails to attend or is discharged, his place shall be filled by a talesman. (Crim. Code, § 74.) The talesman is to be selected in the discretion of the sheriff; but where the judge gives the sheriff the names of several persons to act as talesmen, and requests him to summon them, and the sheriff complies with the request, and two of the persons thus named and summoned serve upon the grand jury, *held*, in the absence of other proof, the supreme court is not to assume that the district judge acted from any wrong or improper motive in naming the talesmen and in making the request of the sheriff, and therefore it cannot be said that such alleged irregularity in the selection of the talesmen amounts to corruption. *State v. Copp*, 34 Kan. 522.

1. *Wilson v. People*, 3 Col. 325; *State v. Bowman* (Iowa) 34 N. W. Rep. 767; *Patrick v. State*, 16 Neb. 330; *Gibbs v. State*, 45 N. J. 379; s. c., 46 Am. Rep. 782; *Reed v. State*, 1 Tex. App. 1 Comp.; *Green v. State*, 1 Tex. App. 82.

Contra.—In *North Carolina* an objection to irregularity in drawing a grand jury must be taken by plea in abatement on arraignment of defendant and not by motion to quash. *State v. Martin*, 82 N. C. 672; *State v. Watson*, 86 N. C. 626.

A grand jury was impanelled in the absence of several persons drawn to serve as grand jurors, such absence being caused by the judge informing them that they would not be wanted. *Held*, that the grand jury was illegally constituted and the indictment should be quashed. *State v. Bowman* (Iowa), 34 N. W. Rep. 767.

An objection to the formation of the grand jury cannot be presented to the court on a motion to set aside the indictment. *People v. Hunter*, 54 Cal. 65.

2. *State v. Reid*, 20 Iowa 413; *Miller's case*, 4 G. (Miss.) 356.

Objection to the manner of impaneling comes too late after the first day of the term. *State v. Canady*, 16 La. Ann. 141; *State v. Hoffpauer*, 21 La. Ann. 609.

The legislature may restrict grounds of challenge to the panel. *People v. Southwell*, 46 Cal. 141.

Waiver.—A defendant personally present or present by attorney when his case is submitted to the grand jury, waives his right by failing to object to the panel at that time. *State v. Ruthven*, 58 Iowa 121; *Haggard v. Com.*, 79 Ky. 366; *State v. Washington*, 33 La. Ann. 896; *Maier v. State*, 3 Minn. 444.

By pleading not guilty to an indictment and going to trial without making any objection to the mode of selecting the grand jury, one waives his right to take the objection or motion in arrest of judgment, and the rule is not altered by the fact that the objection is based upon the constitutionality of the statute under which the grand jury is selected. *United States v. Gale*, 109 U. S. 65.

3. *State v. Lassley*, 7 Port. (Ala.) 526; *Wilson v. People*, 3 Col. 325; *Thayer v. People*, 2 Doug. (Mich.) 420; *State v. Scarborough*, 55 Md. 345; *Chase v. State*, 46 Miss. 683.

In *New York* it was held that the fact that the grand jury was acting under color of authority was sufficient—prisoner could not plead to organization. *People v. Dolan*, 6 Hun. (N. Y.) 232; *People v. Hooghkirk*, 96 N. Y. 149; s. c., 67 How. Pr. (N. Y.) 256.

It is not necessary for the record, in a criminal case, to show affirmatively that the grand jurors were drawn in the presence of the officers to whom that duty is by law committed; if they were not so drawn, that is matter for a plea in abatement. *Preston v. State*, 63 Ala. 127.

Where the terms of court, and the ones at which a grand jury is required to attend have been designated by the county judge, an order of the court, or

irregularities in selecting and summoning them. Such a provision has been held to be constitutional and to bind defendants.¹

(b) *Number*.—At common law a grand jury must consist of at least twelve and not more than twenty-four persons. Of the twenty-four returned, no more than twenty-three are sworn,² in practice, because a finding must be by the concurrence of twelve members.³ The number of grand jurors in our States is regulated either by the common law or by the statutes or constitution of the State.⁴ By the constitutions of

of the board of supervisors is not essential to legalize the summoning and drawing of a grand jury at a court so designated. *People v. Rugg*, 98 N. Y. 537.

1. *Commonwealth v. Brown*, 121 Mass. 69; *Head v. State*, 44 Miss. 731; *Durrah v. State*, 44 Miss. 789; *Logan v. State*, 50 Miss. 269; *State v. Ostrander*, 18 Iowa 435; *State v. Reed*, 20 Iowa 413; *People v. Southwell*, 46 Cal. 141.

2. An indictment found by a grand jury of twenty-four persons is void. *People v. King*, Col. and Cal. (N. Y.) 364; *Comm. v. Salter*, 2 Pears. (Pa.) 461; *Comm. v. Lisenring*, 2 Pears. (Pa.) 466.

3. 4 Blk. Comm. 302, 2 Hawk. P. C. c. 25, § 16.

The absence of any member of a grand jury on account of sickness or any other cause will not prevent the other members of the grand jury from finding and returning indictments, provided, of course, there are twelve members left to transact business; but no indictment can be found without the concurrence of at least twelve grand jurors. *State v. Copp*, 34 Kan. 522.

Where a grand jury permanently excused one of their number, thereby leaving only eleven to transact business, it was objected by the defence that its proceedings were invalidated, but the court held that it had no authority to permanently excuse a member, and therefore its action in so doing was a nullity and absolutely void and did not operate to discharge him, and so the objections could not prevail. *Smith v. State*, 19 Tex. App. 95. See also *Watts v. State*, 22 Tex. App. 572.

4. See statutes of the different States. In most of the States there must be a concurrence of twelve to render the indictment valid, as at common law, and where a statute prescribes the number to be drawn, a finding by a panel consisting of a less number is valid, so that at least twelve be

left to concur. *Ulmer v. State*, 61 Ala. 208; *Finley v. State*, 61 Ala. 201; *Harding v. State*, 22 Ark. 210; *People v. Hunter*, 54 Cal. 65; *People v. Gatewood*, 20 Cal. 147; *Mackey v. People*, 2 Col. 13; *Barron v. People*, 73 Ill. 256; *Beasley v. People*, 89 Ill. 571; *Hudson v. State*, 1 Blackf. (Ind.) 317; *State v. Copp*, 34 Kan. 522; *State v. Swift*, 14 La. Ann. 827; *State v. Lightbody*, 38 Me. 200; *Barney v. State*, 12 S. & M. (Miss.) 68; *People v. Shattuck*, 6 Abb. N. C. (N. Y.) 33; *State v. Clayton*, 11 Rich. L. (S. Car.) 581; *Sayer's case*, 8 Leigh. (Va.) 722; *State v. Brainerd*, 56 Vt. 532; s. c., 48 Am. Rep. 818.

But where the requisite number is not drawn, an indictment found by the grand jury is fatally defective. *Gladden v. State*, 12 Fla. 562.

▲ *Utah* statute declares that twenty-four men shall constitute a grand jury. Less than that number was therefore held not to be a legal grand jury. *Brannigan v. People*, 3 Utah 488.

A grand jury in Texas, as constituted by section 13 of article V of the constitution, is composed of twelve men, and no other number, greater or less. Such a grand jury alone can present a valid indictment, and an indictment presented by a purported grand jury composed of any other number of men is an absolute nullity, and incapable of conferring jurisdiction upon any court of this State. Such an error goes to the foundation of the suit, and can be availed of in any manner and at any stage of the proceedings, and even without exception below or on appeal will be revised by the court if apparent of record. See the opinion *in extenso* on the question. *Lott v. State*, 18 Tex. App. 627; *McNeesee v. State*, 19 Tex. App. 48.

In *Idaho* an act of the legislature providing that grand juries may consist of seven members was held to be valid. (Hollister, J., dissenting.) *People v. Waters*, 1 Idaho N. S. 560.

Missouri,¹ Texas² and Colorado,³ a grand jury consists of twelve men, any nine of whom may concur to find an indictment. In Oregon, of seven men, of whom five may so concur. In Iowa, of any number from five to fifteen. In the United States Courts, a grand jury may consist of not less than sixteen nor more than twenty-three.⁴

(c) *Selection of Foreman*.—After the grand jury has assembled and before it is sworn, a foreman is selected.⁵ In the United States Courts, and those of most of the States, the court makes the selection.⁶ In the New England States, Michigan, Florida and South Carolina,⁷ the grand jury selects its own foreman.⁸

(d) *Oath*.—The grand jury to be legally organized must be sworn.⁹ The foreman is generally sworn first, and then the oath is administered to the rest of the jury.¹⁰ The form of the oath is ancient and must be substantially observed.¹¹ While the form

1. Const. Mo. 2, 28; *State v. Sweeney*, 68 Mo. 97.

2. Const. Tex. 5, 13; *McNeese v. State*, 19 Tex. App. 48; *Smith v. State*, 19 Tex. App. 95; *Williams v. State*, 19 Tex. App. 265; *Ex parte Swain*, 19 Tex. App. 323; *Rainey v. State*, 19 Tex. App. 479.

3. Const. Col. 1, 23; *Wilson v. People*, 3 Col. 325.

4. R. S. (U. S.) § 808; *People v. Green*, 1 Utah T. 11.

This provision applies, however, only to circuit and district courts of the United States. The territorial courts are free to act in obedience to the territorial laws in force for the time being. *Reynolds v. United States*, 98 U. S. 145.

5. Wh. Cr. Pl. and Pr. § 342. The appointment of the foreman need not appear upon the minutes. *People v. Roberts*, 6 Col. 214; *Comm. v. Pullan*, 3 Bush (Ky.) 47.

The court may appoint a talesman properly selected from the bystanders, for foreman of the grand jury. *State v. Brandt*, 41 Iowa 593.

An act of Louisiana required the foreman to be selected from the whole venire and the remainder to be drawn. Any other manner of drawing was held to be illegal. *State v. Texada*, 19 La. Ann. 436.

6. R. S. U. S. § 809.

7. Rev. Stat. Me. ch. 134, § 4; Pub. Stat. Mass. ch. 213, § 7; How. Ann. Stat. (Mich.) § 9494; McC. Dig. (Fla.) ch. 127, § 17; Gen. Stat. S. C. § 2253.

8. Where it appears of record that A. B. was sworn as foreman of the grand jury, it is sufficient evidence of

his appointment. Swearing is as good as appointment. *Woodside v. State*, 2 Howard (Miss.) 655.

9. *Ridling v. State*, 56 Ga. 601.

10. In the following States they are sworn altogether: *Arkansas* Dig. § 2075; *Indiana* R. S. § 1652; *Kentucky* Gen. Stat. p. 570, § 6; *New Hampshire* Gen. Laws ch. 260, § 5; *Oregon* Dig. p. 344, § 37; *Rhode Island* Pub. Stat. ch. 200, § 36; *Vermont* R. L. § 4551; *Washington Territory* Code § 981.

In the following the first two on the list are sworn together and then the remainder: *Florida* McC. Dig. c. 127, § 21; *Maine* R. S. ch. 134, § 2; *Massachusetts* P. S. ch. 213, § 5; *Michigan* How. Ann. Stat. § 9491; *Wisconsin* R. S. § 2547.

11. *Brown v. State*, 10 Ark. 607.

To sustain a conviction of a crime it is essential that the record show affirmatively that the grand jurors were sworn. No inference that they were sworn can be drawn from the word "impanelled" in the record. *Lyman v. People*, 7 Brad. (Ill.) 345; *Cody v. State*, 3 Howard (Miss.) 27.

A presentment may be quashed where one whose name appears on it was not impanelled and sworn as a member of the grand jury. *State v. Tilly*, 8 Baxt. (Tenn.) 381.

A sentence against a defendant convicted of a crime will be reversed where it appears from the indictment and other parts of the record that the grand jurors who found the indictment were not residents of the county for which they were chosen, and have not taken the requisite oath prescribed by law. *Territory v. Woolsey*, 3 Utah 470.

varies somewhat according to the practice or statutes of the different States, it is materially the same in all. The form generally used for swearing the foreman is as follows:

"You, as foreman of this inquest, for the body of the county of ———, do swear (or affirm) that you will diligently inquire, and true presentments make, of such articles, matters and things as shall be given you in charge; the commonwealth's (or State's) counsel, your fellows', and your own, you shall keep secret; you shall present no one for envy, hatred or malice, neither shall you leave anyone unrepresented for fear, favor, affection, hope of reward, or gain, but shall present all things truly, as they come to your knowledge, according to the best of your understanding (so help you, God)."

That administered to the rest of the jury is as follows: "The same oath (or affirmation) which your foreman hath taken, on his part, you and every of you shall well and truly observe, on your part (so help you, God)."¹

A mistake in swearing in grand jurors may be corrected without a fatal effect on the entire body.²

The statutes provide that grand jurors may either affirm or swear to fulfill the duties required of them by law.³

(c) *Charging*.—Before the grand jury withdraw to transact their business they are instructed in the articles of their inquiry by a charge from the judge who sits upon the bench.⁴

If the jury is legally charged with its duties when sworn in the presence of the court, it is not necessary that it should be instructed by the judge.⁵ Nor is it necessary that all of the jurors

Presumption. Where the record shows that the grand jury was sworn, the court will presume that the legal oath was administered, in absence of proof to the contrary. *Lumpkin v. State*, 68 Ala. 56; *Comp. Schamberger v. State*, 68 Ala. 543; *Allen v. People*, 77 Ill. 484; *Comm. v. Pullan*, 3 Bush (Ky.) 47.

Any officer authorized by law to administer oaths may swear the grand jury. *Allen v. People*, 77 Ill. 484.

1. Whart. Cr. Pr. and Pt. § 342.

2. *State v. Fee*, 19 Wis. 562; *State v. Froiseth*, 16 Minn. 313.

3. Quakers and others scrupulous of taking an oath may under a general statutory provision authorizing them to affirm, do so when called as grand jurors. *Comm. v. Smith*, 9 Mass. 107.

4. 4 Blk. Comm. 303.

5. *Commonwealth v. Sanborn*, 116 Mass. 191.

The court will not instruct the grand jury at the instance of the accused as to the nature of the evidence to be received. *Commonwealth v. Knapp*, 26 Mass. 496.

The court will not give in charge to the grand jury with a view to presentment any case of ordinary offence where the remedy by indictment is adequate and no urgent necessity exists for the exercise of such power. *Ex parte Citizens' Assn.*, 8 Phila. (Pa.) 478.

One under prosecution has no right to demand that the grand jury be particularly charged as to his case. 1 *Burr's Trial* 172.

"In the performance of this duty, the judicious magistrate will take care, not only that his remarks are, in general, suited to the offices which a grand jury have to discharge, but a plain reference to local objects, events, discussions and concerns, as far as they properly fall within the limits of his jurisdiction, and seem entitled to his notice. He will strive to allay animosities, to destroy the spirit of party, to discountenance every receptacle of idleness and vice, as well as every vestige of popular barbarity and grossness." 1 *Chitty Crim. L.* 312. See charges of Field J. in 2

should hear the full charge.¹ The statutes generally enjoin the charging of the grand jury.²

3. Qualifications.—At common law each grand juror ought to be of the same county where the indictment is found, to be a freeman and a lawful liege subject; and consequently neither under an attainder of any treason or felony, nor a villain, nor alien, nor outlawed, whether for a criminal matter or in a personal action.³

The statutes of the United States⁴ and of the different States fix the qualifications of grand jurors, and in some States they appear to be exclusive of the common law qualifications.⁵ Where

Sawyer. (U. S.) 678; *Kling J. in Grand Jury v. Public Press*, 4 Brewst. (Pa.) 313; *Lord C. J., Eyre*. in 24 How. St. Tr. 201.

1. *Wadlin's Case*, 11 Mass. 142; *State v. Froiseth*, 16 Minn. 313; *Findley v. People*, 1 Mich. 235.

2. It has been held in *Indiana* that a failure to charge will not vitiate the proceedings of the grand jury. *Stewart v. State*, 26 Ind. 142.

3. 2 Hawk. P. C., c. 25, § 16.

4. R. S. U. S., § 812, 820, 822.

5. *State v. Easter*, 30 Ohio 542; *United States v. Reed*, 2 Blatchf. (U. S.) 435; *State v. Gut*, 13 Minn. 341; *Commonwealth v. Strother*, 1 Va. Cas. 186; *Mahl v. State*, 1 Tex. App. 127; *Roland v. Commonwealth*, 1 Nor. (Pa.) 306; *Beason v. State*, 34 Miss. 602; *Commonwealth v. Ryan*, 5 Mass. 90; *Commonwealth v. Smith*, 9 Mass. 107; *United States v. Williams*, 1 Dillon (U. S.) 485; *State v. Ansaleme*, 15 Iowa 44; *State v. Millain*, 3 Nev. 409.

In *Kentucky* the failure of a grand juror to possess each of the qualifications prescribed by statute, renders indictments found by such jurors subject to be set aside as for substantial error in the formation of the grand jury. *Ranganthall v. Com.*, 14 Bush (Ky.) 457; *Commonwealth v. Smith*, 10 Bush (Ky.) 478.

Such motion must be made before pleading. *Ranganthall v. Comm.*, 14 Bush (Ky.) 457.

Such motion is in the nature of a plea in abatement. If not made promptly the right to make it is waived. *Comm. v. Pritchett*, 11 Bush (Ky.) 277.

Objections to Indictment on Account of Incompetency of Grand Jurors.—In the completion of a grand jury by adding talesmen, if the order of the court directs the talesmen to be summoned from an improper class of persons, the error is fatal to any indictment found

by the grand jury so formed; but when the order of court is correct, if an incompetent person is summoned by the sheriff and serves, the irregularity is not available in defence of an indictment found by the grand jury. *Oliver v. The State*, 66 Ala. 8.

Freeholder.—A grand juror must be a freeholder or householder at the time his name is returned by the sheriff. *State v. Middleton*, 5 Port. (Ala.) 484. Persons who are householders but not freeholders are incompetent as grand jurors. *Wills v. State*, 69 Ind. 286; *State v. Herndon*, 5 Blackf. (Ind.) 75; *Burrows Case*, 23 Miss. 203; *State v. Rockafellow*, 1 Hal. (N. J.) 332; *Stanley v. State*, 16 Tex. 557; *Wysor v. Comm.*, 6 Grat. (Va.) 711.

In *New York* it is not essential that a grand juror shall be a freeholder. *People v. Jewett*, 6 Wend. (N. Y.) 386; *Comp. Palmore v. State*, 29 Ark. 248;

At common law a grand juror need not be a freeholder. 1 Chitty Crim. Law. 308; 2 Hawk. P. C. c. 25, § 10.

Party to Action.—It is not error to quash an indictment on the ground that one of the grand jurors was a party to an action pending and at issue in the superior court. *State v. Liles*, 78 N. C. 496.

One is not disqualified under *N. C. Code* § 2299 to act as a grand juror by reason of having a civil suit pending in the same county. *State v. Edens*, 85 N. C. 522.

The wife of one of the grand jurors, who found an indictment against the respondent charged with misapplying and diverting the funds of the *St. Albans Trust Company*, was a depositor in the said company in her own right. *Held*, that the grand juror was not disqualified. *State v. Brainerd*, 56 Vt. 532; s. c., 48 Am. Rep. 818.

It is no objection to an indictment that the foreman of the grand jury find-

a statute provides that certain persons may be excused from jury duty, it has been held that such exemptions are not disqualifications that may be excepted to by the defendant.¹

ing it was one of the committing magistrates. *State v. Chairs*, 9 *Baxter* (Tenn.) 196.

A grand juror is not disqualified because he has subscribed money for the legitimate suppression of crime. *Koch v. State*, 32 *Ohio St.* 353.

After refusal by the court to allow a legal challenge properly made to a grand juror, he is disqualified and his presence on the jury vitiates the whole panel. *People v. Wentermelten*, 1 *Dak.* 63.

No person is qualified unless his name is on the jury list. *State v. Jacobs*, 6 *Tex.* 99.

The statute forbidding the name of a person once drawn as a juror to be again put into the jury box within two years, does not so far disqualify a person whose name is drawn within that time, that an indictment found by a grand jury of which a person so drawn is a member will be thereby rendered invalid. *State v. Cox*, 52 *Vt.* 471.

Under the Public Statutes of *Rhode Island* the fact that a board of canvassers has listed a man among those qualified to vote on any proposition to impose a tax or expend money in the town of his residence, is not conclusive evidence that he is qualified to serve as a grand juror. *State v. Congdon*, 14 *R. I.* 267.

Alienage Disqualifies.—*Guyowski v. People*, 1 *Scam.* (Ill.) 481; *State v. Gibbs*, 39 *Iowa* 318; *Comm. v. Cherry*, 2 *Va. Cas.* 20; *State v. Cole*, 17 *Wis.* 674; *Harless v. United States*, *Morris* (Iowa) 169; *People v. Henderson*, 28 *Cal.* 465; *Reich v. State*, 53 *Ga.* 73.

Not so in *Indiana*. *State v. Taylor*, 8 *Blackf. (Ind.)* 178.

Grand Jurors Must be Residents of the County.—A grand juror cannot be selected in one county to try offences in another. *Bell v. People*, 1 *Scam.* (Ill.) 399; *Carpenter v. State*, 4 *Howard* (Miss.) 163; *Territory v. Woolsey*, 3 *Utah* 470.

A Non-resident was drawn on the panel from which the grand jury was to be drawn. His name was not drawn as a grand juror. It was held that the grand jury was not disqualified, and that the irregularity was no ground for a plea in abatement. *State v. Glasgow*, 59 *Md.* 209.

Absence from the State for a year on temporary business without intention to change one's domicile, does not disqualify a grand juror. *State v. Alexander*, 35 *La. Ann.* 1100.

Citizenship of the United States.—An affidavit that one of the grand jurors finding the indictment against the defendant was not at the time a citizen of the United States does not show any illegality in the proceedings without further showing that he had not declared his intention of becoming a citizen, as the statute only requires citizenship or declaration of intention as a qualification to serve on a grand jury. *Territory v. Harding*, 6 *Mont.* 323.

Loyalty.—The West Virginia act of Nov., 1863, prescribing loyalty as a qualification of grand jurors, held, not repealed by the act of Feb., 1867, or so modified as to allow objections under it by plea in abatement. *Bradford v. State*, 4 *W. Va.* 763.

The proscription of U. S. Rev. St. § 820 of those as grand jurors who joined the late rebellion against the United States is absolute, and it does not rest in the discretion of the United States Attorney or court to say whether the rule shall be applied or not. *U. S. v. Hammond*, 2 *Woods (C. C.)* 197.

Politics.—The fact that a man is a member of a political party and a strong partisan does not affect his qualifications as a grand juror. *United States v. Eagan*, 30 *Fed. Rep. (U. S.)* 608.

Polygamy.—Sec. 5 of U. S. Act Mar. 22, 1882, providing that in prosecutions for polygamy it shall be sufficient cause of challenge to any person drawn or summoned as a juror or talesman that he believes polygamy to be right, embraces grand jurors. *Clauson v. United States*, 114 *U. S.* 477.

1. *State v. Adams*, 20 *Iowa* 486; *State v. Brown*, 12 *Minn.* 538.

Officers of the United States, although they have the right to be excused from serving as grand jurors, are not disqualified to act as such. *State v. Quimby*, 51 *Me.* 395; *State v. Wright*, 53 *Me.* 328; *Comm. v. Strother*, 1 *Va. Cas.* 186.

Age Not a Disqualification.—*Davison v. People*, 90 *Ill.* 221; *Green v. State*, 59 *Md.* 126; *Booth v. Comm.*, 16 *Gratt. (Va.)* 519.

How Disqualifications May be Excepted to.—When a person who is disqualified is returned it is a good ground for challenge.¹ Challenges can only be made before indictment.²

But in *Florida* an exemption of persons over 65 years of age has been held to be a disqualification. *Kitrol v. State*, 9 Fla. 9.

Quakers are not exempted nor disqualified. *Comm. v. Smith*, 9 Mass. 107.

Double Service.—The provisions in Section 5164 Rev. St., as amended April 29, 1885, (82 *Ohio*, L. 166) that "the trustees of each township and councilmen of each ward shall on the day of the regular State election annually select of good judicious persons having the qualifications of an elector, who have not served as a regular juror in any court of record in the county during the last two years past, and not exempt by law from serving as jurors; the number of persons designated in the notice to be returned as jurors therefrom," does not so far disqualify persons who have so served on a regular jury as to render invalid indictments found by the grand juries of which they were members. *State v. Elson (Ohio)*, 16 N. E. Rep. 684.

Presumption.—The presumption is that talesmen are from the body of the county. *Fletcher v. People*, 81 Ill. 116.

Where the record states that the grand jurors, returning an indictment, were "good and lawful men," householders of the proper county, it will be presumed that they possessed the statutory qualifications. *Willey v. State*, 46 Ind. 363.

A grand juror, drawn and appearing upon summons, is presumed to be qualified. *Thayer v. People*, 2 Doug. (Mich.) 417; *Cody v. State*, 3 Howard (Miss.) 27; *Dowling v. State*, 5 S. & M. (Miss.) 644; *Easterling v. State*, 35 (Miss.) 210.

In *Mississippi* impanelling is held to be conclusive evidence of competency and qualification. *Lee v. State*, 45 Miss. 114; *Nichols v. State*, 46 Miss. 284; *Logan v. State*, 50 Miss. 269; *Head v. State*, 44 Miss. 731; *Durrah v. State*, 44 Miss. 789.

A statement that the grand jury was elected, impanelled, sworn and charged is sufficient. The presumption is that they were good and lawful men. *Galvin v. State*, 6 Cald. (Tenn.) 283.

Excuse.—A judge may excuse grand jurors for reasons appearing to him

satisfactory, and may reject grand jurors who do not appear to have the statutory qualifications. The exercise of such a discretion will not ordinarily be revised. *State v. Bradford*, 57 N. H. 188; *State v. Brown*, 12 Minn. 538; *State v. Gut*, 13 Minn. 341.

Neither the court nor the grand jury have power to permanently excuse a grand juror from serving after they have been impanelled. *Smith v. State*, 19 Tex. App. 95.

1. 2 Hawk. P. C. c. 25, § 16. See *Mershon v. State*, 51 Ind. 14.

In the absence of any statute to the contrary, the prisoner ought to be permitted to challenge the grand jurors at any time before they consider the case, upon information gained that they are lawfully subject to challenge on account of matters arising after a prior challenge has been made. It is accordingly held that, when an indictment has been set aside as a nullity on account of illegality, the grand jurors who found the indictment are subject to challenge by the prisoner, on the ground that, in the finding of the illegal indictment, they have formed and expressed an opinion as to the guilt of the prisoner; and to deny the prisoner, in such case, the right of challenge, and submit the case again to the same grand jury, against his objections, was error. *State v. Osborne*, 61 Iowa 330; *Kemp v. State*, 11 Tex. App. 174.

Under *Dakota* Crim. Code, 1862—107, § 13 allowing a challenge of any individual grand juror before they retire after being drawn and charged, it is error by the court not to allow the challenge to be made of right though no reason was shown why it was not interposed before. *People v. Wintermette*, 1 Dak. Ter. 63.

Burden of Proof.—One challenging a grand juror because he is an alien has the burden of proof. *State v. Haynes*, 54 Iowa 109.

2. *State v. Gibbs*, 39 Iowa 318; *People v. Geiger*, 49 Cal. 643; *Patrick v. State*, 16 Neb. 330; *Maher v. State*, 3 Minn. 444.

An objection to the qualification of a grand juror comes too late after a plea to the merits. *Territory v. Romero*, 2 New Mex. 474.

In *Missouri*, challenge must be made

In most of the States the disqualifications of a juror may be taken advantage of after indictment by plea in abatement,¹ if the right has not been waived.² Ordinarily after the general issue has been pleaded objections are too late.³ Where the ground of

before the jurors are sworn. *State v. Welch*, 33 Mo. 33.

Where grounds of challenge and the time for objecting to the qualifications of a grand juror are provided for by law, the prisoner cannot plead in abatement if he has omitted to request that he be brought into court to make the challenge. *Kemp v. The State*, 11 Tex. App. 174.

1. *State v. Carver*, 49 Me. 588; *McCullough v. Commonwealth*, 17 Smith (Pa.) 30; *Durr v. State*, 53 Miss. 425; *Mershon v. State*, 51 Ind. 14; *United States v. Hammond*, 2 Woods (U. S.) 107; *Dixon v. State*, 3 Iowa 416; *State v. Hinkle*, 6 Iowa 380; *Comm. v. Smith*, 9 Mass. 107; *People v. Roberts*, 6 Cal. 214; *State v. Rockafellow*, 1 Hal. (N. J.) 332; *State v. Brown*, 10 Ark. 78; *United States v. Gale*, 109 U. S. 65.

Where a non-resident was drawn for the regular panel, but was not drawn as a grand juror, it was held that the rest of the panel was not disqualified. *State v. Glasgow*, 59 Md. 209.

2. *Shropshire v. State*, 7 Eng. (Ark.) 190; *Harding v. State*, 22 Ark. 210; *Montgomery v. State*, 3 Kan. 263; *Miller v. State*, 33 Miss. 356; *Territory v. Harding*, 6 Mont. 323.

Plea in Abatement.—Citizen, Householder, Freeholder. It is a good plea in abatement that a member of the grand jury was not a citizen of the state, or that he was not a householder or freeholder. *State v. Brown*, 10 Ark. 78; *State v. Rockfellow*, 1 Hal. (N. J.) 332.

Expressed Opinion.—Objections to the grand jurors on the ground that they have formed or expressed an opinion of the guilt of the defendant before they were sworn, cannot be pleaded in abatement. *State v. Hamlin*, 47 Conn. 114; *State v. Rickey*, 5 Hal. (N. J.) 83.

Interest.—A plea in abatement that a grand juror was interested in procuring the indictment was held to be bad on general demurrer. *State v. Rickey*, 5 Hal. (N. J.) 82.

A plea in abatement that some of the grand jurors were not on the assessment roll of their respective counties without any averment that the defendant was affected thereby, is insufficient.

United States v. Benson, (U. S.) 31 Fed. Rep. 896.

Alien.—It was held a good plea that one of the grand jurors was an alien. *Reich v. State*, 53 Ga. 73.

Member of Coroner's Jury.—That a member of the grand jury had served on the coroner's jury that found that the defendant murdered the deceased, is not good for plea in abatement nor for a motion for new trial after verdict. *Lee v. State*, 69 Ga. 705; *Betts v. State*, 66 Ga. 508.

A plea in abatement that one of the grand jurors who returned the indictment had served on a jury that had found the defendant guilty of the same offence was sustained, and the indictment dismissed. *U. S. v. Jones*, (U. S.) 31 Fed. Rep. 725.

It is not a good plea in abatement to an indictment that one of the grand jurors who found the indictment was not one of the *venire* selected by the county court to serve as jurors, that the *venire* was not exhausted in impaneling the grand jury, and that more than thirteen of the *venire* were in attendance and could have been selected. The mere fact that a juror, otherwise qualified, had been selected from the bystanders instead of a juror from the *venire*, would be no ground for abating an indictment found by him and twelve grand jurors taken from the *venire*. *Epperson v. State*, 5 Lea (Tenn.) 291.

Connected by Marriage.—It is not a good plea in abatement that one of the grand jurors was connected with defendant by marriage. *State v. Maddox*, 1 Lea (Tenn.) 671.

In New Jersey objections to the qualifications of a juror or to the array cannot be raised by plea in abatement, but must be raised by challenge or motion to quash. *Gibbs v. State*, 45 N. J. 379; s. c., 46 Am. Rep. (N. J.) 782.

3. *State v. W. L. Thompson*, 28 La. Ann. 187.

It is too late to object to a member of the grand jury after plea of not guilty and verdict. It should be reached by plea in abatement. *Shropshire v. State*, 12 Ark. 190; *Fenalty v. State*, 13 Ark. 630.

objection is a matter of record it may be availed of in arrest of judgment or in error.¹ A single disqualified member vitiates the whole panel and renders the indictment null.²

4. Powers and Duties.—At common law the powers and duties of the grand jury consisted in their inquiries into offences against the law in the county for which they were impanelled.³

In the several States their functions have been considerably enlarged by statute. It is their duty to inquire into all indictable offences committed or triable in the county, and into the case of every person imprisoned in the county jail and not indicted.⁴

In most of the States, they must inspect the county jail and poor-house, inquire into the willful and corrupt misconduct of public officers within the county, examine into the condition of the county treasurer, the tax-collector's books and accounts, the school-taxes and dockets of justices of the peace. They are generally granted free access to public prisons and to all public records of the county.⁵ Their powers do not cease before the

1. *O'Byrnes v. State*, 51 Ala. 25.

2. *State v. Parks*, 21 La. An. 251; *Barney's Case* 12 S. & M. (Miss.) 68; *State v. Tilly*, 8 Baxt. (Tenn.) 381; *State v. Jacobs*, 6 Tex. 99; *People v. Wintermette*, 1 Dak. Ter. 63; *United States vs. Hammond*, 2 Woods (U. S.) 197.

3. 2 Hale P. C. 153.

4. Code Ala. 1876, § 4767; Comp. L. Ariz. 1877, §§ 596-604; Ark. Dig. Stat. 1874, § 1754; Penal Code Cal. § 923; Miller's R. Code Iowa 1880, §§ 4272, 4280; Ky. Crim. Code § 102; 2 Stat. at Large, Minn. 1873, p. 1038, §§ 102, 112; Comp. L. Nev. 1873, § 1835; Gen. L. N. M. 1880, p. 369, 370; N. Y. Code Crim. Pr. 1881, §§ 252, 260; Rev. Stat. Ohio 1880, § 7194; Gen. L. Oregon 1872, p. 346, §§ 43, 54; Stat. Tenn. 1871, § 5078; Laws Utah 1878, § 138; R. S. W. Va. 1879, ch. 53, § 7; *Grand Jury v. Public Press*, 4 Brewst. (Pa.) 313; *State v. Branch*, 68 N. C. 186; *Lloyd's Case*, 3 Clark (Pa.) 188; *Stowe's Charge*, 3 Pittsb. (Pa.) 174; *State v. Barnes*, 5 Lea. (Tenn.) 398.

In the case of the Board of Health, 5th Penn. Law Jour. p. 63, King, P. J., said in relation to the duties and powers of grand juries: "Our system of criminal administration is not subject to the reproach that there exists in it an irresponsible body with unlimited jurisdiction. On the contrary, the duties of a grand jury in direct criminal accusations are confined to the investigation of matters given them in charge by the court; of those preferred before them by the attorney-general; and of those

which are sufficiently within their own knowledge and observation to authorize an official presentment; and they can not on the application of anyone, originate proceedings against citizens, which is a duty imposed by law on other public agents. This limitation of authority we regard as alike fortunate for the citizens and the grand jury. It protects the citizen from the prosecution and annoyance which private malice or personal animosity introduced into the jury room, might subject him to. And it concerns the dignity of the grand jury and the veneration with which they ought always to be regarded by the people, by making them umpire between the accuser and accused, instead of assuming the office of the former."

The grand jury may inquire into all offences not barred by the statute of limitations. *People v. Beatty*, 14 Cal. 566.

Inquisitorial Powers.—The grand jury have inquisitorial powers in regard to the offence of frequenting a bawdy house. The grand jury may send for witnesses without any order of court in such cases. *State v. Barnes*, 5 Lea. (Tenn.) 398.

It is the duty of the grand jury to report to the court their action on all cases that are submitted to them. *Rion v. Com.*, 1 Duv. (Ky.) 236.

The grand jury is not under the control of the court as a petit jury is. *Allen v. State*, 61 Miss. 627.

5. See statutes of the different States. **United States Courts.**—Mr. Justice Field in the charge to the Grand Jury at

adjournment of the term unless a statute so declares.¹ If they are not discharged and a new grand jury is not drawn they still constitute a legal grand jury.²

5. Jurisdiction.—The powers of grand juries are co-extensive with and limited by the criminal jurisdiction of the courts of which they are a constituent part.³ Where they transcend such powers their proceedings are null.⁴

6. Mode of Doing Business.—The modes of prosecution before a grand jury are by indictment or by presentment.

(a) *By Indictment.*—An indictment is a formal accusation made by a grand jury charging a party with the commission of a public offence.⁵ Formerly it was the practice, and is now in many courts,

the Circuit Court District of California, August 22 1872, 2 Sawyer 673: "We therefore instruct you that your investigations are to be limited:

First—to such matters as may be called to your attention by the court; or,

Second—May be submitted to your consideration by the district attorney; or,

Third—May come to your knowledge in the course of your investigations into the matters brought before you or from your own observations; or,

Fourth—May come to your knowledge from the disclosure of your associates."

1. State v. Winebrenner, 67 Iowa 230; Findley v. People, 1 Mich. 234.

A grand jury summoned for a regular term has power to find indictments at an adjourned term unless meanwhile discharged. State v. Pate, 67 Mo. 488; People ex rel. Packard v. Sheriff of Chatauqua county, 11 Civ. Pro. Rep. (N. Y.) 172.

A court has power to make an order detaining the grand jury until a postponed session of court, and an indictment found then will not be quashed. Traviss v. The Commonwealth, 106 Pa. St. 597.

Their powers and duties do not cease because there happens to be no district attorney. State v. Gonzales, 26 Tex. 197.

2. Re Gannon, 69 Cal. 541.

A grand jury impanelled and in existence at the taking effect of the Act of April 15th, 1881, Acts 1881, p. 557 (R. S. 1881, § 1385 *et seq.*), was not discontinued by force of that act. Williams v. State, 86 Ind. 400.

The words, "next succeeding grand jury," in section 196 of the criminal practice act, providing that after demurrer to an indictment is allowed the court may resubmit the cause "to the same or to the next succeeding grand

jury," refer back to the time when the judgment on the demurrer is made and entered, and the meaning is that if the order of resubmission is made, it must be to the first grand jury that meets after the demurrer is allowed. People v. Hill, 3 Utah 334.

A demurrer to an indictment for a felony was sustained and the court ordered the case submitted "to the same or another grand jury." The grand jury then in session, and a second and third grand jury, failed to indict. A fourth grand jury found an indictment. Held, that nothing in the Nevada statutes made such action irregular and the order was sufficiently certain. *Ex parte* Job., 17 Nev. 184.

3. "Grand juries are accessories to the criminal jurisdiction of a court, and they have power to act and are bound to act, so far as they can aid that jurisdiction. Thus far the power is implied and is as legitimate as if expressly given. To suppose the powers of a grand jury, created not by express statute but by the necessity of their aiding the jurisdiction of a court, to transcend that jurisdiction, would be to consider grand juries once conferred, to be clothed with powers not conferred by law, but originating with themselves. This has never been imagined." Per Chief Justice Marshall in United States v. Hill, 1 Brock. (C. C.) 156.

By Revised Statutes of the United States, § 813, "the grand jury sworn and impanelled in any district court may take cognizance of all crimes and offences within the jurisdiction of the circuit court for said district as well as of the said district court."

4. Beal v. State, 15 Ind. 378; United States v. Hill, 1 Brock. (C. C.) 156.

5. Mr. Justice Field's charge to the grand jury. 2 Sawyer (C. C.) 667.

"An indictment is not an indictment

for the public prosecutor to hand to the grand jury an instrument of this character, that is, a bill of indictment in form, with a list of the witnesses to establish the offence charged. If the jury finds that the evidence produced justifies the indictment they indorse it "a true bill;" otherwise "not found;" or "not a true bill;" or "ignoramus." From the use of the latter expression the bill is sometimes said to be ignored.¹

(b) *By Presentment.*—A presentment differs from an indictment in that it wants technical form, and is usually found by the grand jury upon their own knowledge, or upon the evidence before them, without having any bill from the public prosecutor.² It is an informal accusation, which is generally regarded in the light of instructions upon which an indictment can be framed.³ This form of accusation has fallen into disuse⁴ since the practice has prevailed, and the practice now obtains generally for the prosecuting officer to attend the grand jury and advise them in their investigations.⁵

(c) *Proceedings Before the Grand Jury.*—The accused has no right to be present before the grand jury either personally or by attorney.⁶ Neither can witnesses in his behalf be heard.⁷ The

till it be found. It is only a writing prepared for the ease of the jury and for expedition. It is nothing till it is found, for the jury make it an indictment by finding it." Per Lord Chief Justice Holt, *Blackword's Case*, 13 How. St. Tr. 139.

1. The foreman must indorse each indictment "a true bill" and sign his name as foreman. *Gardner v. People*, 4 Ill. 83.

The names of the grand jurors who found the bill need not be mentioned. *State v. Shay*, 30 La. An. 116.

An indictment not certified to be a true bill though signed by the foreman, is bad. *Webster's Case*, 5 Me. 432.

It is essential that it should appear in each count of an indictment that it was found upon the oath of the grand jurors. *State v. McAllister*, 26 Me. 374.

When an indictment is duly exhibited in open court and indorsed "a true bill," it is evidence that it was duly found by a legal grand jury. *Thorp v. People*, 3 Utah 441.

List of Witnesses Before Grand Jury.—

An objection that the foreman of the grand jury did not return into court a list of witnesses sworn before the jury in finding an indictment, comes too late if first taken after verdict; and, whenever taken, the objection is not fatal, statutory provision requiring a list to be returned being directory merely and not mandatory, and the court having the power to supply the omission in

other ways. *State v. Wilkinson*, 76 Me. 317.

Ignoring a bill and afterwards finding it "true" does not invalidate it. *People ex rel. Packard v. Sheriff of Chataugua Co.*, 11 Civ. Pro. R. (N. Y.) 172.

A bill cannot be found false in part and true in part. The grand jury must reject or find for the whole. *State v. Cowan*, 1 Head. (Tenn.) 280.

2. Mr. Justice Field's charge to grand jury. 2 Sawy. (U. S.) 667.

3. 2 Hawk. P. C. ch. 25, § 1; 4 Blk. Com. 302; 1 Chitty Cr. L. 162; Whart. Cr. Pl. & Pr. (8 Ed.) § 86; Bish. Cr. Pr. (3 Ed.) § 131; Lloyd v. Carpenter, 3 Clark (Pa.) 188; *Lewis v. Wake Co.*, 74 N. C. 194.

4. *Ex parte Citizens Asso.*, 8 Phila. (Pa.) 478.

5. Charge to grand jury, Mr. Justice Field, 2 Sawyer (U. S.) 667. See also *Ex parte Crittendon*, Hempst. (U. S.) 176; *Shattuck v. State*, 11 Ind. 473; *Anonymous*, 7 Cow. (N. Y.) 563; *State v. Whitney* 7 Ore. 386; *Comm. v. Salter*, 2 Pears. (Pa.) 461.

But he may not advise them in the law. That is the function of the court. *U. S. v. Kilpatrick* (N. Car.) 16 Fed. Rep. 765.

6. Chitty Cr. L. 317; *State v. Hamlin*, 49 Conn. 95; *State v. Fassett*, 16 Conn. 471.

7. 2 Hawk. P. C. c. 25, § 145; *United States v. Blodgett*, 35 Ga. 336; *Respublica v. Shaffer*, 1 Dall. 236; *United*

grand jury have no power to summon the accused before them.¹

They are to hear evidence only in support of the charge.² Witnesses before the grand jury are under the control of the court.³ At common law the witnesses were sworn in open court and sent to the grand jury.⁴ The statutes here prescribe the rules as to the swearing of witnesses. Without such power by statute the foreman has no authority to administer the oath.⁵ Nor does such a statute abrogate the common law practice.⁶

Their Sessions Secret.—During the taking of the testimony no

States v. Palmer, 2 Cranch. C. C. (U. S.) 11; *United States v. Lawrence*, 4 Cranch. C. C. (U. S.) 518; *United States v. White*, 2 Wash. (U. S.) 29.

Compare United States v. Kilpatrick (U. S.) 16 Fed. Rep. 765.

1. *People ex rel Packard v. Sheriff of Chataqua Co.*, 11 Civ. Pro. R. (N. Y.) 172.

2. 2 Hale P. C. 157; 2 Hawk P. C. 25, § 145; *Respublica v. Shaffer*, 1 Dall. (U. S.) 236; *United States v. Palmer*, 2 Cranch (C. C.) 11; *United States v. Blodgett*, 35 Ga. 336.

The evidence need not be strictly legal. *State v. Fassett*, 16 Conn. 471.

Presumption.—Where the record is silent as to whether an indictment for perjury was found upon the information of the grand jurors without other information, or upon the testimony of witnesses, it will be presumed that it was found in the manner the law directs. *Mackin v. People*, 115 Ill. 312.

3. *Heard v. Pierce*, 8 Cush. (Mass.) 338; *Ward v. State*, 2 Mo. 120.

Where the grand jury have no personal knowledge of the commission of an offence, the court will not subpoena and send witnesses before them in order to make a presentment. The accuser must proceed before the ordinary tribunal. *Lloyd's Case*, 3 Clark (Pa.) 188; *Case of the Board of Health*, 5 Penn. L. J. 63.

Before ignoring a bill it is the duty of the grand jury to examine all witnesses marked on the indictment. *Comm. v. Ditzler*, 1 Lanc. Bar (Pa.) 493.

The sufficiency of the evidence upon which a grand jury finds an indictment is not a question which can be raised by plea to the indictment. *Hope v. State*, 83 N. Y. 418.

When for some reason not disclosed by the record, an indictment was set aside and the cause referred back to the same grand jury, the action of the court must be presumed to be correct.

In such case it is no objection to a second indictment found by the same grand jury that the indictment was found on the minutes of the evidence attached to the first indictment. There was no necessity for the grand jury to see and hear the witnesses again. *State v. Clapper*, 59 Iowa 279.

It is a criminal misdemeanor and a high contempt for an individual to communicate with the grand jury in reference to a matter before them. *Comm. v. Crans*, 2 Clark (Pa.) 172.

An examiner of the Department of Justice appeared before the grand jury during their investigation of a charge of presenting false and fraudulent accounts to the Treasury Department for payment. The examiner exhibited to the grand jury statements and accounts received from him by officials of the treasury, his statements concerning which being only hearsay, and there was evidence to show that he instructed the grand jury on the law of the case. An indictment was found. *Held*, that it should be quashed. *United States v. Kilpatrick*, 16 Fed. Rep. (U. S.) 765.

4. 1 Chitty Cr. L. 322.

In Connecticut witnesses may be sworn by a magistrate in the jury room. *State v. Fassett*, 16 Conn. 471.

5. *State v. Kilcrease*, 6 Rich. (S. C.) 444.

6. *State v. Allen*, 83 N. C. 680; *State v. White*, 88 N. C. 698.

The Act of 1879, ch. 12, providing that the foreman of the grand jury shall mark on the indictment the names of the witnesses sworn and examined before the jury is *directory* merely; and the omission of the foreman to comply therewith is no ground for quashing the bill, where the proof is that the witnesses were sworn. *State v. Roberts*, 2 Dev. & Bat. (N. C.) 540; *State v. Cain*, 1 Hawks (N. C.) 355, cited and approved; *State v. Hines*, 84 N. C. 810.

one besides the witnesses is permitted to be present except the prosecuting attorney or his assistants.¹ During the deliberations and vote of the grand jury no person not a member of the grand jury may be present.² An indictment may be set aside if the rule is violated.³

Clerk.—One of their number is appointed clerk to keep the minutes of their proceedings, except of their individual votes on an indictment. His appointment is either directed or authorized by statute in most of the States.⁴

7. Secrecy to be Observed by Grand Jurors.—The oath of the grand jurors binds them to keep secret their proceedings in most of the States. Even where it is not embodied in the oath, it is held that they are bound to secrecy.⁵ At common law a grand juror disclosing the evidence before the jury was made an accessory to the offence if a felon, or if treason a principal.⁶ Grand jurors may not be compelled to testify as to the proceedings in the jury room unless it becomes necessary for purposes of public justice or for the protection of private rights.⁷ Where the statutes prescribe the cases in which a grand juror may testify, it is held that he may

1. *United States v. Reed*, 2 Blatch. (U. S.) 435; *State v. Whitney*, 7 Oregon 386; *Ex parte Crittendon Hempst.* (U. S.) 176; *Charge of Mr. J. Field*, 2 Sawyer (U. S.) 678; *Shattuck v. State*, 11 Ind. 473. In *Connecticut* the prosecuting attorney may not be present. *Lung's Case*, 1 Conn. 428. Nor in *North Carolina*. *Lewis v. Wake Co.*, 74 N. C. 104. See also *Comm v. Crans*, 2 Clark. (Pa.) 172; *U. S. v. Kilpatrick*, 16 Fed. Rep. (U. S.) 765.

The presence of a bailiff of the court is not sufficient ground to invalidate the indictment if he was not present when the vote was taken. *State v. Kimball*, 29 Iowa 267.

2. See statutes of different States.

3. *Rothschild v. State*, 7 Tex. App. 519.

4. See statutes.

The appointment by a judge of a citizen not a member of the grand jury as clerk of that body is unauthorized by law, and can be made the ground of a motion in arrest of judgment. *State v. Watson*, 34 La. Ann. 669.

5. *Little v. Comm.*, 25 Gratt. (Va.) 921; *United States v. Reed*, 2 Blatch. (U. S.) 435; *Comm. v. Hill*, 65 Mass. 137.

6. 4 Blk. Com. 126.

7. As to Numbers Concurring.—In some States it has been held that a grand juror may not be compelled to testify as to whether twelve concurred

in finding the indictment. *State v. Hamlin*, 47 Conn. 114; *State v. Baker*, 20 Mo. 338; *State v. Wammack*, 70 Mo. 410; *Watts v. Territory*, 1 Wash. T. (U. S.) 409; *Creek v. State*, 24 Ind. 151; *State v. Gibbs*, 39 Iowa 318; *State v. Davis*, 41 Iowa 311; *State v. Mewherter*, 47 Iowa 88; *State v. Oxford*, 30 Tex. 428.

But courts have held differently elsewhere. *Low's Case*, 4 Me. 439; *People v. Shattuck*, 6 Abb., N. C., (N. Y.) 33; *Sparrenburger v. State*, 53 Ala. 481; *State v. Horton*, 63 N. C. 595; *Cherry v. State*, 6 Fla. 679; *Comm. v. Smith*, 9 Mass. 109; *Comm. v. Twitchell*, 1 Brewst. (Pa.) 551.

Who Prosecuted.—It has been held that a grand juror may be compelled to testify as to who was the prosecutor in an indictment. *Huidekoper v. Cotton*, 3 Watts (Pa.) 56.

Upon Indictment for Perjury Before the Grand Jury.—“It is obvious that if grand jurors are through all time and to all purposes prohibited from disclosing and proving the testimony of witnesses before them, there is a perfect exemption from temporal penalties of perjury before a grand jury. The consequences of such a doctrine would be alarming; for besides the danger of tempting the witnesses to commit so great a crime without the fear of punishment, grand jurors would have no credible evidence on which to act, on the

do so in no other.¹

8. Misconduct of Grand Jurors.—In cases of misconduct or neglect of duty on the part of any of the grand jurors, while on duty, an indictment may be maintained against him, or he may be punished for contempt of court.²

9. Liability of Grand Jurors.—During the course of their proceedings the grand jury are protected in the discharge of their duty, and cannot be held liable in civil or criminal action for their finding, even though dictated by malice or lacking any foundation in fact.³

GRAND BILL OF SALE.—See BILL OF SALE.

GRAND LARCENY.—See LARCENY.

one hand, and the citizen, on the other, would be deprived of one of his most boasted and valuable protections against arbitrary accusations and arrests. It would be extraordinary, were witnesses thus enabled to perjure themselves without responsibility." Per. Ruffin in *State v. Broughton*, 7 Ired. L. (N. C.) 96. See also *State v. Fassett*, 16 Conn. 468; *Crocker v. State*, 1 Meigs (Tenn.) 127; *Jones v. Teupin*, 6 Heisk. (Tenn.) 181; *People v. Hulbut*, 4 Denio (N. Y.) 133; *United States v. Reed*, 2 Blatchf. (U. S.) 435. *People v. Young*, 31 Cal. 563.

To Contradict a Witness.—A grand juror may be called to show that testimony of a witness at the trial is inconsistent with that given before the grand jury. *Comm. v. Mead*, 12 Gray (Mass.) 167; *Jones v. Turpin*, 6 Heisk. (Tenn.) 181; *State v. Fassett*, 16 Conn. 468; *State v. Wood*, 53 N. H. 484; *People v. Hulbut*, 4 Denio (N. Y.) 133; *United States v. Reed*, 2 Blatchf. (U. S.) 435; *Little v. Comm.*, 25 Gratt. (Va.) 921.

To Confirm a Witness.—A grand juror may be called to confirm the testimony of a witness who is contradicted. *Perkins v. State*, 4 Ind. 222; *People v. Hulbut*, 4 Denio (N. Y.) 133.

Secrecy Due to Public.—A grand juror's obligation of secrecy is due to the public and not to the witnesses who testified before the grand jury. *People v. Young*, 31 Cal. 563.

As to Other Facts.—A grand juror may not be compelled to answer the question how he voted on the indictment. *Ex parte Sontag*, 64 Cal. 525.

On motion to quash, a grand juror may be examined as to alleged irregularity not arising out of the miscon-

duct of the grand jury. *People v. Briggs*, 60 How. Pr. (N. Y.) 17.

Grand jurors may not state how any member voted, or the opinion expressed by any member, or the evidence on which an indictment is found, or disclose the finding of an indictment for felony, unless the person is in custody or has been recognized, but a grand juror is a competent witness to show that the defendant was not a witness before the grand jury at a term when the indictment was found. *Comm. v. Hill*, 65 Mass. 137.

The preferment by a grand jury of an indictment without any evidence as to the guilt of the accused may be proved by the prosecuting attorney, but not by a member of the grand jury. *State v. Grady*, 84 Mo. 220.

A grand juror's obligation to secrecy only continues until the object thereof is accomplished. *Jones v. Turpin*, 6 Heisk. (Tenn.) 181.

Burdick v. Hunt, 43 Ind. 381; *Burnham v. Hatfield*, 5 Blackf. (Ind.) 21; *Jones v. Turpin*, 6 Heisk. (Tenn.) 181. *Sands v. Robison*, 12 Smed. & M. (Miss.) 704; *Huidekoper v. Cotton*, 3 Watts (Pa.) 56; *Way v. Butterworth*, 106 Mass. 75.

Re Ellis, Hemspt. (U. S.) 10; *Pennsylvania v. Keffer*, Addison (Pa.) 290.

The court may, where the administration of justice requires it, in their discretion quash an indictment for misconduct of the grand jury. *State v. Dayton*, 3 Zab. (N. J.) 49; *Comm. v. Dorwart*, 7 Lanc. Bar (Pa.) 121.

1 Chitty Cr. L. 323.

Hunter v. Mathis, 40 Ind. 356; *Ullman v. Abrams*, 9 Bush (Ky.) 742; *Re Lloyd and Carpenter*, Judge King's Charge, 5 Penn. L. J. 60; s. c., 3 Clark (Pa.) 193; *Turpin v. Booth*, 56 Cal. 65.

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GRANTOR AND GRANTEE.—(See DEEDS; ESCROW.)

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I. DEFINITION.—(a) *Grantor.*—He by whom a grant is made.

(b) *Grantee.*—He to whom a grant is made.¹

II. CAPACITY OF GRANTOR AND GRANTEE GOVERNED BY LAW *rei sitae*.—The capacity of a person to take or transfer real estate is determined and controlled by the law of the *situs*.²

Granite Building.—A policy of insurance described the property insured as "contained in a granite building." It was held that the phrase might designate a building with a granite front only. *Medina v. Builders' Ins. Co.*, 120 Mass. 225. See FIRE INSURANCE.

1. Bouv. L. Dic. 721.
 2. *Clark v. Graham*, 6 Wheat. 577; *Moore v. Nelson*, 3 McLean C. C. 383; *Cutter v. Davenport*, 1 Pick. 81; 11 Am. Dec. 149; *McGoon v. Scales*, 9 Wall 23 per Justice Miller; *Chapman v. Robertson*, 6 Paige 627, 31 Am. Dec. 264. It is a settled rule of law that not only the capacity of persons to convey or devise real estate and the right to inherit, but also the forms and solemnities requisite to pass the title must be in conformity with the local law of the country in which the land is situated. IV. Kent Com. 441.

If an alien is not permitted to hold land by the laws of the country where it lies it is immaterial what the law of

his domicile may be upon the subject. Devlin on Deeds, § 65, citing Huey's appeal, 1 Grant Cas. (Pa.) 51; *Kling v. Syour*, 4 La. An. 128; *Hughes v. Hughes*, 14 La. An. 85; *Cloapton v. Booker*, 27 Ark. 482; *Kerr v. Morn*, 9 Wheat. (U.S.) 565; *Buchanan v. Deshon*, 1 Har. & G. 280; *Seuree v. Lee*, 9 Mass. 363. On the subject of the capacity of parties to transfer lands, Judge Story, advertent to the fact that if aliens are excluded by the laws of a country holding lands the title becomes inoperative as to them, regardless of what may be the law of their domicile, thus continues: "So if a person is incapable from any other circumstances of transferring his immovable property by the law of the *situs*, his transfer will be held invalid although by the law of his domicile no such personal incapacity exists. On the other hand, if he has capacity to transfer by the law of the *situs*, he may make a valid title, notwithstanding an incapacity may attach to him by the

III. LEGAL CAPACITY OF GRANTOR.—1. **Generally.**—Every person legally competent to bind himself by contract, may convey his property by deed, or empower another to do so for him.¹ There are, however, certain disabilities under which persons may be laboring that render them incapable of making a valid contract. Some of those who rest under a disability rendering them to a certain extent incapable of contracting are permitted to convey or acquire title subject to certain restrictions.²

2. **Disability of Insanity.**—The deed of an insane person not under guardianship conveys a seizin, it being voidable only, and not void.³ But the deed of an idiot or insane person under

law of his domicile. This is the salient, but irresistible result of the principle adopted by the common law which has no admitted exception. We may illustrate the principle by an application to cases of common occurrence under the domain of the common law. By that law a person is deemed a minor and is incapable of conveying real estate, until his arrival at the age of twenty-one years. But by the law of some foreign countries minority continues until twenty-five or even until thirty years of age. Let us then suppose a foreigner owning lands in England or America (where the common law prevails) who is by the law of his domicile in his minority, but who is over twenty-one years of age. It is clear that he may convey his real estate in England or America, notwithstanding such domestic incapacity, for he is of the age required by the local law. On the other hand, let us suppose, a married woman who is domiciled in a foreign country, and by the law of that country is capable of alienating her real estate without the consent of her husband, owning real estate in England or in America where she is incapable of alienating it without the consent of her husband and her separate act will be held *ipso facto* void by the law of the *situs*." Devlin on Deed, § 66; Story on Conflict Laws § 431; Goodwin v. Jones, 3 Mass. 514; 3 Am. Dec. 173; Blake v. Williams, 6 Pick. (Mass.) 286; 17 Am. Dec. 372; Clarke v. Graham, 6 Wheat. (U. S.) 577; Homes v. Remsen, 4 Johns. Ch. (N. Y.) 460; 8 Am. Dec. 581; s. c. 20 Johns. (N. Y.) 254; Milne v. Moreton, 6 Binn. (Pa.) 353, 359; 6 Am. Dec. 456; Nicholson v. Leavitt, 4 Sand. (N. Y.) 276; Hosford v. Nichols, 1 Paige (N. Y.) 220; Cockerell v. Dickens, 3 Moore P. C. 98, 131; Brodie v. Barry, 2 Ves. & B.

130; Wiles v. Cowper, 10 Ohio 279; s. c. 2 Ham. 124; Curtis v. Hutton, 14 Ves. jr. 537; Butthwhistle v. Vardill, 5 Barn. & C. 438; Elliott v. Lord Minto, 6 Madd. 16. See Barnum v. Barnum, 42 Md. 251, 307. By statute in Illinois a deed good in the State where made will convey lands in Illinois; and the same is the law in Michigan. Root v. Brotherson, 4 McLean, C. C. 230; Butterfield v. Beall, 3 Ind. 203.

1. But no person can convey more than he possesses, and those who come in under the holder of a void grant can acquire nothing. Polk v. Wendell, 5 Wheat. (U. S.) 293.

2. Devlin on Deeds, § 64; Wash. on Real Prop., 3 vol. 261; Cutter v. Davenport, 1 Pick. (Mass.) 81, 11 Am. Dec. 149; Darby v. Mayer, 10 Wheat. (U. S.) 465; United States v. Crosby, 7 Cranch (U. S.) 115; Chapman v. Robertson, 6 Paige (N. Y.) 627; 31 Am. Dec. 264; Hosford v. Nichols, 1 Paige (N. Y.) 220; Sill v. Worwswick, 1 Black. H. 655; Coppin v. Coppin, 2 P. Wms. 240; Hunter v. Potts, 4 Tenn. Rep. 182.

3. Wait v. Maxwell, 5 Pick. (Mass.) 217; Arnold v. Rich Iron Works, 1 Gray (Mass.) 434; Allis v. Billings, 6 Met. 415; 39 Am. Dec. 744; Ingraham v. Baldwin, 9 N. Y. 45; Eaton v. Eaton, 37 N. J. L. 108; Breckenridge v. Ormsby, 1 J. J. Marsh (Ky.) 245, 19 Am. Dec. 71; Irvine v. Irvine, 9 Wall. 626; Howe v. Howe, 99 Mass. 98; Copenrath v. Krenbz, 83 Ind. 18; 2 Black. Com. 291; Riggan v. Green, 80 N. C. 236; Cates v. Woodson, 2 Dana (Ky.) 452; Freed v. Brown, 55 Ind. 310; Jackson v. Gumaer, 2 Cowen (N. Y.) 552; Crouse v. Halmon, 19 Ind. 30; Price v. Barrington, 3 Macn. & G. 486; Bensell v. Chancellor, 5 Whart. (Pa.) 376, 34 Am. Dec. 561; Beals v. See, 10 Pa. St. 56; 49 Am. Dec. 573; Seaver v. Phelps, 11 Pick.

guardianship is void.¹

(Mass.) 304; 22 Am. Dec. 372; Thomas v. Hatch, 3 Sum. 170; Key v. Davis, 1 Mo. 32; Somers v. Pumphrey, 24 Ind. 231; Tucker v. Moreland, 10 Peters 58; Yanger v. Skinner, 1 McCart. 389. A deed of conveyance of real estate executed by an insane person, apparently of sound mind, before office found is not void but merely voidable and vests the title in the grantee, subject to the right of the grantor, upon restoration of his reason, or of his guardian, to affirm or disaffirm the contract. Such disaffirmance must precede the bringing of an action to dispossess the grantee, but such action may be brought without first restoring the consideration to the grantee. Nichol v. Thomas, 53 Ind. 42.

But see Farley v. Parker, 6 Ov. 105; VanDeusen v. Sweet, 51 N. Y. 378, 383.

1. Wait v. Maxwell, 5 Pick. (Mass.) 217; 16 Am. Dec. 391; Fitzhugh v. Wilcox, 12 Barb. (N. Y.) 235; Mohr v. Tulip, 40 Wis. 66; Hovey v. Hobson, 53 Me. 451; Elston v. Jasper, 45 Tex. 409; VanDeusen v. Sweet, 51 N. Y. 378; Griswold v. Miller, 15 Barb. 520; Wadsworth v. Sherman, 14 Barb. (N. Y.) 169; Leonard v. Leonard, 14 Pick. (Mass.) 280; White v. Palmer, 4 Mass. 147; McDonald v. Morton, 1 Mass. 543; Rogers v. Walker, 6 Pa. St. 371; 47 Am. Dec. 470. See Pearl v. McDowell, J. J. Marsh (Ky.) 658; Hill v. Nash, 41 Me. 585; Burgess v. Pollock, 53 Iowa 273; Davren v. White (N. J.) 7 Atl. 682; Lerch v. Snyder (Pa.) 4 Atl. 336.

In Hovey v. Hobson, 53 Me. 451, it was held that if the deed of an insane person not under guardianship, obtained without fraud and for an adequate consideration, has never been ratified or affirmed, it could be avoided by his heirs, not only as against his immediate grantee, but also as against subsequent *bona fide* purchasers for value and without notice.

Validity of Conveyance by Insane Grantor.—If the incompetent grantor has been placed under guardianship, this fact is deemed conclusive on the question of his disability, and a deed made by him is void. Devlin on Deeds, § 74.

In Eaton v. Eaton, 37 N. J. L. (8 Vr.) 108, Scudder J. says: "While it is doubtless the settled law in England, confirmed by Act of Parliament, 7 and 8 Vict. c. 76, § 7, that a conveyance by

feoffment or other assurance, as well as a deed of bargain and sale, release or grant, by an idiot or lunatic, is wholly void, yet the weight of authority in this country favors the rule that the conveyances by deed, of persons of non-sane mind and of infants are voidable, and not wholly void: 1 Pars. on Con. 283; 3 Washb. Real Prop. 558; 4 Kent Com. 450; Dart on Vend. and Pur. 3; 1 Story Eq. Jur. § § 222, 228. This doctrine of the voidability of the contracts of insane persons has encountered, however, strong opposition in some of the American courts. In Dexter v. Neall, 15 Wall. 9, Mr. Justice Strong said: "Looking at the subject in the light of reason, it is difficult to perceive how one incapable of understanding and of acting in the ordinary affairs of life, can make an instrument, the efficiency of which consists in the fact that it expresses his intention, or more properly his mental conclusions. The fundamental idea of a contract is that it requires the assent of two minds; but a lunatic, or a person *non compos mentis*, has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he can not make a contract which may have any efficiency as such. He is not amenable to the criminal laws, because he is incapable of discriminating between that which is right and that which is wrong. The government does not hold him responsible for acts injurious to itself. Why, then, should one who has obtained from him that which purports to be a contract, be permitted to hold him bound by its provisions, even until he may choose to avoid it? If this may be, efficacy is given to a form to which there has been no mental assent. A contract is made without any agreement of minds, and as it plainly requires the possession and exercise of reason quite as much to avoid a contract as to make it, the contract of a person without mind has the same effect as it would have had he been in full possession of ordinary understanding. While he continues insane he can not avoid it, and if, therefore, it is operative until avoided, the law affords a lunatic no protection against himself; yet a lunatic equally with an infant is confessedly under the protection of courts of law as well as courts of equity. The contracts of the latter, it is true, are

3. **Mental Weakness.**—Weakness of understanding is not of itself any objection to the validity of a contract if the capacity remains to see things in their true relations, and to form correct conclusions. When it appears that a grantor has no strength of mind and reason to understand the nature and consequences of his act in making a deed, it may be avoided on the ground of insanity.¹

(a) **EVIDENCE OF MENTAL WEAKNESS.**—The validity of a conveyance made by a person who was insane both before and after

generally held to be only voidable (his power of attorney being an exception). Unlike a lunatic, he is not destitute of reason. He has mind, but it is immature, insufficient to justify his assuming a binding obligation, and he may deny or avoid his contract at any time, either during his minority or after he comes of age. This is for him a sufficient protection; but, as a lunatic can not avoid a contract for want of mental capacity, he has no protection if his contract is only voidable." See *Allen v. Berryhill*, 27 Iowa 540; *Van Deusen v. Sweet*, 51 N. Y. 378; *Desilver's Estate*, 5 Rawle (Pa.) 110.

In *Fitzgerald v. Reed*, 9 S. & M. 94 Miss. the court (Clayton J.) says: "This is a bill to rescind a contract upon the ground of mental incapacity of the complainant. * * * In rescinding the contract, however, the courts ought to place the parties in the situation they respectively occupied before it was entered into, or nearly as practicable whatever benefit the lunatic or his estate may have received in consequence of his contract must be given up." So also in *Carr v. Haliday*, 5 Ind. Eq. (N. C.) 167, the court says: "The bill seeks to rescind certain contracts entered into between the intestate, Robert Carr, and the defendant. (A reference had been made to a master to determine what benefit the lunatic's estate had received.) The master reports that the plaintiff cannot make restoration to the defendant of any property so purchased by him; that the contracts were made in good faith, without any knowledge of Robert Carr * * * the court will not deprive him (the defendant) of the advantages he has obtained without restoring to him whatever benefit the estate of the lunatic has received in consequence of the contract. This, we are informed, can not be done. The bill must be dismissed with costs."

New York and Pennsylvania.—The deed of a *non compos* is void. *Van*

Deusen v. Sweet, 51 N. Y. 384; *Matter of Desilver*, 5 Rawle 111.

New Jersey.—In New Jersey the deed of a *non compos* is voidable only. *Eaton v. Eaton*, 37 N. J. L. 108; *Rogers v. Blackwell*, 49 Mich. 192 that it is void.

1. *Cole v. Cole*, (Neb.) 31 N. W. 493; *Dennett v. Dennett*, 44 N. H. 538; *Short v. Prettyman*, 1 Houst (Del.) 339; *Osmond v. Fitzroy*, 3 P. Wms. 129; *Carpenter v. Carpenter*, 8 Bush (Ky.) 283; *Hovey v. Hobson*, 55 Me. 256; *Shelford on Lun.* 37; *Odell v. Buck*, 21 Wend. (N. Y.) 142; *Jackson v. King*, 4 Cowen (N. Y.) 267; 15 Am. Dec. 354; *Corbit v. Smith*, 7 Iowa 60; 71 Am. Dec. 431; *Sprague v. Duel*, 1 Clarke (Pa.) 90. In *Dennett v. Dennett*, 44 N. H. 538, the court says: "If a man be legally *compos mentis*, he is the disposer of his own property, and his will stands for the reason of his actions. . . . The doubtful and uncertain point at which the disposing mind disappears and where incapacity begins can be ascertained only by an examination of the particular circumstances of each case to be duly weighed and considered by the court or jury; and in determining the question the commonsense and good judgment of the tribunal must be plainly relied on." See *Stewart v. Flint*, (Vt.) 8 Atlantic Rept. 801. Where the mind is so deranged that a person can not comprehend and understand the effect and consequence of an act, or the business in which he may be engaged, the law will relieve him from his acts; but so long as he is possessed of the requisite mental faculties to transact rationally the ordinary affairs of life, he will not be relieved from the responsibility that rests on the ordinary citizen. *Titcomb v. Vantyle*, 84 Ill. 372.

But though weakness of understanding may be insufficient to avoid a deed, it is said to supply a ground for the suspicion of improper influence, wher-

its execution is determined by the condition of the grantor's mind at the time, and satisfactory evidence is necessary to establish the fact of his sanity.¹

4. Nervous Excitement.—Where the sanity of a grantor, at the time of executing a deed of the land in controversy, is in issue, the party seeking to uphold the deed can not justly complain of the instruction, that mere nervous excitement or mental weakness

ever fraud can be inferred; therefore, from the circumstances of the transaction, relief against it will be given. *Jackson v. King*, 4 Cowen (N. Y.) 216; 15 Am. Dec. 354.

1. Devlin on Deeds, § 69; *Henderson v. McGregor*, 30 Wis. 78; *Encking v. Simmons*, 28 Wis. 272; *Miller v. Craig*, 36 Ill. 109; *Speers v. Seuree*, 4 Bush (Ky.) 239; *Riply v. Babcock*, 13 Wis. 425; *Davis v. Culver*, 13 How. Pr. (N. Y.) 62; *Ripley v. Grant*, 4 Ind. Eq. 443; *Crowther v. Rowlandson*, 27 Cal. 376; *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 513; *Odell v. Buck*, 21 Wend. (N. Y.) 142; *Darby v. Hayford*, 56 Me. 246.

To prove the sanity of a party at the time of his making a contract, evidence of the state of mind which tended to prove his recognition thereof should be admitted as conducing to prove his sanity at the time when the contract was made. *Grant v. Thompson*, 10 Am. Dec. 119; s. c. 4 Conn. 203; *Dickinson v. Barber*, 6 Am. Dec. 58; 9 Mass. 225; *Peaslee v. Robbins*, 3 Met. 164; *Watson v. Anderson*, 11 Ala. 43; *Negroes v. Jerry v. Townsend*, 9 Md. 145; *Hendrix v. Money*, 1 Bush (Ky.) 306. In a case before the Supreme Court of the United States, Justice Field laid down this rule: "It is not necessary in order to secure the aid of equity to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that from her sickness and infirmities she was at the time in a condition of great mental weakness and that there was gross inadequacy of consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred. It may be stated as settled law that wherever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly

inadequate, a court of equity will, upon proper and reasonable application of the injured party or his representatives or heirs, interfere and set the conveyance aside." *Allore v. Jewell*, 94 U. S. (4 Otto) 506, 510; *Harding v. Handy*, 11 Wheat. (U. S.) 125; *Kemson v. Ashbee*, 10 Ch. Cas. 15.

But where there is no evidence of fraud committed or undue advantage taken of the grantor's weakness, such weakness, unless it is to such a degree that it may be termed imbecility, will not invalidate the deed. *Devlin on Deeds*, § 69; *Marmmon v. Marmmon*, 47 Iowa 121. And even in the case of a lunatic, a contract may be obligatory on him unless the party with whom he dealt knew or ought to have known of his infirmity of intellect and took some unconscionable advantage of him. *Devlin on Deeds*, § 69; *Richardson v. Stong*, 13 Ind. 106; 55 Am. Dec. 430; *Ashcroft v. DeArmond*, 44 Iowa 229; *Sims v. M. J. Lure*, 8 Rich. Eq. (S. C.) 286; 70 Am. Dec. 196; *Campbell v. Hill*, 22 Up. Can. C. P. 526; s. c. 23 Up. Can. C. P. 473; *Lincoln v. Buckmaster*, 32 Vt. 652; *Greenslade v. Dare*, 20 Beav. 284; *Skidmore v. Ramlin*, Bradf. (Ind.) 122; *Beavan v. M'Donnell*, 9 Ex. 309; *Campbell v. Hooper*, 3 Small & G. 153; *Dane v. Kirkwall*, 8 Car. & P. 679; *Browne v. Joddrell*, 1 Moody & M. 105; *Molton v. Camroux*, 2 Ex. 487; *Elliott v. Juce*, 7 De. Gex. M. & G. 475. Where it appears that imposition was practiced or the consideration is grossly inadequate, importance will be attached to slight evidence tending to establish imposition or unfair dealing. *Wilson v. Oldhone*, 12 B. Mon. (Ky.) 55; *McFadden v. Vincent*, 21 Tex. 47; *Hale v. Brown*, 11 Ala. 87; Evidence is not admissible to show insanity at remote periods before or after the making of the conveyance. *Harden v. Hays*, 14 Pa. St. 91. Compare *Adair v. Cook* (Ky.) 5 S. W. Rept. 412; *Griffith v. Gody*, 113 U. S. 89; *Harding v. Handy*, 11 Wheat. (U. S.) 103; *Allore v. Jewell*, 94 U. S. 506; *Conley v. Nailor*, U. S. 127.

would not be sufficient to defeat the operation of the deed.¹

5. Deaf and Dumb Grantor.—A person deaf and dumb from his nativity having in fact sufficient capacity is not legally incapable of executing a deed.²

6. Disability of Intoxication.—Where a grantor is in such a state of intoxication that he is incapable of giving an intelligent consent to a contract, he may avoid it.³ He becomes a *non compos mentis* by his own act⁴ and the law not only permits him to plead his intoxication as a defence to actions founded upon such instruments, but also authorizes a court of equity upon a reasonable application of the parties or their legal representatives, to set the conveyance aside.⁵

(a) **DEGREE OF INTOXICATION.**—The influence of liquor must be shown to exist to such extent as to seriously impair the reasoning faculties at the time of the contract,⁶ and when the grantor is in this condition it is immaterial whether or not there was connivance on the part of the grantee at the intoxication.⁷

If, however, there is a connivance by the grantee the conveyance will be set aside though the grantor is not wholly deprived of his reason if it appear that any unfair advantage was taken of his condition.⁸

1. *Darby v. Harrison*, 56 Me. 246.

2. *Brown v. Brown*, 3 Conn. 246; 8 Am. Dec. 187.

3. *Devlin on Deeds*, § 79; *Story on Contracts*, § 87; *Broadwater v. Dorne*, 10 Mo. 277; *Joest v. Williams*, 42 Ind. 365; *Bates v. Ball*, 72 Ill. 108; *Donelson v. Posey*, 13 Ala. 752; *Reinicker v. Smith*, 2 Har. and J. 421; *Dunlany v. Green*, 4 Har. (Del.) 285; *Warnock v. Campbell*, 25 N. J. Eq. 485.

4. *Co. Litt.* 247; *Beverly's case*, 4 Co. 124; *Hendrick v. Hokkins*, Cary 93.

5. *Pitt v. Smith*, 3 Comp. 34; *Butler v. Mulvihill*, 1 Bligh. 160.

6. *Pickett v. Sutter*, 5 Cal. 412; *Freeman v. Staats*, 8 N. J. Eq. 814; *Johnson v. Phifer*, 6 Neb. 401; *Barrett v. Buxton*, 2 Aiken 167; 16 Am. Dec. 691; *Wade v. Colvert*, 2 Mill. Const. 27; 12 Am. Dec. 652; *Taylor v. Patrick*, 1 Bibb (Ky.) 168. See *Borough v. Richman*, 13 N. J. L. 233; *Foot v. Tewksbury*, 2 Vt. 97; *Lee v. Ware*, 1 Hill (S. C.) 313; *White v. Cox*, 3 Hayw. (Tenn.) 82; *Broadwater v. Dorne*, 10 Mo. 277; *Dummond v. Hopper*, 4 Har. (Del.) 327; *Birdsong v. Birdsong*, 2 Head. 289.

7. *Barrett v. Buxton*, 16 Am. Dec. 691; 2 Aiken 167; *Gore v. Gibson*, 13 Mees & W. 623; *Drummond v. Hopper*, 4 Har. (Del.) 329; *Wrigglesworth v. Steers*, 1 Hen. & M. 70; *Foot v.*

Tewksbury, 2 Vt. 97; *Burroughs v. Richman*, 13 N. J. L. 233.

8. *Devlin on Deeds*, § 80; *Cooke v. Clayworth*, 18 Ves. 12; *Johnson v. Middlecott*, 3 P. Wms. 131; *Say v. Barwick*, 1 Ves. & B. 195; *Jenness v. Howard*, 6 Blackf. 240; *Cory v. Cory*, 1 Ves. 19; *Hutchinson v. Tindall*, 2 Green Ch. 128; *Shaw v. Thackray*, 1 Small & G. 537; *Crane v. Conklin*, Saxt. ch. 346; *Nagle v. Baylor*, 2 Dr. & W. 64; *Phillips v. Moore*, 11 Miss. 600; *Calloway v. Witherspoon*, 5 Ind. Eq. 128; *Cooley v. Rankin*, 11 Mo. 642; *Shievs v. Higgons*, 1 Madd. Ch. Pr. 399; *Cragg v. Holme*, 18 Ves. 14.

But the fact that a father regarded a son obtaining a deed of gift from him with the most favor, and was disposed to give him the largest portion of his estate, it is held is no ground of objection to the transaction, nor is the fact that the father was at the time in some degree intoxicated, if the son used no contrivance or management to draw him into drink, and took no further advantage of his state of intoxication to obtain the deeds. *Wilson v. Bigger*, 7 Watts & S. (Pa.) 111.

Intoxication May Release Grantor When.—In law the acts of a drunkard are avoided on the ground of incompetency; in equity on that of fraud; but there must be that state of excessive

7. Person Under Duress.—A deed obtained through fraud and duress is only voidable, and a *bona fide* purchaser from the vendee in such deed, for a valuable consideration, without notice of the fraud or duress will hold the property.¹ To avoid a deed on the ground of duress *per minas*, the threats must be such as to strike with fear a person of common firmness and constancy of mind; duress by mere advice, direction, influence and persuasion being unknown to the law.² (See DURESS, vol. 6, p. 81.)

drunkenness which deprives the person of the consciousness of what he is doing, and such drunkenness is a defense, whether it is voluntary or caused by the procurement of the other party; and a less degree of drunkenness when procured by the other party may, in equity, avoid a contract on the ground of fraud. In either event the contract is voidable and not void. *Mansfield v. Watson*, 2 Iowa 111. A deed will not be binding upon one whose mind has become so weakened and impaired by long continued previous intoxication as to incapacitate him from giving that consent essential to the validity of all contracts, even though at the time of the execution of the conveyance he is not intoxicated. *White v. Cox*, 3 Hayw. (Tenn.) 79; *Birdsong v. Birdsong*, 2 Head. 289; *Belcher v. Belcher*, 10 Yerg. (Tenn.) 121; *Wilson v. Bigger*, 7 Watts & S. (Pa.) 111. See *Morris v. Nixon*, 7 Humph. (Tenn.) 579; *Wiley v. Ewalt*, 66 Ill. 26.

"To render a contract voidable," says Walker, J., in *Bates v. Ball*, 72 Ill. 108, "he (who sets up intoxication as a defense) should have been so drunk as to have drowned reason, memory and judgment, and impaired his mental faculties to an extent that would render him *non compos mentis* for the time being, especially as there is no pretense that any person connected with the transaction aided in or procured his drunkenness. The rule has never, so far as our knowledge extends, been announced that mere drunkenness is sufficient to release a party from his contracts."

1. *Deputy v. Stapleford*, 19 Cal. 302; *Hackett v. King*, 6 Allen (Mass.) 58; *Kelsey v. Hapey*, 16 Pet. Adm. 269; *Foos v. Hildreth*, 10 Allen (Mass.) 76; *Knight's Case*, 3 Leon 239; *Brown v. Peck*, 2 Wis. 161; *Davis v. Fox*, 59 Mo. 125; *Baker v. Morton*, 12 Wall. 150; *Cook v. Moore*, 39 Tex. 255; *Bogle v. Hammons*, 2 Heisk. (Tenn.) 136. In *Baker v. Morton*, 12

Wall. 150, it was held that a deed procured by means of threats to take the life of the person executing it was void.

2. *Barrett v. French*, 1 Conn. 354; 6 Am. Dec. 241; *Harmon v. Harmon*, 61 Me. 227; 14 Am. Rep. 556; *United States v. Hauckabee*, 16 Wall. 432; *Burr v. Burton*, 18 Ark. 214; *Hazellrigg v. Donaldson*, 2 Metc. (Ky.) 445; *Maxwell v. Griswold*, 10 How. 242; *Beckwith v. Frisbie*, 32 Vt. 559; *Durr v. Howard*, 6 Ark. 361.

Threat of Legal Proceedings.—Though a person is arrested under a legal warrant and by a proper officer, yet if one of the objects of the arrest is thereby to extort money, or enforce the settlement of a civil claim, such arrest is false imprisonment by all who have directly procured the same or participated therein for any such purpose, and a release or conveyance of property obtained by means of such arrest is void. And the discharge of the person arrested without being taken before a magistrate for examination, and the failure to return the warrant, are circumstances competent to be considered as bearing upon the question whether the release or conveyance was obtained by duress. And if the presiding judge on the trial of a case where the validity of a release or conveyance of property executed by a person under arrest is in question, has stated the above principles of law to the jury, no exception lies to his refusal to instruct them that the discharge of the person arrested without examination, and the failure to return the warrant of themselves rendered the arrest illegal and established the fact of duress. *Hackett v. King*, 6 Allen (Mass.) 58; *Meek v. Atkinson*, 1 Bail. (S. C.) 84; 19 Am. Dec. 653; *Richards v. Vanderpool*, 1 Daly (N. Y.) 71; *Shepherd v. Watrous*, 3 Caines' 166; *Watkins v. Baird*, 6 Mass. 511; 4 Am. Dec. 170. Duress may be caused by an arrest without cause for an improper purpose, or by an arrest though made for just cause yet without lawful authority, or by an arrest

8. Infant Grantor.—A deed of real estate by an infant is voidable, but not void.¹

for improper purposes, though there be just cause and lawful authority. *Strong v. Grannis*, 26 Barb. (N. Y.) 122; *Thompson v. Lockwood*, 15 Johns. (N. Y.) 256. If a conveyance or contract is procured by means of duress, caused by an arrest by a person pretending to have a warrant when he has not, it may be set aside for duress. Duress may be caused it is said by mere fear and imprisonment. *Fashey v. Ferguson*, 5 Hill (N. Y.) 154; *Whitfield v. Longfellow*, 13 Me. 146; *Eddy v. Herrin*, 17 Me. 338; 35 Am. Dec. 261. If a contract is made under the influence of an arrest procured by perjury, although it is lawful and regular in form it will be considered as made under duress. *Strong vs. Grannis*, 26 Barb. (N. Y.) 122. But in *Meek v. Atkins*, 19 Am. Dec. 653, it was held that it was only in cases where the arrest is made without sufficient cause or lawful authority, or where an improper use has been made of it and an advantage gained thereby.

Undue Influence over Grantor.—In *Davis v. Culver*, Brown, J., said: "The influence which the law not only refuses to recognize but repudiates, is undue influence, denominated undue because it is unrighteous, illegal, and designed to perpetuate a wrong. The undue influence exerted to procure the execution of a deed or a bequest, or devise by will, must amount to fraud or coercion. The grantor must be overreached and deceived by some false representation or stratagem, or by coercion physical or moral." See *Anthony v. Hutchins*, 10 R. I. 165; *Bowles v. Wathan*, 54 Mo. 261; *Howe v. Howe*, 99 Mass. 88; *Turner v. Turner*, 44 Mo. 535; *Taylor v. Taylor*, 8 How. 183; *Allore v. Jewell*, 94 U. S. (4 Otto) 506; *Moad v. Coombs*, 26 N. J. Eq. 114; *Amis v. Satterfield*, 5 Ired. Eq. (N. C.) 173; *Fuller v. Fuller*, 40 Ala. 301. A deed from a child just at age and living with her parents, made to a trustee for the parent's benefit, founded on real consideration, and executed under the influence of misrepresentation by the parents, may be set aside. *Taylor v. Taylor*, 8 How. 183. Where a bill was filed to set aside a conveyance for undue influence, and for an accounting as to the interests of various parties, it was held that advances in payment of the debts of the grantor and the expenses of his

maintenance were proper charges on the estate and should remain a lien thereon pending the final and complete settlement. *Harding v. Handy*, 11 Wheat. 103.

Evidence of Undue Influence.—The burden of proving undue influence is upon the person alleging it, and each case must for the most part be decided by its own peculiar circumstances. The relations between the parties should be taken into consideration in determining whether the grantor was acting under undue influence. *Howe v. Howe*, 99 Mass. 88. Less evidence is necessary to establish the use of undue influence to obtain the execution of a deed when relations of trust and confidence, as parent and child, guardian and ward, trustee and beneficiary, attorney and client, physician and patient, nurse and invalid, exist than might be required in other cases. *Devlin on Deeds*, § 84; *Bayliss v. Williams*, 6 Coldw. (Tenn.) 440; *Futrill v. Jones* Eq. (N. C.) 61; *Peebles v. Horton*, 64 N. C. 374; *Case v. Case*, 26 Mich. 484. But see *Jenkins v. Pye*, 12 Peters 241; *Crowe v. Peters*, 63 Mo. 429; *Millican v. Millican*, 24 Tex. 426. Where the grantor is of feeble mind but acts with the knowledge of friends competent to advise him in his business affairs and against their objections, his deed will not be set aside for improper influence unless it assumes the character of fraud. *Corbit v. Smith*, 7 Iowa 60; 71 Am. Dec. 431; *Guest v. Buson*, 2 Houst. (Del.) 247; *Hallocher v. Hallocher*, 62 Mo. 267; *Devlin on Deeds*, § Houst. (Del.) 247; *Hallocher v. Hallocher*, 62 Mo 267; *Devlin on Deeds*, § 84. See *Jenkins v. Pye*, 12 Pet. 241.

1. *Irvine v. Irvine*, 9 Wall. 617; *Jenkins v. Jenkins*, 12 Iowa 195. In *Kendall v. Lawrence*, 22 Pick. (Mass.) 543, Shaw, C. J., in delivering the opinion of the court, said: "The rule seems well established by decided cases that the deed of a minor, conveying his land for a valuable consideration, is voidable and not void, that the right to avoid it on coming of age, is a personal privilege to the minor and his heirs, and that it cannot be avoided by an attachment, made by a creditor after the minor comes of age. *Oliver v. Howdlet*, 13 Mass. 237; *Worcester v. Eaton*, 13 Mass. 374; *Whitney v. Dutch*, 14

(a) HOW HIS DEED AVOIDED.—A deed can not be avoided until the infant arrives at full age.¹ Neither an infant nor his guardian has authority while the infancy continues, to determine whether a voidable contract of the infant shall be affirmed or annulled; this is a matter for his own decision when he arrives at mature age.² If the infant dies before attaining his majority all voidable contracts made by him may be disaffirmed by his heirs or legal representatives.³

Mass. 460; *Boston Bank v. Chamberlain*, 15 Mass. 220; *Nightingale v. Withington*, 15 Mass. 271; *Moore v. Abernathy*, 7 Blackf. (Ind.) 442; *Wellborn v. Rogers*, 24 Ga. 558; *Cummings v. Powell*, 8 Tex. 89; *Ferguson v. Bell*, 17 Mo. 347; *Harrod v. Myers*, 21 Ark. 592; *Roof v. Stafford*, 7 Cowen (N. Y.) 180; *Phillips v. Green*, 3 A. K. Marsh. (Ky.) 7; 13 Am. Dec. 124; *Tucker v. Moreland*, 10 Peters 58.

1. *Shipman v. Horton*, 17 Conn. 482; *Zouch v. Parsons*, 3 Burr. 1808; 3 Bac. Abr. Tit. Infancy A. A deed of lands executed by an infant cannot be avoided until he comes of age though he may enter and take the profits in the meantime. *Bool v. Mix*, 17 Wend. (N. Y.) 119; *Hastings v. Dallarhide*, 24 Cal. 195.

2. *Dunton v. Brown*, 31 Mich. 182.

3. *Devlin on Deeds*, § 87; *Bozeman v. Browning*, 31 Ark. 365; *Person v. Chase*, 37 Vt. 647; *Veal v. Forbson*, 57 Tex. 482. See also *Nelson v. Eaton*, 1 Redf. (N. Y.) 408; *Abbott v. Parson*, 3 Burr. 1805; *Tillinghast v. Holbrook*, 7 R. I. 230; *Jefford v. Ringgold*, 6 Ala. 544; *Vaughan v. Parr*, 20 Ark. 600; *Sharp v. Robertson*, 76 Ala. 343.

Infant must Give Notice of Disaffirmance.—"A deed executed and delivered by an infant conveying land, remains good and valid until it is avoided by him; and as he alone has the power of avoiding the deed and rescinding the contract, he is bound in reason and justice after he comes of age, and is competent to exercise a discretion upon the subject, to make his election and give notice of his intention. He ought not to be allowed to leave the grantee upon whom the contract is binding, in a state of suspense and uncertainty, and unless he makes known his determination in a reasonable time, it is just that the contract should become absolute against him. At any rate silence on his part while the grantee or any one under him is claiming, holding and occupying under the contract, is an ac-

quiescence from which a confirmation of the contract may be inferred." *Pren-tiss, C. J.*, in *Biglow v. Kinney*, 3 Vt. 353, 359. See 2 Kent's Com. 239; 21 Am. Dec. 589. In the case of every act of an infant which is merely voidable, he must disaffirm it on coming of full age, or he will be bound by it, and this must be done in a reasonable time. *Redfeld, J.* in *Richardson v. Boright*, 368, 371. In *Holmes v. Blogg*, 8 Tourb. 35, 39. . . *Dallas, J.*, said: "I agree that in every instance of a contract voidable only by an infant, on coming of age the infant is bound to give notice of disaffirmance of such contract in reasonable time; and if the case before the court were that simple case, I should be disposed to hold that as the infant had not given express notice of disaffirmation within four months, he had not given notice of disaffirmance in reasonable time." See *Hartley v. Wharton*, 11 Ad. & E. 934.

In many of the States this principle is declared by statute. *Wright v. Germain*, 21 Iowa 585; *Jones v. Butler*, 30 Barb. (N. Y.) 641; *Wallace v. Lewis*, 4 Har. (Del.) 75; *Flinn v. Powers*, 36 How. Pr. (N. Y.) 289; *Hoit v. Hunderhill*, 9 N. H. 439; 32 Am. Dec. 679. See *Jamison v. Smith*, 35 La. Ann. 609; *Green v. Wilding*, 59 Iowa 679; 44 Am. Rep. 696.

In **California**, where the contract of an infant is made under the age of eighteen, it may be disaffirmed by the minor himself either before his majority, or within a reasonable time afterwards, or by his heirs or personal representatives in case of his death, and if made while he is over age of eighteen, it may be disaffirmed in the same mode by a restoration of the consideration or its equivalent. Civ. Code, § 35.

Delaware.—Where extensive improvements have been made on property conveyed an infant's acquiescence for four years amounts to a confirmation of his deed. *Wallace v. Lewis*, 4 Har. (Del.) 75.

An infant may avoid his deed by re-entering and ousting the occupant, or if already in possession, by performing some act explicitly evincing his intention to defeat the conveyance.¹ An

Michigan.—The mere delay, after majority, of one who, when a minor, has executed a deed of lands to make an actual disaffirmance of the deed by entry or conveyance in the absence of any circumstances of equitable estoppel, will not operate as an affirmance or confirmation of the deed until the time limited by the statute of limitations for bringing an action has elapsed. *Prout v. Wiley*, 28 Mich. 163.

North Carolina.—It was held that where an infant bought a piece of land and after his majority lived upon it and paid a portion of the purchase price, he had confirmed the transaction. *Dewey v. Burbank*, 77 N. C. 259. See *Hubbard v. Cummings*, 1 Me. 11; *Dana v. Coombs*, 6 Me. 89; *Bostwick v. Atkins*, 3 Comst. 58.

An unexplained delay of three years and a half after the ceasing of her disability is fatal to a disaffirmance of a deed made by a minor married woman. *Goodnow v. Empire Lumber Co.*, 31 Minn. 468; 47 Am. Dec. 798; *Bingham v. Bailey* (55 Tex. 281) 40 Am. Dec. 801; *Murphy v. Attenheimer* (85 Ill. 39); 25 Am. Rep. 424; *Gillespie v. Baley* (12 W. Va. 70) 29 Am. Rep. 445. But see *Wells v. Seixas*, 24 Fed. R. 82.

Acquiescence not Affirmance.—"Where a person has made a conveyance of real estate and would affirm or disaffirm it after he becomes of age, in such case, mere acquiescence for years affords no proof of ratification. There must be some positive and clear act performed for that purpose. The reason is that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him as a duty towards others to act speedily. Language appropriate in other cases requiring him to act within a reasonable time would become inappropriate here. He may, therefore, after years of acquiescence, by an entry or by a conveyance of the estate to another person, disaffirm and avoid the conveyance made during his infancy. *Jackson v. Carpenter*, 11 Johns. 539; *Austin v. Patton*, 11 S. & R. 311; *Tucker v. Moreland*, 10 Peters 58;" *Boody v. McKenney*, 23 Me. 517, 523, per Shipley, J. Where a woman married at 1844 at

sixteen, within a year joined her husband in the conveyance of her land, the consideration being received by him; but in 1881, her husband joining, gave notice of her disaffirmance of the deed, she is not estopped by any statute of limitations from bringing an action to determine and quiet her title to the land so conveyed. In such case the disaffirmance was within a reasonable time. *Sims v. Bardoner*, 86 Ind. 87; *Hutch v. Carondelet*, 56 Mo. 202, 210; *Urban v. Grimes*, 2 Grant Cas. 96; *Gillespie v. Baley*, 12 W. Va. 70; *Sims v. Everhardt*, 22 Alby L. J. 445; *Simms v. Smith*, 86 Ind. 577.

Mr. Devlin in his work on Deeds, § 91, says: "The most reasonable rule seems to be that the right of disaffirmance should be exercised within a reasonable time after the infant attains his majority or else his neglect to avail himself of this privilege should be deemed an acquiescence and affirmance on his part of his conveyance. The law considers his contract avoidable on account of its tender solicitude for his rights, and its fear that he may be imposed upon in his bargains. But he is certainly afforded ample protection by allowing him a reasonable time after he reaches his majority to determine whether he will abide by his conveyance executed while he was a minor or will disaffirm it, and it is no more than just and reasonable that if he silently acquiesces in his deed and makes no effort to express his dissatisfaction with his act, he should after the lapse of a reasonable time, dependent upon circumstances, be considered as fully ratifying it."

1. *Roberts v. Wiggin*, 1 N. H. 73; 8 Am. Dec. 38. Justice Story, on page 71 says: "He may sometimes avoid it by matter *in pais* as in case of a feoffment by an entry, if his entry is not tolled; sometimes by plea as where he is sued upon his bond or other contract; sometimes by suit as where he disaffirms a contract made for the sale of his chattels; sometimes by a writ of *audita querela*, as when he has acknowledged a recognizance or statute, staple or merchant; sometimes as in the case of an alienation of his estate during his non-age, by a writ of entry, *dum fuit infra aetatem*, after his ar-

unconditional sale and conveyance of the property to a third person would clearly evince a desire to disaffirm his deed.¹

1. *Restoring the Consideration.*—An infant need not ordinarily restore the consideration before suing to recover back lands conveyed by him.²

rival of age." See *Dawson v. Helmes*, 30 Minn. 107.

But where an infant in 1784 conveyed lands in the military tract and afterwards in 1794 having arrived to full age, conveys the same lands to another person, and such conveyance was registered, it was held that the lands being waste and uncultivated, he was not concluded by the lapse of time, and that an entry was not necessary to avoid the former deed which (not being a coeffment,) might be avoided by a deed of the same nature and equal notoriety. *Jackson v. Carpenter*, 11 Johns. (N. Y.) 539.

If the grantee was in possession it seems in New York that an entry would be necessary. *Jackson v. Burchin*, 14 Johns 127; *Jackson v. Todd*, 6 Johns. 257.

1. *Bool v. Mix*, 17 Wend. (N. Y.) 119; *Tucker v. Moreland*, 10 Pet. 58.

But in order that a subsequent deed by an infant after reaching his majority may operate as a disaffirmance of his prior deed, it must be consistent with it, so that both cannot properly stand together. Thus, an infant conveyed real estate and his grantee before the coming of age of the infant, mortgaged to one party and sold it to another. The latter obtained a quit claim deed from the infant grantor, and when a bill was brought to foreclose the mortgage he attempted to defeat the lien of the mortgage by asserting that the deed to him was a disaffirmance of the deed to the mortgager, the original grantee of the infant, but it was held that the subsequent deed of the infant was intended as a mere confirmation of the previous title and not as a disaffirmance of the previous conveyance. *Devlin on Deeds*, § 93; *Eagle Fire Co. v. Lent*, 6 Paige, 635. So where an infant conveys one tract of land by deed to one person and another tract by a separate deed to another person, and the latter has granted portions of the land purchased by him to several purchasers, the infant after becoming of age cannot bring a joint action against both of his grantees and against the purchasers from one of such grantees,

to recover possession of the premises. *Vorhees v. Vorhees*, 224 Barb. (N. Y.) 150; *Palmer v. Miller*, 25 Barb. 399; *Dominick v. Michael*, 4 Sand. (N. Y.) 374, 421; *Dawson v. Helmes*, 30 Minn. 107.

Alabama.—If a minor sells the same property twice and when he has attained majority ratifies the second sale, this it has been held in Alabama is a disaffirmance of the first sale. *Derrick v. Kennedy*, 4 Port. 41; *Weaver v. Jones*, 24 Ala. 421.

Indiana.—Written notice of disaffirmance of a deed by an infant after he reaches full age is an avoidance of his conveyance made during infancy. *Walker v. Ellis*, 12 Ill. 470; *Prout v. Wiley*, 28 Mich. 164; *Scranton v. Stewart*, 52 Ind. 69; *Worcester v. Eaton*, 13 Mass. 371; *McGill v. Woodward*, Const. s. c. 468.

2. 2 Kent. Com. 264; *Hovey v. Hobson*, 53 Me. 453, 457; *Gibson v. Soper*, 6 Gray (Mass.) 279; *Cresinger v. Welch*, 15 Ohio 156. It has, however, been held that the retention and spending of the consideration after the vendor has become of full age is an affirmation of the sale. *Brontley v. Wolf*, 60 Miss. 420; *Beverley's case* 4 Co., 123 b.; *Co. Lit.* 247; *Tucker v. Moreland*, 10 Pet. 58; *Dearborn v. Eastman*, 4 N. H. 441; *Lang v. Whidden*, 2 N. H. 435; *Allis v. Billings*, 6 Met. 418; *Bryan v. Walker*, 4 Barr. 371; *Shaw v. Boyd*, 5 S. & R. (Pa.) 309; *Curtin v. Patton*, 11 S. & R. 305; *Benham v. Bishop*, 9 Conn. 330; *Phillips v. Green*, 3 A. K. Marsh. (Ky.) 7; *Wilcox v. Roath*, 12 Conn. 550; *Goodsell v. Myers*, 3 Wend. (N. Y.) 479; *Com. Dig. Infant*, c. 3, 4, 5; *Whitney v. Dutch*, 14 Mass. 457; *Smith v. Mayo*, 9 Mass. 62; *Ford v. Phillips*, 1 Pick. (Mass.) 202; *Thompson v. Lay*, 4 Pick. 48; *Walker v. Davis*, 1 Gray (Mass.) 506; *Seaver v. Phelps*, 11 Pick. 304; *Mitchell v. Kingman*, 5 Pick. 431; *Worcester v. Eaton*, 13 Mass. 371; *Thompson v. Leach*, 3 Mod. 310; *Tyler on Infancy and Coverture* (2nd ed); *Womack v. Womack*, 8 Tex. 397; 58 Am. Dec. 119; *Pursley v. Hays*, 17 Iowa 311; *Badger v. Phinney*, 15 Mass. 359; 8 Am. Dec. 105; *Hillyer v.*

II. *Consideration Retained*.—If the grantor during infancy has wasted or squandered the consideration received, and on coming of age disaffirms and repudiates the transaction, he may do so without restoring the consideration, and the adult who had dealt with him is accordingly remediless.¹

(b) RATIFICATION OF DEED.—There are three modes of affirming the voidable deeds of infants: First, by an express ratification;² second, by the performance of acts from which an affirmance may reasonably be implied;³ third, by the omission to

Bennett, 3 Edw. Ch. (N. Y.) 222; Brantley v. Wolf, 60 Miss. 420; Stuart v. Baker, 17 Tex. 417; Smith v. Evans, 5 Humph. (Tenn.) 70; Bartholomew v. Finnemore, 17 Barb. (N. Y.) 428; Gray v. Lessington, 2 Bosw. 257; Attman v. Mook, 3 Sand. Ch. (N. Y.) 431; Kitchen v. Lee, 11 Paige (N. Y.) 107; 42 Am. Dec. 101; Roof v. Stafford, 7 Cowen (N. Y.) 179; Farr v. Sumner, 12 Vt. 28; Miles v. Lingerman, 24 Ind. 385.

See *contra*: Arnold v. Richmond Iron Works, 1 Gray (Mass.) 437, 440; Allis v. Billings, 6 Met. 415; Wait v. Maxwell, 5 Pick. (Mass.) 217; Kendall v. Lawrence, 22 Pick. 543; McCrillis v. Bartlett, 8 N. H. 569; Ballard v. McKenna, 4 Rich. Eq. (S. C.) 358; Price v. Rarrington, 3 Macn. & Gord. 486; Molton v. Camrous, 2 Exch. 487 & Exch. 17; Baxter v. Portsmouth, 5 B. & C. 170 and 2 Car. & P. 178; Done v. Kirkwall, 8 Car. & P. 679; Niell v. Morley, 9 Ves. 478; *Ex parte* Ferne, 5 Ves. 832; Norton v. Norton, 5 Cush. (Mass.) 530; Manson v. Felton, 13 Pick. 212.

1. In *Price v. Furman*, 27 Vt. 271, the court says: "A distinction is to be observed between the case of an infant in possession of such property after age and when he has lost, sold or destroyed the property during his minority. In the former case, if he has put the property out of his power, he has ratified the contract and rendered it obligatory upon him. In the latter case, the property is to be restored if it be in his possession and control. If the property is not in his hands nor under his control, that obligation ceases. To say that an infant cannot recover back his property which he has parted with under such circumstances because by his indiscretion he has spent, consumed or injured that which he received, would be making his want of discretion the means of binding him to all his improvident contracts and de-

prive him of that protection which the law designed to secure to him." An equally strong case is *Chandler v. Simmons*, 97 Mass. 508, where the court hold that if money paid to a minor as the consideration for his conveyance of real estate has been wasted or spent by him during his minority, payment or tender of the amount is not necessary to enable him, or if he is under guardianship, his guardian to avoid the conveyance. This rule is very positively asserted in *Mustard v. Wohlford*, 15 Gratt. (Va.) 329, 341; *Fitts v. Hall*, 9 N. 44; *Robbins v. Eaton*, 10 N. H. 562. *Boody v. McKinney*, 23 Me. 517; *Branner v. Franklin*, 4 Gill (Md.) 463; *Green v. Green*, 7 Hun. (N. Y.) 492; *Gibson v. Soper*, 6 Gray 279, 282; 66 Am. Dec. 414; *Badger v. Phinney*, 15 Mass. 359; *Dill v. Brown*, 54 Ind. 204; *Maning v. Johnson*, 26 Ala. 446; *Biglow v. Kinney*, 3 Vt. 353; 21 Am. Dec. 589; *Williams v. Norris*, 2 Litt. Sel. Cas. 157; *Smith v. Evans*, 5 Humph. (Tenn.) 70; *Grace v. Hall*, 2 Humph. 27; 36 Am. Dec. 206; *Hill v. Anderson*, 5 Smedes & M. (Miss.) 216; *Walsh v. Young*, 110 Mass. 396; *Gillepsie v. Bailey*, 12 W. Va. 92. Compare *Stout v. Merrill*, 35 Iowa 47; *Kerr v. Bell*, 44 Mo. 120; *Hill-mer v. Bennett*, 3 Edw. Ch. (N. Y.) 222; *Eureka Co. v. Edwards*, 71 Ala. 248; 46 Am. Rep. 314; *Dawson v. Helmes*, 30 Minn. 107; *Price v. Furman*, 27 Vt. 268; 65 Am. Dec. 589.

2. *Kline v. Beebe*, 6 Conn. 494; *Dana v. Coombs*, 6 Greenleaf 89; 19 Am. Dec. 194.

3. *Lynde v. Budd*, 2 Paige (N. Y.) 191; *Richardson v. Boright*, 9 Vt. 368; *Kline v. Beebe*, 6 Conn. 494. A letter from an heir after coming of age, enclosing money and saying, "You will find enclosed the sum of——in part towards your right of dower. The remainder I shall forward you in a few days. It was entirely unexpected to me that it was not paid before, as I

disaffirm within a reasonable time.¹

1. *Delivery of Deed After Majority.*—If a married woman, while an infant, signs and acknowledges with her husband, a deed for her real estate and authorizes him to deliver it, and he delivers it with her consent, after she becomes an adult, such deed cannot be avoided by her on account of infancy.²

(c) *PURCHASER WITH KNOWLEDGE OF INFANT'S PRIOR CONVEYANCE.*—Where an infant conveys his land by deed duly recorded, and on arriving at majority, ratifies such conveyance by a written instrument and subsequently conveys the land to a third person for a valuable consideration, the last purchaser having constructive notice through the record, of the deed made in infancy, but no notice, actual or constructive, of the ratification, such ratifying instrument is within the policy of the registry laws, and the last grantee will hold the land.³

9. *Married Woman as Grantor.*—At the common law the convey-

had lodged property in A's hands to meet an annual payment," is a ratification. *Barnaby v. Barnaby*, 1 Pick. (Mass.) 221. Where an infant made a mortgage of his land, and after coming of age conveyed the same land subject to the mortgage, this second deed was holden to confirm and make good the mortgage. *Boston Bank v. Chamberlain*, 15 Mass. 220. A deed of conveyance of land in fee and a mortgage of the same made at the same time by the grantee to the grantor, are to be taken as parts of one and the same contract. If such grantee, being an infant, continue in possession of the land after his arrival at full age, this is an affirmation of the contract. *Hubbard v. Cummings*, 1 Me. 11. But mere declarations of intention of a party to perform a contract entered into by him during infancy, when made to a third person in no way interested in the matter are not evidence of such ratification of the contract as will render him liable thereon; to constitute a ratification there must be either a direct promise, after the infant comes of age to the party himself or to his agent, or acts and declarations, or acts alone, showing a clear recognition and confirmation of the contract. *Hoit v. Underhill*, 9 N. H. 436; 32 Am. Dec. 380. See *Phillips v. Green*, 5 Mon. (Ky.) 344; *Williams v. Mabee*, 3 Halst. Ch. (N. J.) 500; *Eagle Fire Co. v. Lent*, 1 Edw. Ch. (N. Y.) 301; s. c., 6 Paige 635; *Houser v. Reynolds*, 1 Hayw. (N. C.) 143; 1 Am. Dec. 551; *Riggs v. Fisk*, 8 Cent. L. J. 325; *Hughes v. Watson*, 10 Ohio 127; *Ferguson v. Bell*, 17 Mo. 347; *Peterson v.*

Laik, 24 Mo. 541; *Trader v. Jarvis*, 23 W. Va. 160.

1. *Kline v. Beebe*, 6 Conn. 494; "In *Holmes v. Blogg*, 8 Tann. 35, 39, 40, it was observed by Dallas, J., (afterwards Ch. J.), 'the infant is bound to give notice of the disaffirmance of a voidable contract, in reasonable time; and if the case before the court were that simple case I should be disposed to hold, that as the infant had not given express notice of disaffirmance, within four months, he had not given notice of a disaffirmance in reasonable time. This principle is recommended, by its justice and general convenience. It is unjust that the infant, after his arrival at maturity, and the lapse of a reasonable time, should hold the scales in his hands and decide as future circumstances should incline. In the meantime the purchaser is at a stand, and incapable of making any necessary and permanent improvement on his estate.'" Of this opinion is the author of commentaries on American Law. "His confirmation," said that learned jurist, "of the act or deed of his infancy may be justly inferred against him, after he has been of age for a reasonable time, either from his positive acts in favor of the contract, or from his tacit assent under circumstances not to excuse his silence." 2 Kent's Com. 195.

Acquiescence merely for an unreasonable time, is an act that denotes an intent not to rescind the contract. 1 Swift's Dig. 58; *Kline v. Beebe*, 6 Conn. 494, per Hasmer Ch. J.

2. *Sims v. Smith*, 99 Ind. 469.

3. *Black v. Hill*, 36 Ill. 376.

ance of a married woman was void; she could pass her title to real estate only by fine and common recovery.¹ A married woman is now, in some of the States of the Union, permitted to alienate her lands, under certain restrictions imposed by statute. A deed that does not observe the requirements of the statute is absolutely void.²

10. Joint Deed of Husband and Wife.—In several of the States a married woman can convey her real estate only by a joint deed executed by herself and husband and acknowledged separate and apart from her husband. In other States the rigor of the early rule has been relaxed.³

1. Devlin on Deed, § 100; Kent's Com. 150; 2 Blackst. Com. 293.

2. Devlin on Deeds, § 100; Kent's Com. 150; Glidden v. Strupler, 52 Pa. 400; McClure v. Douthitt, 6 Pa. 414; Kirkland v. Hepselgefer, 2 Grant. Cas. 84; Sulp. v. Campbell, 19 Pa. 361; Stoops v. Blackford, 27 Pa. 213; Peck v. Ward, 18 Pa. 506; Trimmer v. Heagy, 16 Pa. 484; Pettit v. Fretz, 33 Pa. 118; Thorndell v. Morrison, 25 Pa. 326; Rumsfelt v. Clemens, 46 Pa. 455; Miltenberger v. Croyle, 27 Pa. 170; Roseburg's Ex'rs v. Sterling's Heirs, 27 Pa. 202; Richards v. McClelland, 29 Pa. 385.

3. Devlin on Deeds, § 101; Holt v. Agnew, 67 Ala. 360; Lane v. McKean, 15 Ala. 304; Rowe v. Hamilton, 3 Me. 63; *Ex parte* Thomas, 3 Me. 50; Shaw v. Russ, 14 Me. 432. A deed of lands owned in fee, by a married woman, who is a native citizen, executed jointly by her and her husband, an alien, is valid and effectual to pass the title. Whiting v. Stevens, 4 Conn. 44; Hyde v. Morgan, 14 Conn. 104. Payne held an estate in right of his wife, subject to right of dower in his wife's mother, but which had never been demanded or assigned. Payne conveyed the estate to another, his wife signing the deed which after a general description contained the following: "Meaning to convey all the right and interest which Eliza Butterfield now my wife, Eliza Payne, has or ever had in said land," "except the right to her mother's thirds which I reserve a right to claim at the decease of the mother of said Eliza." *Held*, that exception must be construed to be of the reversion of the dower and not the dower itself; and that no dower having been assigned by metes and bounds, the grantee took by his deed two-thirds of the estate in common and undivided. Payne v. Parker, 10 Me.

178. See Buchanan v. Hazzard, 95 Pa. St. 240; Fowler v. Shearer, 7 Mass. 14; Andrews v. Hooper, 13 Mass. 476; Ela v. Card, 2 N. H. 176; Concord Bank v. Bellis, 10 Cush. 276; Gordon v. Haywood, 2 N. H. 402; Hall v. Savage, 4 Mason 273; Manchester v. Hough, 5 Mason 67.

New York.—The statute provides that the acknowledgments of a married woman may be taken and certified in the same manner as if she were sole. Laws of 1880 ch. 300.

Massachusetts.—A married woman has the same power to convey real estate as if she were unmarried.

New Jersey.—The rule is applied with strictness. The husband must join in the deed of the wife or the conveyance will be void. Moore v. Rake, 2 Dutch. 574; Den v. Crawford, 3 Halst. 90; Armstrong v. Ross, 20 N. J. Eq. 109. And she must acknowledge the execution of the deed upon a private examination without the hearing of her husband. Marsh v. Mitchell, 26 N. J. Eq. 497; Thayer v. Torrey, 37 N. J. Eq. 339.

Ohio.—It must appear in the certificate of the wife's acknowledgment, both that she acknowledged the signing and sealing of the instrument to be her free act and deed, and also that upon being examined separate and apart from her husband and the contents made known to her, she declared that she signed, sealed, and acknowledged the same voluntarily and was still satisfied therewith. Ludlow v. O'Neal, 29 Ohio St. (O. S.) 181; Carney v. Hopple's Heirs, 17 Ohio St. (O. S.) 39; Kilbourn v. Tury, 26 Ohio St. 153.

Pennsylvania.—Both husband and wife must join in the conveyance. Richards v. McClelland, 29 Pa. 385; Buchanan v. Hazzard, 95 Pa. St. 240; Glidden v. Strupler, 52 Pa. 400; Dun-

11. Deed from Husband to Wife.—According to the strict rules of the old common law, the wife was not permitted to take and

ham v. Wright, 53 Pa. 167. See Elsey v. McDaniel, 95 Pa. St. 472. The wife's separate acknowledgment must be taken out of the presence of the husband, and where he cannot see or hear any indication of unwillingness on her part to execute and acknowledge. McCandless v. Engle, 51 Penn. St. 309; Loudon v. Blythe, 27 Penn. St. 22; Glass v. Cook, 30 Pitts. L. J. 41.

Unless it appears that a *feme covert* was examined separate and apart from her husband, a statement that she voluntarily consented to the conveyance, will not supply the defect, but she may after the husband's death ratify it and parol evidence is admissible to show such ratification. Jourdon v. Jourdon, 9 Serg. & R. 268.

Indiana.—The separate real estate of the wife can be conveyed only by a deed executed by herself and husband. If the husband is insane the wife may convey her separate property without her husband's action, and in case of the husband's abandonment or imprisonment in the penitentiary, she may be authorized by the court to convey her real estate. Devlin on Deeds, § 107; Shumaker v. Johnson, 35 Ind. 33; Kinnaman v. Pyle, 44 Ind. 275; McCormick v. Hunter, 50; Abdil v. Abdil, 26 Ind. 287; Bowers v. VanWinkle, 41 Ind. 432; Baxter v. Bodkin, 25 Ind. 172; Mattox v. Hightshue, 39 Ind. 257; Farley v. Eller, 29 Ind. 322; Philbrooks v. McEwen, 29 Ind. 347; Buell v. Shuman, 28 Ind. 464.

Illinois.—The wife may alienate her own lands, yet as the husband is entitled to a third part of her estate of inheritance unless he waives it, a deed from both is generally required. Cole v. VanRiper, 44 Ill. 58; Rogers v. Higgins, 48 Ill. 211; Scovil v. Kelsey, 46 Ill. 344; Hoyt v. Swar, 53 Ill. 134; Marston v. Brittenham, 76 Ill. 611; Stiles v. Probst, 69 Ill. 382; Bressler v. Kent, 61 Ill. 426.

Other States.—In Alabama, Florida, Louisiana, Delaware, Maryland, Kentucky, Virginia, West Virginia, Georgia, North Carolina, Tennessee, Mississippi, Missouri and Texas the husband must join in the wife's conveyance. In Alabama, where a wife held under a deed of gift from her husband to her children, which authorized her to sell when she saw proper, it was held that her deed,

signed also by the husband, was sufficient, although the husband was not named in the body of the deed as a party. Devlin on Deeds, § 107; Holleman v. DeNyse, 51 Ala. 95. See *Freundenwald v. Mullen*, 10 Heisk. (Tenn.) 226; *Rhea v. Rhenner*, 1 Pet. 105. In Minnesota and Oregon the separate real estate of the wife can be conveyed only by a deed executed by herself and husband. As a general rule, in Iowa, Nebraska, Wisconsin, Michigan, California, Nevada and Colorado, a wife may sell her separate estate without the joinder of her husband. In South Carolina and Arkansas there are constitutional provisions authorizing married women to convey their property as if they were sole. Devlin on Deeds, Roberts v. Wilcox, 36 Ark. 355. In nearly all the States, however, the wife is required to acknowledge the execution of the deed upon an examination separate and apart from her husband. The certificate of acknowledgment must show that there has been a compliance with all the requirements of the statute. Devlin on Deeds, § 107; Young v. the State, 7 Gill & J. 253; Belcher v. Weaver, 46 Tex. 243; Pool v. Chase, 46 Tex. 207; Smith v. Elliott, 39 Tex. 201; Fitzgerald v. Turner, 43 Tex. 72; Brown v. Moore, 38 Tex. 645; Rice v. Peacock, 37 Tex. 392; Nichols v. Gordon, 25 Tex. Supp. 109; Brundige v. Poor, 2 Gill & J. (Md.) 1; Nicholson v. Hemsley, 3 Har. & McH. 409; Lewis v. Waters, 3 Har. & McH. 430; Webster's lessee v. Hall, 2 Har. & McH. 19; 1 Am. Dec. 370; Fleming v. Nix, 14 Fla. 268; Waddell v. Weaver, 42 Ala. 293; Johnston v. Wallace, 53 Miss. 331; Willis v. Grattman, 53 Miss. 721; Allen v. Lenoir, 53 Miss. 321; Barnard v. Elder, 50 Miss. 336; Lasseter v. Turner, 1 Yerg. (Tenn.) 413; Campbell v. Taul, 3 Yerg. 548; Edmondson v. Harris, 2 Tenn. Ch. 427; Heath v. Edur, 1 Har. & J. 751; Grove v. Zumbro, 14 Gratt. 501; McChesney v. Brown's Heirs, 25 Gratt. 393; Hawley v. Tuyman, 29 Gratt. 728; Tod v. Baylor, 4 Leigh 498; Countz Geiger, 1 Call. 193; Nelson v. Hawood, 3 Call. 394; Wannell v. Kem, 57 Mo. 478; Devorse v. Snider, 60 Mo. 325; Barker v. Circle, 60 Mo. 258; Sharpe v. McPike, 62 Mo. 300; Paul v. Carpenter, 70 N. C. 502; Davis v. Duke, 2 Hawy. 401; Glüchist v.

enjoy real or personal property, independently of her husband. These rules were modified by the courts of equity and have been abolished in most of the States.¹ The wife may take and enjoy

Bull, 1 Dev. & B. 359; *Bartlett v. Fleming*, 3 W. Va. 163; *Linn v. Patton*, 10 W. Va. 198; *Leftwich v. Neal*, 7 W. Va. 569; *Moorman v. Board*, 11 Bush. 135; *Hughes v. Coleman*, 10 Bush. 246; *McCormick v. Woods*, 14 Bush. 78; *Martin v. Davidson's Heirs*, 3 Bush. 572; *Jelt v. Rogers*, 12 Bush. 564; *Elliott v. Peirsol*, 1 Peters 328; *Pendergast v. Gwathmey*, 2 Marsh. A. K. 67. The infancy of a married woman will render her deed voidable. *Youse v. Norcoms*, 12 Mo. 549; *Hoyt v. Swar*, 53 Ill. 134; *Boal v. Mix*, 17 Wend. 119; 31 Am. Dec. 285; *Stanford v. McLean*, 3 Paige 117; 23 Am. Dec. 773; *Contra*, *Coho v. Endress*, 8 Cent. L. J. 187.

1. *Sims v. Rickets*, 35 Ind. 181; 9 Am. Rep. 679; *Underhill v. Morgan*, 33 Conn. 107; *Martin v. Martin*, 1 Greenl. 394; *Rowe v. Hamilton*, 3 Greenl. 63; *Voorhees v. Presb. church*, 17 Barb. 103; *Shepard v. Shepard*, 7 Johns. Ch. 57; 11 Am. Dec. 396. In *Sims v. Rickets*, 35 Ind. 181, many cases relating to the validity of a husband's deed to his wife, have been collected and the following propositions, among others, deduced from their examination: "A conveyance from a husband directly to his wife without the intervention of a trustee is void at law. A direct conveyance from a husband to his wife will be sustained and upheld in equity in either of the following cases, namely: 1. Where the consideration of the transfer is a separate interest of the wife, yielded up by her for the husband's benefit, or that of their family or which has been appropriated by him to his uses. 2. Where the husband is in the situation to make a gift to his wife and distinctly separates the property given from the mass of his property, and sets it apart to the separate, sole and exclusive use of his wife."

Commissioner Hunt in *Hunt v. Hunt*, 44 N. Y. 27, s. c. 4 Am. Rep. 631, gave an exhaustive opinion as to the effect in equity of a husband's deed to his wife. He said: "The case of *Shepard v. Shepard*, decided in this State (New York) more than fifty years since, by one of the best equity judges that ever presided in our courts, answers the question in the affirmative (7 John. C. R. 57). On the 26th day of December,

1808, Hazel Shepard executed and delivered to his wife a deed of a lot of land containing fifty acres. Nine years afterward he executed a deed of the same land to his son. Shepard died in 1819. There were many facts in the case tending to establish an equity in the wife, although there was no consideration of a pecuniary character, and she filed a bill in equity against the son asking as an alternative, that he be decreed to release to her his interest in the fifty-acre lot. In deciding in favor of the plaintiff's claim, Chancellor Kent says: "The deed from S. to the plaintiff was undoubtedly void in law for the husband cannot make a grant or conveyance directly to his wife during coverture. (Co. Lit. 3 a.) And in equity the courts have frequently refused to lend assistance to such a deed or to any agreement between them." He then cites and comments upon several cases to that effect. He proceeds: "It is to be observed, however, that none of these cases were determined strictly and entirely upon the incapacity of the husband to convey to the wife according to the rule of law; and they do not preclude the assertion of a right in a court of equity under certain circumstances, to assert such a conveyance. The court relied upon the staleness of the demand in the first case, and upon the want of consideration in the second, and upon the extravagance of the gift in the third, as also constituting grounds for the decree; and it is pretty apparent, that if the grant in each case had been no more than a suitable and meritorious provision of the wife the court would have inclined to assert it." After citing and commenting upon several English cases in which effect had been given to articles of agreement made directly between the husband and the wife he adds: "The consideration for the deed to the wife in the case before me was very meritorious. It was natural affection and to make a sure maintenance for the said Anna S. and consort of H. S., in case she should survive him." After further setting forth the facts, establishing the equity of the case he finishes that branch of the case in these words: "I conclude accordingly that the deed from the husband to the wife may and ought in this case, to be aided

real or personal property conveyed directly by the husband if no fraud is thereby committed upon creditors.¹ Effect will likewise be given by equity to the conveyance if it is made by force of the statute of uses in the form of a deed to the use of the husband or wife or of a covenant to stand seized.² The agreement of the husband to hold the property as the trustee of the wife should be shown by satisfactory evidence.³

12. Joint Tenants and Tenants in Common as Grantors.—A tenant in common may make a valid conveyance of any undivided portion of his undivided interest of the common estate, but he can not convey the whole interest in any portion of the land, because

and enforced by this court." *Shepard v. Shepard*, 7 John. Ch. 60.

The same doctrine is laid down in *Newfolk v. Thomson* (3d Edw. Ch. R. 92). In *Garlick v. Strong*, 3 Paige 440; a post nuptial contract between the husband and wife by which a bond and mortgage was set apart for the use of the wife, was sustained. To the same effect is *Bullard v. Briggs*, 7 Pick. 533. In his commentaries (2d vol. 163) Chancellor Kent thus lays down the rule: "Gifts from the husband to the wife may be supported as her separate property if they be not prejudicial to creditors; even without intervention of trustees and when the husband after marriage agreed in writing to settle part of the wife's property upon her, the agreement was held to enure to the benefit of the children, and that the wife herself would not waive it."

Judge Story says (2 Story Com. Eq. § 1395): "The doctrine is now firmly settled in equity, that a wife may bestow her separate property, by appointment or otherwise upon her husband as well as a stranger." The transaction is however to be examined with watchfulness to guard against undue influence on the part of the husband.

Rich v. Cockell (9 Ves. 369) sustains the same doctrine. In *Clancy on Married Women* 355, it is thus expressed: "As a married woman can deal and bargain with her husband with respect to her separate estate, so she may deal with a stranger without the privity of her husband." "And a married woman may not only deal with her husband and a stranger with respect to her separate property, but she may sell it to the person who holds it in trust for her." See same author p. 458, *Atherby* on marriage settlements 84, 85, new series. But in *Alabama* a husband cannot convey the title to real estate by a

deed executed directly to his wife *Gaston v. Weir*, (Ala.) 4 So. 258.

1. *Barnum v. Farthing*, 40 How. Pr. 25; *Aultman v. Obermeyer*, 6 Neb. 260; *Loomis v. Bush*, 36 Mich. 40; *Shepard v. Shepard*, 7 Johns. Ch. 57; 11 Am. Dec. 396; *Spencer v. Godwin*, 30 Ala. 355; *Jewell v. Porter*, 31 N. H. 34; *Slanning v. Style*, 3 P. Wms. 334; *Frissel v. Rozier*, 19 Mo. 448; *Fowler v. Trebin*, 16 Ohio St. 493; *Bancroft v. Curtis*, 108 Mass. 47; *Abbott v. Hurd*, 7 Blackf. 510; *Simmons v. Thomas*, 43 Miss. 31. See *Moyse v. Gyles*, 2 Vern. 385; *Clarke v. McGeiham*, 25 N. J. Eq. 423; *Prec. Ch. 124*; *Beard v. Beard*, 3 Atk. 72; *Lady v. Arundel v. Phipps*, 10 Ves. 146, 149; *Lucas v. Lucas*, 1 Atk. 270.

2. *Thatcher v. Omans*, 3 Pick. 521.

3. *McLean v. Langland*, 5 Ves. 79; *Walter v. Hodge*, 2 Swan St. 107.

When Grant Sustained in Equity.—If a gift between the parties is reasonable and not inconsistent with the condition and circumstances of the parties it will be sustained in equity. *Devlin on Deeds*, § 108; *Walter v. Hodge*, 2 Swanst. 106, 107; *Graham v. Londonerry*, 3 Swanst. 393, 395; *Wilson v. Peck*, *Prec. Ch. 295*, 297; *Townshend v. Townshend*, 1 Abb. N. C. 81. The words, "I hereby give, bequeath, transfer and set over to my wife" certain lands, "and hereby bind myself legally to execute to my said wife a good and sufficient deed" thereof, express an executed contract and are sufficient to constitute a grant. *Hunt v. Johnson*, 44 N. Y. 27. But it has been held that if the transfer is extravagant and exhaustive of the means of the parties and may be said to be unreasonable, effect will not be given to it. *Devlin on Deeds*, § 108; *Beard v. Beard*, 1 Atk. 72. See *Adlard v. Adlard*, 65 Ill. 212.

this would interfere with his co-tenants' right of partition.¹

13. Partners of Firm as Grantors.—A deed executed in the firm name of a partnership by one of the partners will only operate upon his own interest and cannot affect the interest of his partner.² A partner has no implied power by virtue of his relation to bind the firm by an instrument under seal, unless express authority has been given for the execution of such a deed, or there has been a subsequent ratification of it.³

1. *Laraway v. Larne*, 63 Iowa 407; *Bartlett v. Harlow*, 12 Mass. 346; *Porter v. Hill*, 9 Mass. 34; 6 Am. Dec. 22; *Baldwin v. Whiting*, 13 Mass. 57; *Rising v. Stannard*, 17 Mass. 282; *Campan v. Godfrey*, 18 Mich. 27; *Peabody v. Minot*, 24 Pick. 329; *Nichols v. Smith*, 24 Pick. 316; *Griswold v. Johnson*, 5 Conn. 363; *Staniford v. Fullerton*, 18 Me. 229; *Duncan v. Sylvester*, 24 Me. 482; 41 Am. Dec. 400; *Farr v. Reilly*, 58 Iowa 399; *Varnum v. Abbott*, 12 Mass. 474; *Robinett v. Preston*, 2 Rob. (Va.) 278; *Whitton v. Whitton*, 38 N. H. 127; 75 Am. Dec. 163. A levy of execution on the undivided interest of a tenant in common in a part of the land held in common, is invalid. *Blossom v. Brightman*, 21 Pick. 283; *Phillips v. Tudor*, 10 Gray 78; 69 Am. Dec. 306; *Sneed's Heirs v. Waring*, 2 Mon. B. 522; *Goods v. Coombs*, 28 Tex. 51; *Lamb v. Wakefield*, 1 Sawy. 252; *McKey v. Welch*, 22 Tex. 390; *Campan v. Godfrey*, 18 Mich. 27; *Jewett v. Stockton*, 3 Yerg. 492; *Biglow v. Topliff*, 25 Vt. 273; 60 Am. Dec. 264; *Gates v. Salmon*, 35 N. J. Eq. 394; *Marsh v. Hunter*, 50 Tex. 243.

But in *Stark v. Barrett*, 15 Cal. 362, it was held that one joint tenant or tenant in common of land may convey his interest in a particular portion of the land described by specific metes and bounds, but the grantee takes subject to the co-tenant's right of partition of the whole tract. The grantee's title is good against his grantor, and all except the co-tenant. *Primm v. Walker*, 38 Mo. 94. See *Reinicker v. Smith*, 2 Har. & J. 421; *Bell v. Adams*, 81 N. C. 118; *Treon v. Emerick*, 6 Ohio 391; *Porter v. Hill*, 9 Mass. 34; *Barnhart v. Campbell*, 50 Mo. 597.

2. *Devlin on Deeds*, § 110; *Anthony v. Butler*, 13 Pet. 423; *Brooks v. Sullivan*, 32 Wis. 444; *Layton v. Hastings*, 2 Har. 147; *Thompson v. Bowman*, 6 Wall. 316; *Jackson v. Stanford*, 9 Ga. 14; *Anderson v. Tompkins*, 11 Brock 456. See *Sherry v. Gilmore*, 58 Wis. 324.

3. *Doe v. Tupper*, 4 Smedes & M. 261; *Devlin on Deeds*, § 110; *Minnely v. Dorherty*, 1 Yerg. 26; *Clemen v. Brush*, 3 Johns. Cas. 180; *Harrison v. Jackson*, 7 Tenn. Rep. 207; *Posey v. Bullitt*, 1 Blackf. 99; *Little v. Hazard*, 5 Harring 292; *Trimble v. Coons*, 2 Marsh A. K. 375; 12 Am. Dec. 411; *Snodgrass' Appeal*, 13 Pa. St. 471; *Morris v. Jones*, 4 Har. 428; *McNaughton v. Patridge*, 11 Ohio 223; *Shirley v. Fearne*, 33 Miss. 653; 69 Am. Dec. 375.

If an instrument be executed by one of a partnership in the name of the firm, and one seal only is affixed, and this by the consent of the other, or if there be a subsequent ratification, which may be proved by parol, it is sufficient to bind the firm. *Pike v. Bacon*, 21 Me. 280; *Gunter v. Williams*, 40 Ala. 561; *Ely v. Hair*, 16 Mon. B. 230; *Baldwin v. Richardson*, 33 Tex. 16; 1 Am. Lead. Cas. 592; *Lowery v. Drew*, 18 Tex. 786; *Haynes v. Seachrest*, 13 Iowa 455.

Subsequent Ratification.—An unauthorized execution of a deed of a partnership may be ratified by parol. *Holbrook v. Chamberlain*, 116 Mas. 155; *Cady v. Sheppard*, 11 Pick 400. This is the general rule in the several states. *Bond v. Atkins*, 6 Watts & S. 165; 40 Am. Dec. 550; *Grady v. Robinson*, 28 Ala. 289; *Gunter v. Williams*, 40 Ala. 561; *Hayes v. Seachrest*, 13 Iowa 455; *Skinner v. Dayton*, 19 Johns. 513; 10 Am. Dec. 286; *Smith v. Kerr*, 3 Comst. 144; *Johns v. Battin*, 30 Pa. St. 84; *Gram v. Seton*, 1 Hall. 262; *McDonald v. Eggleston*, 26 Vt. 154; 60 Am. Dec.; *Russel v. Annable*, 109 Mass. 72; *Drumright v. Philpot*, 16 Ga. 424; 60 Am. Dec. 738; *Swan v. Stedman*, 4 Met. 548; *Holbrook v. Chamberlain*, 116 Mass. 155; *Gibson v. Warden*, 14 Wall. 244. See also *Williams v. Gillies*, 75 N. Y. 197; *Kasson v. Bocker*, 47 Wis. 79. Such a deed may be ratified by implication. *Seachrest*, 13 Iowa 455; *Pike v. Bacon*, 21 Me. 280; 38 Am. Dec. 259; *Gwinn*

14. Disseizin as Grantor.—According to the common law a person out of possession was unable to make a valid transfer of his property.¹ In many of the States statutes have been enacted providing against the conveyance of pretended titles.² A conveyance by a disseizee is unlawful and void.³

The deed of one who is disseized is void to the extent that it will not convey legal title and seizin, or a right of entry, upon which the grantee may maintain an action in his own name against one who has actual seizin. It is not void as a contract between the parties to it. The grantee may avail himself of it against the grantor by way of estoppel, or by suit upon the covenants, or may recover the land by an action in the name of the grantor. Although he has no right of entry, yet if by any lawful means he comes into possession, he may then avail himself of the title of his disseized grantor, and by uniting that to his own present possession, defeat recovery by the intermediate disseizor, and his title will also be made good against any one attempting to set up a deed from his grantor subsequent to his own.⁴

v. Rooker, 24 Me. 292; *Hatch v. Crawford*, 2 Port. 54; *Davis v. Burton*, 3 Scam. 41; 36 Am. Dec. 511; *Witter v. McNeil*, 3 Scam. 433. See *Catlin v. Gilder*, 3 Ala. 536; *Kelley v. Pike*, 5 Cush. 484.

1. *Devlin on Deeds*, § 112; *Jackson v. Andrews*, 7 Wend. 152; *Murray v. Ballow*, 1 Johns. Ch. 573; *Jackson v. Ketchum*, 8 Johns. 479; *Ludlow v. Kidd*, 3 Ohio 542; See *Roberts v. Cooper*, 20 How. 467; *Bradstreet v. Huntington*, 5 Pet. 402.

2. By the revised code of 1846 of Michigan no deed of lands shall be void for the reason that at the time of the execution thereof such lands are in the actual possession of another claiming adversely. *Roberts v. Cooper*, 20 How. 467. Such is the rule in Wisconsin. *Noonan v. Braley*, 2 Black 499. See *Green v. Liler*, 8 Cranch 229; *Loud v. Darling*, 7 Allen 205; *Dame v. Wingate*, 12 N. H. 291; *Thurman v. Cameron*, 24 Wend. 87; *Way v. Arnold*, 18 Ga. 181; *Johnson v. Cook*, 73 Ala. 537; *Bernstein v. Humes*, 75 Ala. 241.

3. In *Sohier v. Coffin*, 101 Mass. 179, it was held that the owner of land of which another person is in actual possession claiming a fee can convey no title, by deed delivered off the premises, as against the party in possession, though such possession has been for not more than four months.

4. *Farnum v. Peterson*, 111 Mass. 151; *Waite v. Lindsay*, 6 Met. 407, 413; *Cleveland v. Flagg*, 4 Cush. 76; *Mc-*

Mahan v. Bowe, 114 Mass. 140; *Snow v. Orleans*, 126 Mass. 453; *Alexander v. Carew*, 13 Allen 72.

Indiana.—A conveyance of land at the time held adversely by another is void as against the person holding adverse possession. *Webb v. Thompson*, 23 Ind. 428; *German Ins. Co. v. Grim*, 32 Ind. 257.

Vermont.—A deed by a disseizee is valid in equity and between the parties, but inoperative against strangers. *Devlin on Deeds*; *White v. Fuller*, 38 Vt. 204; *Park v. Pratt*, 38 Vt. 553.

To constitute an adverse possession of lands, so as to bar a recovery, or to avoid a deed subsequently executed by the true owner, the party setting up the possession must in making his entry upon the land, act in good faith and in the belief that he has title thereto and his possession must be under color and claim of title, exclusive of any other right. *Moore v. Worley*, 24 Ind. 81; *Livingston v. Peru Co.*, 9 Wend. 511, 522, 523.

The same rule prevails in New York, North Carolina, Massachusetts, Mississippi, Kentucky, Indiana, Vermont, Georgia, Michigan, New Hampshire and Connecticut. *Thurman v. Cameron*, 24 Wend. 87; *Foxcraft v. Barnes*, 29 Me. 128; *Granger v. Swart*, 1 Woolw. 91; *Den v. Shearer*, 1 Murph. 114; *Harral v. Leverty*, 50 Conn. 46, 47 Am. Rep. 608; *Hoyle v. Logan*, 4 Dev. 495; *Gresham v. Webb*, 29 Ga. 320; *Ewing v. Savary*, 4 Bibb. 424;

15. Corporation as Grantor.—As corporations are the mere creatures of the statutes, they can hold or convey property only for the purposes for which they were created.¹

Hathorne v. Haines, 1 Me. 238; *Helms v. May*, 29 Ga. 121; *Wade v. Lindsey*, 6 Met. 407, 414; *Stockton v. Williams*, 1 Doug. (Mich.) 546; *Parker v. Proprietors, etc.*, 3 Met. 98; 37 Am. Dec. 121; *Betsey v. Torrance*, 34 Miss. 132; *Selleck v. Starr*, 6 Vt. 194.

1. *Abbott v. American Hard Rubber Co.*, 33 Barb. 578, 598; *Bissel v. M. S. & N. I. R. Co.*, 22 N. Y. 281; *Coe v. Columbus P. & I. etc. R. Co.*, 10 Ohio St. 377, 378, 390; *Abbott v. Baltimore, etc. R. Co.*, 1 Md. Ch. 542; *Penn., Del. & Md. Steam Nav. Co. v. Dandridge*, Gill & J. 318, 319; *Hood v. N. Y. & N. H. R. Co.*, 22 Conn. 502; *Dodge v. Woolsey*, 18 How. 341, 343; *York & Md. L. R. Co. v. Winans*, 17 How. 30; *Pierce v. Madison & I. R. Co.*, 21 How. 441; *Ohio M. R. R. Co. v. I. R. R. Co.*, 5 Am. Law Register N. S. 733; *Clark v. City of Des Moines*; *Robbins v. Clay*, 33 Med. 132; *Kean v. Johnson*, 1 Stockton Ch. 401; *New Orleans, J. & G., etc., R. Co. v. Harris*, 27 Mass. 517, 541; *Brady v. The Mayor*, 2 Bosw. 185; *Ward v. Sea Ins. Co.*, 7 Paige 297; *New York & Sharon Bank v. Fulton Bank*, 7 Wend. 35; *Hodges v. City of Buffalo*, 2 Denio 113; *McCullough v. Moss*, 5 Denio 578; *McSpedon v. Mayor of New York*, 7 Bosw. 601; *Zottman v. San Francisco*, 20 Cal. 102; *Wallace v. Mayor of San Jose*, 29 Cal. 186, 188; *Branham v. Mayor of San Jose*, 24 Cal. 604; *Winch v. Birkenhead, etc., R. Co.*, 13 E. L. & E. 506; *Angell & Ames on Corp.*, §§ 391, 393.

Thus a corporation organized for the purpose of owning ditches for the conveyance and sale of water, possesses the power of selling and conveying all its corporate property, provided the sale is made for corporate or lawful purposes, and strangers taking a conveyance have a right to assume, as against the corporation, that the sale was for a lawful purpose. If the corporation contests the validity of such sale on the ground that it was made for an unlawful purpose, it devolves upon it to show that the party making the purchase knew of such unlawful purpose. Such sale may be made to any person natural or artificial, capable of taking, and the stockholders of one or more corporations may form themselves into a new corporation, and the

property of one or both of the old corporations may be conveyed to the new corporation. *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543; *Angell & Ames on Corp.*, § 187; *Devlin on Deeds*, § 114; *White Water Valley Canal Co. v. Vallette*, 2 How. 425; *State v. Bank of Maryland*, 6 Gill & J. 205; 26 Am. Dec. 561; *Dana v. Bank of United States*, 5 Watts & S. 223; *Beers v. Phoenix Glass Co.*, 14 Barb. 358; *U. S. Bank v. Hutch*, 4 Mon. B. 423.

In *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 543, the court said: "This corporation was created for the immediate benefit of the stockholders with no direct specific public purpose in view. As in the case of a railroad or turnpike or canal companies. The only interest the public has in the continuance of the business is the remote general interest which it has in the proper development of the resources of the country. The restrictions placed upon it are for the purpose of giving the public notice of its powers, of confining its business to the line indicated in its certificate, and for protecting the shareholders and parties dealing with it against the usurpation of its officers. The corporation is a distinct individual, holding the legal title to the property in trust for the benefit of the shareholders, who are the beneficiaries having the equitable interest. If it is found from experience that the interest of the corporators and creditors require that the business should not be carried on upon so large a scale, or that it should cease entirely, and the disposal and conveyance of a part of the whole of the property is necessary to a reduction or cessation of the business, and the stockholders consent or do not object, we know of nothing in the statute or in sound public policy to prevent the sale or conveyance for such purpose. The State can have no interest in compelling its citizens or corporations to carry on business of any kind at a loss. No sound public policy can drive corporations or private individuals to insolvency."

A corporation chartered with power to purchase and hold water power created by the erection of dams, and to hold real estate, may, when its water privileges can no longer be profitably used, and when by contract with the

The power of alienation may, however, be restricted by the nature of the corporation or by the character of the objects for which it was organized, although the charter contain no limitation upon its power to convey.¹

IV. LEGAL CAPACITY OF GRANTEE.—The capacity of grantee is less restricted than that of a grantor. Thus married women, infants and persons *non compos mentis* may take as grantees.² But Indians and Alcaldes can not take as grantees, by statute in some of the States.³ A wife might take as grantee at common law without her husband's consent, and unless the husband avoided the conveyance by some act which declared his dissent, the deed would be good. The wife, however, might after her husband's death waive or disagree to the purchase.⁴

But at the present time, in nearly all the States, a conveyance may be made to a married woman in the same manner as other persons.⁵ If land is purchased by the separate funds of the wife, it is presumed to be common property unless the fact is affirmatively established by clear and decisive proof.⁶

commonwealth it has extinguished its water power, lawfully sell its lands. *Duppee v. Boston Water Power Co.*, 114 Mass. 37; *Treadwell v. Salisbury Manfg. Co.*, 7 Gray 393; 66 Am. Dec. 490; *Sargent v. Webster*, 13 Met. 498; 46 Am. Dec. 743; *Reynolds v. Commissioners*, 5 Ohio 205; *Hodges v. New Eng. Screw Co.*, 1 R. I. 347; 53 Am. Dec. 624.

1. *Devlin on Deeds*, § 115; *Richards v. Railroad*, 44 N. H. 136. A donation of all the property of an incorporated secret society by a resolution of a majority of its members to another corporation of which the majority are members, is invalid. *Polar Star Lodge v. Polar Star Lodge*, 16 La. Ann. 53.

2. *Devlin on Deeds*, § 116; *Wash. Real Property*, § 267; *Wood on Conveyancing*, § § 165, 168; See *Concord Bank v. Bellis*, 10 Cush. 278; compare *Brigham v. Fayerweather*, (Mass.) 3 N. E. Repr. 761.

3. *Sunal v. Hepburn*, 1 Cal. 255; *Woodworth v. Fulton*, 1 Cal. 295; *Reynolds v. West*, 1 Cal. 322.

4. *Devlin on Deeds*, § 116; 2 Kent. Com., § 150; 2 Blackst. Com., § 292; 1 Bishop on Married Women, § 25; *Scanlan v. Wright*, 13 Pick. 523; 25 Am. Dec. 344; *Baxter v. Smith*, 6 Binn. 427.

5. *Richmond v. Tibbles*, 26 Iowa, 474; *Vance v. Nagle*, 70 Pa. St. 176; *Burnley v. Thomas*, 63 Mo. 390; *Lippincott v. Mitchell*, 94 U. S. 767; *Smalley v. Lawrence*, 9 Rob. (La.) 211; *Uhrig v. Hartsman*, 8 Buch. 172;

McVey v. Green Bay R. R. Co., 42 Wis. 532.

In *Georgia*, before the passage of the act of 1866, a conveyance of land to a wife without any words showing that it was intended for her sole and separate use, vested the title in her husband; and especially so, when the consideration paid was the property of the husband. *Whitehead v. Arline*, 43 Ga. 221; *Nightengale v. Hidden*, 7 R. I. 128; *Gamber v. Gamber*, 6 Har. (Pa.) 363; *Commonw. v. Williams*, 7 Gray 337; *Ayer v. Ayer*, 16 Pick. 331; *Fisk v. Stubbs*, 30 Ala. 335; *Pooley v. Webb*, 3 Cold. 599; *Meyer v. Kinzer*, 12 Cal. 251; 73 Am. Dec. 538; *Bayer v. Cockerill*, 3 Kan. 282; *Huston v. Curl*, 8 Tex. 240; 58 Am. Dec. 110.

6. *Meyer v. Kinzer*, 12 Cal. 245; *Adams v. Knowlton*, 22 Cal. 283. A conveyance of land to a married woman "in her own right is not a sufficient conveyance of it to her sole and separate use free from the interference or control of her husband," within the *Mass. St.* of 1845, C. 208, c. 3. At common law the husband is presumed to own all the property in the possession of the wife while they are living together, and the act of 1861 was not designed to overcome this presumption. If the wife claims the benefit of the act she must bring herself within its provisions by proof. She holds the affirmative of the issue, and must prove it. *Reeves v. Webster*, 71 Ill. 307; see *Hussey v. Castle*, 41 Cal. 239; *Hoyt v.*

1. **Grantee must be in esse.**—A conveyance to a party not living at the time of its execution is void.¹

2. **Alien as Grantee.**—(See ALIENS.)

3. **Husband and Wife as Grantee.**—At the common law the husband and wife held lands conveyed to them by entirety. Statutes have been passed in many of the States providing that an estate which is granted or devised to two or more persons shall be deemed a tenancy in common unless there is an express declaration that it shall be held in joint tenancy. Where these statutes exist the common law rule, that the husband and wife take by entirety, however, generally prevails, notwithstanding such statutes.²

Parks, 39 Conn. 357; Denechand v. Berrey, 48 Ala. 591. In *Hussey v. Castle*, 41 Cal. 239, it was held that there was no legal presumption that land, the separate property of the husband conveyed by him to the wife for money, the separate property of the wife, became after such transfer the community property of the husband and wife.

1. *Lyles v. Lescher*, (Ind.) 7 West. 53 (1888); *Phelan v. San Francisco Co.*, 6 Cal. 531; *Barr v. Schroeder*, 32 Cal. 610; *Skinner v. Grace Church*, 20 N. W. Repr. 577; *Hunt v. Watson*, 12 Cal. 363; 73 Am. Dec. 543. This rule does not apply to remainder men. *Devlin on Deeds*, § 123; 3 Washburn Real Prop. 4th ed. 266; *Wood on Conveyancing* 170, 171; *Perkins*, § 53. A deed to a corporation never created or organized can have no effect. *Harri-man v. Southan*, 16 Ind. 190; *Jones v. Cincinnati Type Foundry*, 14 Ind.; *Russel v. Topping*, 5 McLean 202; *Miller v. Chittenden*, 2 Iowa 368; *Pot-ter v. Chapin*, 6 Paige 649. A deed of land to the "estate of D. W. Hart" is a nullity. *Simmons v. Spratt*, (Fla.) 1 So. Repr. 860 (1888); *Schaidt v. Blane*, (Md.) 5 Cent. 580. But a misnomer of a corporation in a devise, grant or obligation will not prevent it from taking or recovering in its true name. *Dra-matic Fund Asso. v. Lett* (N. J.), 4 Cent. 403. See CORPORATIONS.

2. *Wright v. Sadler*, 20 N. Y. 320; *Jackson v. Stevens*, 16 Johns. 110; *Tor-rey v. Torrey*, 14 N. Y. 430; *Dias v. Glover*, Hoff. Ch. 71; *Beach v. Hollis-ter*, 3 Hun. 519; *Dickinson v. Co-dinse*, 1 Sand. Ch. 314; *Baker v. Lamb*, 11 Hun. 519; *Freeman v. Barber*, 3 N. Y. 574; *Goelet v. Gori*, 31 Barb. 314; *Farmers' and Mechanics' National Bank v. Gregory*, 49 Barb. 155, 162;

Rogers v. Benson, 5 Johns. 431; *Miller v. Miller*, 9 Abb. Pr. (N. S.) 444; *Bar-ber v. Harris*, 15 Wend. 615; *Jackson v. McConnel*, 19 Wend. 175; *Doe v. Howland*, 8 Cowen 277; *Zortlein v. Bram*, (N. Y.) 1 Cent. 66.

In New York a statute was enacted in 1860 and it was held in *Meiker v. Wright*, 76 N. Y. 263, that where lands have been conveyed to a husband and wife jointly, without any statement in the deed as to the manner in which the grantees shall hold, they are tenants in common. But Earl, J., in delivering the opinion of the court in a very recent decision (*Bertles v. Nunan*, 92 N. Y. 152; 44 Am. Rep. 361) said: "It is said that the reason upon which the common law rule under consideration was based has ceased to exist, and hence that the rule should be held to disap-pear. It is impossible now to deter-mine how the rule, in the remote past, obtained a footing or upon what rea-son it was based, and hence it is im-possible now to say that the reason, whatever it was, has entirely ceased to exist. There are many rules appear-ing to the ownership of real property originating in the feudal ages, for the existence of which the reason does not now exist or is not discernible, and yet on that account courts are not to disregard them. They must remain until the legislature abrogates or changes them, like statutes founded up-on no reason, or upon reasons that have ceased to operate. It was never, we believe, regarded as a mischief that under a conveyance to husband and wife they should take as tenants by the entirety, and we have no reason to be-lieve that it was within the contempla-tion of the legislature to change that rule, neither do we think that there is

any public policy which requires that the statutes should be so construed as to change the common law rule. It was never considered that the rule abridged the rights of married women, but rather that it enlarged their rights and improved their condition. It would be against the spirit of the statutes to cut down an estate of the wife by the entirety to an estate as tenant in common with her husband. If the rule is to be changed it should be changed by a plain act of the legislature applicable to future conveyances; otherwise incalculable mischief may follow by unsettling and disturbing dispositions of property made upon the faith of the common law rule. The courts certainly ought not to go faster than the legislature in obliterating rules of law under which many generations have lived and flourished and the best civilization of any age or country has grown up." Danforth, J. and Finch, J. dissented, on the ground that the common law doctrine was abrogated by the statutes enabling a wife to hold a separate estate and also for the reasons stated in the case of *Meeker v. Wright*, 76 N. Y. 262.

Massachusetts.—A devise of land to husband and wife creates a joint tenancy, notwithstanding the statute of 1785, c. 62. *Fox v. Fletcher*, 8 Mass. 274; *Shaw v. Heassey*, 5 Mass. 520; *Varnum v. Abbot*, 12 Mass. 479; 7 Am. Dec. 87; *Dutch v. Manning*, 2 Danes Abr. 230; *Ross v. Garrison*, 1 Danes Abr. 35; *Wales v. Coffin*, 13 Allen. 213.

Wisconsin.—The common law rule prevails. *Bennett v. Child*, 19 Wis. 365; *Ketchum v. Walsworth*, 5 Wis. 95; 68 Am. Dec. 49.

Indiana.—At common law if a conveyance of real estate is made to a man and his wife, they are not joint tenants or tenants in common, but both are seized of the entirety, *per tout*, and not *per my*. Neither can dispose of any part of the estate without the assent of the other, but the whole must remain to the survivor. Such was the law under the act of January 2d, 1818, (Rev. Stat. 1838, 398) and such is the law under the statutes of 1852, (1 G. & H. 259, § 6, 7, 8). *Arnold v. Arnold*, 30 Ind. 305; *Davis v. Clark*, 26 Ind. 412; *Hulett v. Inlow*, 57 Ind. 412; *Anderson v. Tannehill*, 42 Ind. 141; *Simpson v. Pearson*, 31 Ind. 1; *Falls v. Northorn*, 30 Ind. 444.

Missouri.—The common law rule is

recognized in Missouri. *Garner v. Jones*, 52 Mo. 68; *Gibson v. Zimmerman*, 12 Mo. 385; 51 Am. Dec. 168.

Maine.—*Harding v. Spinger*, 14 Me. 407; 31 Am. Dec. 61; and

Vermont, also *Bronson v. Hull*, 16 Vt. 309; 42 Am. Dec. 517.

New Hampshire.—The doctrine of tenancies by entirety has been abrogated by statute. *Clark v. Clark*, 56 N. H. 105.

Connecticut.—The husband and wife become joint tenants, and the husband has the power of conveying his interest. *Whittlesey v. Fuller*, 11 Conn. 337.

Pennsylvania.—The husband and wife take the estate by entirety, although the deed be made to them as "tenants in common, and not as joint tenants." *Stuckey v. Keefe's Executor*, 26 Pa. St. 397; *Fairchild v. Chastelleux*, 1 Pa. 176; 44 Am. Dec. 117; *Bates v. Seeley*, 46 Pa. 248; *Diver v. Diver*, 56 Pa. 106; *McCurdy v. Canning*, 64 Pa. 39; *French v. Mehan*, 56 Pa. 289.

Michigan.—Where property is granted to a husband and wife by the same deed, the husband is neither a tenant in common nor an ordinary joint tenant; he has no right to an undivided half of the property, and if he dies, his estate goes to his wife by survivorship. *Ætna Ins. Co. v. Resh*, 40 Mich. 241; *Fisher v. Provin*, 25 Mich. 347; *Jacobs v. Miller*, 50 Mich. 119; *Manwaring v. Powell*, 40 Mich. 371. A husband and wife may occupy the homestead as tenants in common. *Lozo v. Sutherland*, 38 Mich. 168.

New Jersey.—Common law rule abolished by statute. *Den v. Hardenbergh*, 5 Halst. 42; 18 Am. Dec. 371; *Thomas v. De Baum*, 1 McCart. 40; *Washburn v. Burns*, 34 N. J. L. 18; *Den v. Gardener*, Spenc. 556; *McDernott v. French*, 2 McCart. 78; *Bolles v. State Trust Co.*, 12 Green C. E. 308. See *Kip v. Kip*, 33 N. J. Eq. 213; 23 Alb. L. J. 219.

Kentucky.—By revised statutes the husband and wife hold as tenants in common unless a right of survivorship is expressly provided for in the conveyance. 2 Rev. Stats. ch. 47, § 14; *Croan v. Joyce*, 3 Bush. 454; *Elliott v. Nichols*, 4 Bush. 502. As to former rule, see *Ross v. Garrison*, 1 Dana 35; *Cochran v. Kerney*, 9 Bush 199; *Babbit v. Scroggin*, 1 Duval 272; *Rogers v. Gelder*, 1 Dana 243.

In Maryland, Virginia, North Carolina, Tennessee, Arkansas and Missis-

4. Husband's Name Inserted as Grantee by Mistake.—Equity will correct a deed of conveyance to the husband and wife upon clear and satisfactory evidence that the husband's name was inserted in the deed by mistake.¹

5. Corporation as Grantee.—If a charter of a corporation forbids it to purchase or take land a deed made to it is void.²

issippi, the common law prevails. *Hannan v. Touers*, 3 Har. & J. (Md.) 147; 5 Am. Dec. 427; *Marburg v. Cole*, 22 Alb. L. J. 59; *Thornton v. Thornton*, 3 Rand. (Va.) 179; *Jones v. Potter* (N. C.) 220; *Woodford v. Higly*, 1 Winst. 237; *Needham v. Branson*, 5 Ind. (Va.) 426; *Motley v. Whitmore*, 2 Dev. & B. 537; *Ames v. Norman*, 4 Sneed (Tenn.) 683; *Taul v. Campbell*, 7 Yerg. (Tenn.) 319; 27 Am. Dec. 508; *Robinson v. Eagle*, 29 Ark. 202; *Henningsway v. Scales*, 42 Mass. 1; *McDuff v. Beauchamp*, 50 Miss. 531.

1. *Courtright v. Courtright*, 63 Iowa 356; *Nowlin v. Pyne*, 47 Iowa 293; *Stafford v. Fetters*, 55 Iowa 484; *Reed v. Root*, 59 Iowa 359. Compare *Ramage v. Ramage*, 2 S. E. 834.

2. *Leazure v. Hillegas*, 7 Sug. & R. 319. The right of corporations to purchase land was restrained by the statutes of Mortmain. 1 Blackst. Com. 479; 2 Blackst. Com. 268, 274; Co. Litt. 2 b. These statutes have not been enacted in any of the States except Pennsylvania, where they are enforced so far as they are consonant with its political condition. 3 Binney App. 626; *Methodist Church v. Remington*, 1 Watts 218; 26 Am. Dec. 61; *Devlin on Deeds*, § 120; 2 Kent. Com. 229; *McCartee v. Orphan Asylum*, 9 Cowen 452; 18 Am. Dec. 615; *Lathrop v. Scioto Com. Bank*, 8 Dana 119; *Potter v. Thornton*, 7 R. I. 252. See CORPORATIONS; See, also, FOREIGN CORPORATIONS.

Corporation Forbidden by its Charter to Take and Hold Land. Bill for Specific Performance.—In *Banks v. Poitiaux*, 3 Randolph (Va.) 136; 15 Am. Dec., it was decided upon a bill by a corporation for the specific performance of a contract to convey lands that it was no defense that the corporation was by its charter not allowed to hold them. It was consideration only between the State and the corporation. In that case the charters of the banks after authorizing them to purchase lands, provided that the lands which it should be lawful for them to hold should be only such as were requisite for their immediate ac-

commodation or acquired in satisfaction of debts, and that they should not deal directly or indirectly in any other thing than bills of exchange, gold or silver, etc. *Green, J.*, said: "It is insisted that the lands which the banks sold to the appellee were not acquired in satisfaction of debts, etc., and were not requisite for their immediate accommodation, etc., according to the charters, and that therefore, the banks could not acquire any title to such land, and could not convey any title to the purchaser from them, or if they could, that as the purchase and sale were contrary to the policy of the law, a court of equity ought not to assist them, by enforcing the contract. It seems to me that the charters are only directory in this respect; they impose no penalty in terms. They do not declare the purchase by or conveyance to the banks to be void, nor vest the title in the commonwealth, or any other than the banks in consequence of such purchase and conveyance. The legal title passed to the banks by the conveyance to them, and their conveyance would effectually transfer that title to any other. If, in making the purchase of the land in question, the banks violated their charters, the corporation might for that cause be dissolved by a proceeding at the suit of the commonwealth, and even in that case it seems to be the better opinion, that the property, if not previously conveyed to some other, would revert, upon the dissolution of the corporation, to the grantor and not to the commonwealth. Co. Lit. 13 b. But any conveyance made by the corporation before its dissolution would be effectual to pass their title; Fonbl. Eq. 298, note (s) and the cases there cited. The banks have, therefore, a title which they can convey to the appellee, and which would, in his hands, be indefeasible. If, in this case, the banks violated their charter, by the purchase of the land in question, the maxim, '*factum valet quod fieri non debet*,' seems to apply. It would be extremely inconvenient if every contractor with one of these banks could, for the purpose of avoid-

GRANTS.—See ASSIGNMENT, CONVEYANCE, IMPLIED COVENANTS, DEED, ENTRY, HOMESTEAD, PATENT, PUBLIC LANDS, REAL ESTATE, RAILROADS.

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 - (1) *General Nature*, 46.
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1. DEFINITIONS.—A grant, in its largest sense, is the passing of any kind of property from one person to another by the voluntary act of the grantor.¹ The word has also two special

ing his contract, institute the inquiry whether the bank had violated its charter. They have a right to insist that the question should be tried by a jury, in a proceeding having that single object in view." See *Storer v. Great Western Co.*, 2 Younge, etc., ch. 48; *Silver Lake v. North*, 4 Johns. Ch. 370; *In Natoma Water Co. v. Clarkin*, 14 Cal. 544. Chief Justice Field in the petition for re-hearing said: "The plaintiffs are an incorporated company under the Act of April 14, 1853, by the fourth section of which they are authorized to purchase, hold, sell, and convey such real and personal estate as the premises in controversy are necessary for those purposes it is not material to inquire; that is a matter between the government and the corporation, and is no concern of the defined acts. It would lead to infinite inconveniences and embarrassments, if in suit by corporations to recover the possession of their property, inquiries were permitted as to the necessity of such property for the purposes of their incorporation and the title made to rest upon the existence of that necessity." In *California State Telegraph Co. v. Alta Telegraph Co.*, 22 Cal. 398, Cape, C. J., on page 429 says: "If the corporation, in making the purchase, has acquired property which under the law of its incorporation it had no right to acquire, all that can be said is that it has exceeded its powers and may be deprived of its property by a judgment of forfeiture. The question is one which the State alone can raise. A purchase by a corporation in the face of a positive prohibition would be void,

but that is not this case. There was no provision of law forbidding the purchase, and admitting that the corporation had no power to make it, the want of power in the absence of an express prohibition is not sufficient to avoid it as to third persons." See *Contra Michigan Bank v. Niles*, 1 Doug. 401; *Barrow v. Nashville Turnpike*, 9 Humph. 304.

Corporations Buying Land in Another State.—The Legislature of the State of New York incorporated. "The New York & Schuylkill Coal Co. The act of incorporation was granted for the purpose of supplying the City of New York and its vicinity with coal, and the company having at great expense secured by purchase, valuable and extensive coal lands in Pennsylvania, the Legislature of New York to promote the supply of coal as fuel, granted the incorporation, with the usual powers of a body corporate, giving to it the powers to purchase and hold lands, to promote and attain the objects of the incorporation. The recitals in the act of incorporation show that this power was granted with special reference to the purchase of lands in the State of Pennsylvania. Held, that the right to hold the lands so purchased depended on the assent or permission express or implied of the State of Pennsylvania. *Runyan v. Lessee of Coster*, 14 Peters 122. See FOREIGN CORPORATIONS.

1. "This word is taken largely where anything is granted or passed from one to another, and in this sense it doth comprehend feoffments, bargains and sales, gifts, leases, charges and the like, for he that doth give or sell doth grant

meanings,¹ to which at one time its use was almost wholly confined, viz: (1) A grant of real property is a conveyance by deed.² (2) A grant of personal property is a conveyance with or without writing, upon a consideration and accompanied by a transfer of possession.³

2. KINDS OF GRANT.—The term *Public Grant* includes the conferring of franchises by charter, but is used specially to denote the mode and act of creating a title in any person, corporation, or body politic to lands which had previously belonged to the government of the State or nation making the grant.⁴ Such a grant cannot

also, and thus it is sometimes in writing or by deed, and sometimes it is by word without writing. But the word being taken more strictly and properly, it is the grant, conveyance, or gift by writing of such an incorporeal thing as lieth in grant and not in livery and cannot be given or granted by word only without deed. Or it is the grant of such persons as cannot pass anything from them but by deed, as the King, bodies corporate, etc." Shep. Touch. 228.

In a treaty the term "grant" comprehends not only those which are made in form, but also any concession, warrant, order or permission to survey, possess or settle, whether evidenced by writing or parol, or presumed from possession. *Strother v. Lucas*, 12 Pet. (U. S.) 410, 436.

1. In the same way the verb "to grant" has always been used in both the general and special senses mentioned in the text, having been from very early days one of the customary words used in a feoffment (*dedi et concessi*, have given and granted,) a lease (*concessi et demisi*, have granted and leased,) and in other forms of conveyance. See LEASE.

2. Hence its use as a conveyance was originally confined to such property as could only pass by deed, *i. e.* incorporeal hereditaments, which were therefore said to "lie in grant," as distinguished from corporeal hereditaments, which being capable of, and in fact requiring, livery of seizin, were said to lie in livery. Bracton L. 2 c. 18; Co. Lit. 9 b., 85 a, 172 a, 332 a; 2 Bl. Com. 317; Prest. on Ests. 13; Williams on R. Prop. (Am. 6th ed.) *239; 3 Wash. R. Prop. (5th ed.) *516. This difference in the ancient mode of transfer constituted the chief distinction between these two classes of property.

Stat. 889 Vict. c. 106, s. 2 provided that all corporeal tenements and hereditaments should, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. This abolished the above distinction in regard to the modes of conveyance. In the United States also the necessity of livery of seizin no longer exists, and every species of property is the subject of grant. Stim. Am. Stat. Law, § 1470.

3. The presence of a consideration distinguishes a grant from a gift. Transfer of possession is essential to render a grant complete, as that alone can put it out of the grantor's power to retract. 2 Bl. Com. 441.

It is impossible for a man to make a valid grant in law of that in which he has no actual or potential property, but which he only expects to have. Williams Per. Prop. (13th ed.) 45; Com. Dig. Tit. Grant (D.) See ASSIGNMENT.

4. 3. Wash. R. Prop. (5th ed.) *516.

A legislative grant passes the title of the State to the grantee, with power to institute and maintain a suit for the recovery of the thing granted. *McCaughal v. Ryan*, 27 Barb. (N. Y.) 376.

See ENTRY, HOMESTEAD, PRE-EMPTION, SURVEY.

For a full treatment of the subject of public grants see PUBLIC LANDS.

In addition to public grants proper, *i. e.*, grants of land belonging to the United States or the State making the grant, American public land law has to deal also with the confirmation by the United States of grants made by the French, Spanish and Mexican governments, of lands which became subject to the United States government before the titles had been perfected under the grants.

One species of public grant known in

be revoked except for special cause and by due process of law.¹

A *Private Grant* is a grant by any private person or corporation.²

An *Office Grant* is a conveyance made by an officer of the law to effect certain purposes where the owner is either unable or unwilling to execute the requisite deeds to pass the title.³

3. CONSTRUCTION AND OPERATION.—Every grant must be so construed as to take effect according to the intent of the parties as expressed in the instrument by which the grant is made.⁴ Hence, though the word "grant" is the proper technical term to be

America, a railroad land grant, can be treated apart from the general subject of public lands. See *infra* 4.

1. *Duncan v. Beard*, 2 N. & M. (S. Car.) 400; *Nichols v. Hubbard*, 5 Rich. (S. Car.) 267.

Grants from the Crown may be avoided upon three grounds: First, where the Crown professes to give a greater estate than it possessed in the subject-matter of the grant; secondly, where the same estate, or part of the same estate, has already been granted to another; and thirdly, where the Crown has been deceived in the consideration expressed in the grant. *Gledstanes v. Earl of Sandwich*, 5 M. & G. 995; s. c., 12 L. J. C. P. 41. See *Com'th v. Boley*, 1 Weekly Notes (Pa.) 303.

A legislative grant is an executed contract, and therefore within the clause of the U. S. Constitution prohibiting States from passing any law impairing the obligation of contracts.

2. 3 Wash. R. Prop. (5th ed.) *550.

See ASSIGNMENT, DEED.

3. 3 Wash. R. Prop. (5th ed.) *537 *et seqq.*

See EXECUTORS AND ADMINISTRATORS, GUARDIANS, JUDICIAL SALES, LEINS, TAXES.

4. Co. Lit. 313 a. b.

As a means to this end it follows that "when anything is granted, all the means to obtain it, and all the fruits and effects of it, are granted also, and shall pass *inclusive*, together with the thing, by the grant of the thing itself, without the words *cum pertinentiis*, or any such like words. *Cuiusque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit.*" *Shep. Touch. 89; Rood v. N. Y. & E. R. Co.*, 18 Barb. (N. Y.) 80.

The law will not reserve anything out of a grant, in favor of the grantor, except in a case of necessity. *Crossley v. Lightowler*, L. R. 2 ch. App. 478.

In construing grants the words used must be taken in the sense which the common usage of mankind has applied to them as well in reference to the context in which they are found, as the circumstances in which they are placed. *Lord v. Sydney*, Cy. Commos., 12 Moo. P. C. 473.

It is an old rule that "where the grant is impossible to take effect according to the letter, there the law shall make such a construction as the gift by possibilities may take effect, which is worthy of observation. *Benignae faciendae sunt interpretationes cartarum propter simplicitatem laicorum, ut res magis valeat quam pereat.*" id. 183 b. Even by transposing words where necessary, id. 217 b.

This rule of construction was qualified as to private grants by another, viz: that a grant should be construed most strongly against the grantor, ("*Verba cartarum fortius accipiuntur contra proferentem, et quaelibet concessio fortissime contra donatorem interpretanda est*"), though only in extreme cases, when all other rules of construction failed. Co. Lit. 63 a; *Shep. Touch. 87; Broom's Leg. Max.* (5th ed.) *594.

The modern English doctrine, however, is that the meaning of the instrument must be ascertained according to the ordinary and proper rules of construction, without considering whether such meaning be for or against the grantor's interest. If the meaning cannot be discovered, the instrument is void for uncertainty, which is equivalent to a construction in favor of the grantor, for the grant is annulled. *Taylor v. St. Helen's*, L. R. 6, ch. D. 264.

As to public grants the rule was the reverse. *Gen. v. Eveline Hoyt*, 17 Beav. 366; s. c., 22 L. J. ch. 846. Blackstone makes a distinction between two classes of grants by the crown, saying that a grant made at the suit

employed in a deed of grant, other words indicating an intention to grant will answer the purpose.¹

A deed of grant, like a lease and release, is an "innocent conveyance," simply passing that which may lawfully and rightfully be conveyed, *i. e.*, the interest of the grantor or grantors.²

The word "grant," usually in conjunction with "bargain" and "sell," in a deed of real estate, implies in many States certain statutory covenants for title.³

4. LAND GRANTS.—(1) **General Nature.**—A land grant, as the term is technically used in the United States, is a grant by Congress⁴ of

of the grantee, should be construed against the latter, but if made "*ex speciali gratia, certa scientia et mero motu regis*," the construction should be more liberal. 2. Bl. Com. *347. The American rule was that public policy required that in cases of doubt the construction should be in favor of the public and against the grantee. Chas. Riv. Br. v. Warren Br., 11 Pet. (U. S.) 420, 589; Rice v. R. R. Co., 1 Black. (U. S.) 358; Slidell v. Grandjeau, 111 U. S. 412; Hagan v. Campbell, 8 Port. (Ala.) 9; Swann v. Jenkins, 82 Ala. 478; McLeod v. Burroughs, 9 Ga. 213; Harrison v. Young, 9 Ga. 359; Miners' Bk. v. U. S., 1 Greene (Iowa) 553; McManus v. Carmichael, 3 Iowa 1; Greene's Est. 4 Md. Ch. 349; Chas. Riv. Br. v. Warren Br., 7 Pick. (Mass.) 344; La Plaisance, etc., Co. v. Munroe, Walk. (Mich.) 155; Newark, etc., Co. v. Elmer, 9 N. J. Eq. 754; Townsend v. Brown, 24 N. J. Law 80; Currier v. M. & C. R. Co., 11 Ohio St. 228; Mayor v. O. & P. R. Co., 26 Pa. St. 355.

Of late years the tendency has been to carry out the objects of the grant as fully as possible, especially in the case of railroad land grants. See *infra* 4 (4).

1. Williams R. Prop. (6th Am. ed.), *201; Shover v. Pincke, 5 Term 154; Haggerston v. Hanburg, 5 B. & C. 101.

A release will operate as a grant to effect the intent of the parties. Goodtitle v. Bailey, Cowp. 597; Hastings v. Blue Hill Tpke. Co., 9 Pick. (Mass.) 80.

Conversely, even at common law, the word "grant" might indicate a feoffment, a gift, a lease, a release, a confirmation, a surrender, etc., according as the intent was determined from the context. Co. Lit. 301 b; 307 a, 313 a.

2. Co. Lit. 214 a; Will. R. Prop. (6th Am. ed.), *201. Hence no after-acquired estate passed by estoppel under a common law grant: "If a man

grant a rent charge out of the manor of Dale, and in truth he hath nothing in that manor, and after he purchases the manor, yet he shall hold it discharged." Br. Abr. Tit. Estopped pl. 146; Rawle, Coots for Title, 5th ed., § 244.

Where, however, it distinctly appeared that a certain estate was intended to be conveyed and received, then, under the rule above mentioned as to the intentions of the parties, they are estopped from denying the operation of the deed. Rawle, Coots, for Title, (5th ed.), § 245.

It is never presumed that the grantor intended to grant more than he legally could, nor that the grantee intended to receive more. Goodyer v. Carey, 4 Blatch. (U. S.) 271.

3. See IMPLIED COVENANTS.

4. As every land-grant is made by an act of Congress, the nature and terms of any particular grant must be gathered from the language of that act. (For grants up to 1870, and the construction of the same, see LESTER'S LAND LAW of the U. S., (2d ed.)

The object of this portion of the present article is to delineate the general nature of these grants, and also to show the judicial interpretation which various land-grant acts have received, it being observable that they all resemble each other in their main features. Moreover while land-grants have been made for the improvement of river navigation (see Woolcott v. D. M. Co., 5 Wall. (U. S.) 681,) the building of wagon-roads (see Pengra v. Munz, (Oreg.), 29 Fed. Rep. 830; Cal. & Oreg. L. Co. v. Munz, (Oreg.) 29 Fed. Rep. 837,) and other purposes, (see the swamp-land grant cases, *infra*, p. 49, n. 3), the vast majority have been made in aid of railroads, and almost every decision involves a railroad grant. The subject has therefore necessarily been treated as involving railroad land-grants exclusively.

a portion of the public lands¹ of the United States, either to a State or Territory² for purposes of internal improvement, most frequently to aid in the construction of a railroad, to be built between certain places, or by a certain company named in the grant,³ or else to such company directly.⁴ In the former case, the State acts as a trustee,⁵ selling the land for the company's benefit,⁶ or conveying it to the company when it has become entitled thereto by the completion or partial construction of its road.⁷

1. "Public lands," as here used, have been defined as "lands subject to sale or other disposition under general laws." *Newhall v. Sanger*, 92 U. S. 761. See PUBLIC LANDS.

2. A general grant of this kind gives a State no right to dispose of land outside its own borders. It has been held by the attorney general that where a railroad land-grant is to more than one State, the whole length of the road in each State, after actual survey and definite location, determines and limits the extent of the grant to that State individually. It has also been ruled by the land commissioner that a grant to one State must be confined to the limits of that State. It was accordingly held in *St. Paul, etc., R. C. v. Phelps*, (Minn.) 26 Fed. R. 569, that no land outside the State of Minnesota though within six miles of the railroad (which was wholly within the State) passed under the grant, though made originally to the Territory of Minnesota, within whose limits the land in question was situated.

Conversely, the building of the road does not entitle the company to receive lands in any other State than that where the corresponding portion of the road is built. In *Swann v. Jenkins*, 82 Ala. 478, where there was a grant to the State of Alabama, for railroads in that State, of every alternate section of the public lands within six miles of the line of such roads, it was held that the land in Alabama, within six miles of a railroad in the State of Georgia, did not pass by the grant.

Where, however, the grant is made to the railroad company directly, and covers land in any State or Territory where the road may be located, lands in one State will pass by the grant, even though that part of the road for which the patent issues should lie outside that State. *Denny v. Dodson*, (Oreg.) 32 Fed. Rep. 899.

3. See *supra*, n. 4, p. 46.

4. The former is the usual mode. In either case the building of the road is the consideration for the grant. Hence, where, by separate acts, at different sessions of Congress, lands have been granted to two different corporations or parties, to aid in building roads with the same general course or direction, by no arrangement between such corporations or parties can the building of one road secure the benefit of both grants. Unless there be a clear intention to the contrary, the presumption is that the later act has superseded the former, or else that the two roads must be built in order to earn the two grants. *Brewster v. K. C. L. & S. K. R. Co.*, (Kan.) 25 Fed. Rep. 243.

5. Where the State or Territory acquires under the act only "a naked trust or power to dispose of the lands in the manner therein specified, and to apply the same to the use and purpose therein described," Congress can "at any time repeal the act creating the trust, if not executed, and withdraw the power." *Rice v. N. & M. R. Co.*, 1 Black. (U. S.) 358, 381.

6. *Swann v. Lindsey*, 70 Ala. 507; *Swann v. Larmore*, 70 Ala. 555; s. c., 14 Am. and Eng. R. R. Cas. 504, 519; *Rogers v. P. H. & S. M. R. Co.*, 45 Mich. 460; s. c., 10 Am. & Eng. R. R. Cas. 635; *Jackson, etc., R. Co. v. Davison*, (Mich.) 32 N. W. Rep. 736.

7. The State can only grant the land to the railroad company in sections as the road is completed. *Swann v. Lindsey*, 70 Ala. 507; s. c., 14 Am. & Eng. R. R. Cas. 504.

Any conveyance to the company in excess of the quantity actually earned is void, even if such land should subsequently be earned. *Jackson, etc., R. Co. v. Davison*, (Mich.) 32 N. W. Rep. 736; 37 N. W. Rep. 537.

If the State has an absolute power of sale of the land, it can lawfully assign and transfer this power to the railroad company. It will not be presumed that

(2) **What is Granted.**—The act usually confers a right of way over the public lands,¹ and also grants the odd numbered sections of land on either side of the railroad line, within fixed lateral

the power of sale has been exhausted before such transfer. *Swann v. Larmore*, 70 Ala. 555; s. c., Am. & Eng. R. R. Cas. 519.

In *Courtwright v. C. R. & M. R. Co.*, 35 Iowa 385, the State was entitled to dispose of the first one hundred and twenty sections before the road was built, and it was held that these sections could be transferred to the railroad company with the same freedom from conditions.

Conditions Imposed by State.—Within constitutional limits, a State can impose its own conditions on its own grants, and if it grant on conditions of acceptance subject to certain terms, a qualified acceptance is invalid. *Rogers v. P. H. & L. M. R. Co.*, 45 Mich. 460; s. c. 10 Am. & Eng. R. R. Cas. 635.

The grant may be conditioned on the payment to the governor of certain money to be expended in paying laborers and others for work done for the company to whose successor the grant is made. *State v. Rusk*, 55 Wis. 465; s. c. 10 Am. & Eng. R. R. Cas. 642.

If the State impose no conditions, the railroad company will hold the land granted upon the same conditions as the State held it, and upon none other. *Railroad Co. v. Courtwright*, 21 Wall. (U. S.) 310; *Miller v. Iowa Land Co.*, 56 Iowa 374; s. c. 3 Am. & Eng. R. R. Cas. 27.

A patent from the State passes whatever title it may have, but does not establish the fact that it has a title. *Muser v. McRae*, 38 Minn. 409.

Grant by State Prior to Grant to It by Congress.—It has been held that as legislative grants are not warranties, but are subject to the common law rule that no estate passes to the grantee except what the grantor had at the time, no land can pass to a railroad company by virtue of a charter or grant from a State prior to the grant to the State itself by Congress. *Rice v. M. & N. R. Co.*, 1 Black. (U. S.) 358.

This case was not followed, however, in *Nash v. Sullivan*, 29 Minn. 206; s. c. 10 Am. & Eng. R. R. Cas. 552, *Mitchell, J.*, said: "If an act of the legislature is considered merely as a grant, this doctrine [of *Rice v. M. & N. R. Co.*, 1 Black. (U. S.) 358] would, undoubtedly, be sound. But it is always to

be borne in mind, in construing a legislative grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given it as will carry out the intent of the legislature. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. The rules of the common law must yield to the legislative will. This important rule is not at all alluded to in the case of *Rice v. M. & N. R. Co.*, 1 Black. (U. S.) 358, but it is distinctly announced by the same court subsequently in the cases of *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44, 62, and *Missouri, etc., R. Co. v. K. P. R. Co.*, 97 U. S. 591." It was accordingly held to be the intent of the Minnesota act of March 2, 1865, "to grant to the railroad company all lands that might thereafter be granted to the State by Congress to aid in the construction of these railroads," and, further, that that act did in fact transfer to the railroad company lands granted to the State by an act of Congress, passed March 3, 1865. It is to be observed, however, that *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44, and *Missouri, etc., R. Co. v. K. P. R. Co.*, 97 U. S. 491, do not undertake to overrule *Rice v. M. & N. R. Co.*, 1 Black. (U. S.) 358, on the point in question, and in fact do not touch upon that exact point. See *infra*, n. 3, p. 56.

1. A simple grant of a right of way over the public domain is sufficient to give the company a perfect right to construct a road upon any lands the titles to which are subsequent to the grant, even if, when the road is finally built, patents have been issued for such lands. *Missouri, etc., R. Co. v. K. P. R. Co.*, 97 U. S. 491; *St. Joseph, etc., R. Co. v. Baldwin*, 103 U. S. 426; s. c. 2 Am. & Eng. R. R. Cas., 510; 5 Am. & Eng. R. R. Cas. 408; *Flint, etc., R. Co. v. Gordon*, 41 Mich. 420; *Wilkinson v. N. P. R. Co.*, 5 Mont. 538; s. c. 10 Am. & Eng. R. R. Cas. 320.

A fortiori, if such lands have been taken up after the road has been located. *Simonson v. Thompson*, 25 Minn. 450. Such a grant is of a present interest and is notice of the company's interest within the prescribed limits. *St. Jos-*

limits,¹ except such land as has already been taken up before the location of the road,² or is reserved from the grant expressly, or by undoubted implication.³ Provision is also made for replacing

eph, etc., R. Co. v. Baldwin, 103 U. S. 426.

And where the line has been changed pursuant to an act of Congress, purchasers from the United States take subject to a right of way under the new location afterwards made. Rider v. B. & M. River R. Co., 14 Neb. 120; s. c., 10 Am. & Eng. R. R. Cas. 688.

The right of way prevails even as against a prior entry if the patent for land entered be not issued until after the railroad is built; but in such case the settler should receive compensation for improvements on land actually taken. Flint, etc., R. Co. v. Gordon, 41 Mich. 420.

School sections, not actually reserved for that purpose at the time of the grant, are subject to the right of way. Union Pac. R. Co. v. Douglas Co., (Neb.) 31 Fed. Re. 540; Coleman v. St. P., M. & M. R. Co., 38 Minn. 260.

1. These lands are called "place lands" and the limits, "place limits," in distinction from the indemnity (or lieu) lands and limits, see *infra*, n. 1, p. 50.

Territorial Limits.—Where the land granted was to be taken "on the line of the road, and in equal quantities on each side thereof," it was held that the terms of the grant meant "along the general direction and course of the road within lines perpendicular to it at each end," and that the company could not take more on one side than on the other. If it should do so, however, and receive the patents, the United States could not annul them. U. S. v. B. & M. Riv. R. Co., 98 U. S. 334.

Where no lateral limits are prescribed, the company can only take up land off the line of the road in case the land on the line be insufficient to satisfy the grant. Wood v. B. & M. Riv. R., 104 U. S. 329; s. c., 10 Am. & Eng. R. R. Cas. 611.

Where, by the terms of the grant, the lands taken must be "on either side of the line," no land beyond the terminus can be claimed. Neer v. Williams, 27 Kan. 1; s. c., 10 Am. & Eng. R. R. Cas. 561.

2. The exception is generally expressed thus—"But in case it shall appear that the United States have, when the lines or stakes of said road are definitely fixed, sold any section or

any part thereof, granted as aforesaid, or that the right of preemption or of homestead settlement has attached to the same," then the company shall have no title to the section. Ryan v. R. Co., 99 U. S. 382. See Brown v. Carson, (Oreg.) 19 Pac. Re. 66. Where a preemption right has attached before the location of the road, the title thereunder is valid, though the patent do not issue until after the location. S. C. etc., Co. v. Griffey, 72 Iowa 505. The existence of a homestead entry of record, valid on its face, is sufficient to bring the land within the exception. Hastings, etc., R. Co. v. Whitney, 34 Minn. 538; s. c., 24 Am. & Eng. R. R. Cas. 106.

A general reservation of preemption claims may be controlled by a subsequent section, providing that in certain cases the land shall not be subject to preemption. Buttz v. N. P. R. Co., 119 U. S. 55; s. c., 29 Am. & Eng. R. R. Cas. 455.

3. An exception of lands affected by preemption, homestead, or swamp-land, or other lawful claim, was held to cover land claimed under an alleged Spanish or Mexican grant, the validity of which was still *sub judico*. Newhall v. Sanger, 92 U. S. 761. But not after the final rejection of the claim. Ryan v. R. R. Co., 99 U. S. 382.

Where a patent has been issued under a grant excepting mineral land, such patent is not conclusive of the fact that the land was not mineral land, but evidence to the contrary may be introduced. Chicago, etc., Co. v. Oliver, (Cal.) 16 Pac. Re. 780.

In Missouri, etc., R. Co. v. K. P. R. Co., 97 U. S. 491, it was held that a reservation for the purpose of thereafter granting lands to other railroads was not within either the language or the intent of the acts in question.

In Bullard v. D. M. & F. D. R. Co., 122 U. S. 167, it was held that a joint resolution of Congress, relinquishing to the State of Iowa "the title which the United States still retain" in certain lands, did not put an end to a reservation of these lands from the operations of a land-grant act, such reservation being made in the act itself.

Indian Lands.—An exception of "all lands reserved to the United States for

any part of the land, which shall prove to have been already taken up, with an equal quantity to be selected from certain other lands at a greater distance from the line of the road.¹ The costs of the

any purpose whatever," has been held to include lands set apart for and occupied by an Indian tribe. *L. L. & G. R. Co. v. U. S.*, 92 U. S. 733.

While the courts have always upheld the legal title of the United States to the land occupied by the Indians, and the absolute right of the government to extinguish, by purchase or conquest, the Indian title of occupancy (1 Kent's Com. 13th etc., *257), yet the uninitiated foreigner or resident of the Atlantic States might suppose that the government of the United States would not, even to aid in the construction of a railroad, grant away lands still occupied by the Indians (and, as is usually the case, secured to them by solemn treaty), before the Indian title had been extinguished, and that on terms satisfactory to *both parties*. It has been decided, however, that without an express exception, or one as general as in the case last cited, such lands will pass by the grant, and that a reservation of "pre-emption and other rights and claims" will not have this effect. *Utah R. Co. v. Fisher*, 116 U. S. 28; s. c., 24 Am. & Eng. R. R. Cas. 117; *Buttz v. N. P. R. Co.*, 119 U. S. 55; s. c., 29 Am. & Eng. R. R. Cas. 455.

The intention to grant these lands must, however, be unmistakable, and the bounds of Indian reservations cannot be changed by the mere topographical ignorance of the federal or state officers making the survey. *Dubuque, etc., R. Co. v. D., M. B. R. Co.*, 109 U. S. 329; s. c., 14 Am. & Eng. R. R. Cas. 532.

Moreover, the Indian right of occupancy is held not to be affected by the grant; the manner, time and conditions of extinguishing such right being exclusively within the control of the government. *Buttz v. N. P. R. Co.*, 119 U. S. 55; s. c., 29 Am. & Eng. R. R. Cas. 455.

As, however, the wishes of the Indians themselves are rarely consulted, the existence of such "right" does not ultimately prevent the acquisition of the land by the company.

Swamp Lands.—An exception of "all lands heretofore reserved by any act of Congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any purpose whatever," was held

to exclude swamp lands previously granted, although the Secretary of the Interior had, in fact, never yet identified them as such. *R. R. Co. v. Fremont Co.*, 9 Wall. (U. S.) 89; *R. R. Co. v. Smith*, 9 Wall. (U. S.) 95. See, also, *Wolcott v. D. M. Co.*, 5 Wall. (U. S.) 681. And also, although other proper steps had not been taken to perfect the title of the claimant under the swamp-land grant. *Hannibal, etc., R. Co. v. Snead*, 65 Mo. 239.

Parol evidence of the swampy character of the land is inadmissible to substantiate a title as against a claim under a railroad land-grant. *Iowa, etc., Co. v. Antoine*, 52 Iowa 429.

1. **Indemnity or Lien Lands.**—This is the term used to distinguish these from the "place lands." See *supra*, n. 1, p. 49.

The indemnity lands remain afloat until chosen at the instance and under the supervision of the Secretary of the Interior. The mere location of the road does not give any title as against entries made before actual selection by the company. This point was left unsettled in *Grinnell v. R. Co.*, 103 U. S. 739; but subsequently decided in *Cedar Rapids, etc., R. Co. v. Herring*, 110 U. S. 27; s. c., 14 Am. & Eng. R. R. Cas. 537; *Kansas Pac. R. Co. v. A. T. & S. F. R. Co.*, 112 U. S. 414; *U. S. v. C. P. R. Co.*, (Cal.) 26 Fed. R. 479; s. c., 24 Am. & Eng. R. R. Cas. 120; *Missouri, etc., R. Co. v. Noyes*, 24 Kan. 340; s. c., 5 Am. & Eng. R. R. Cas. 440; *A. T. & S. F. R. Co., v. Rockwood*, 25 Kan. 292; s. c., 5 Am. & Eng. R. R. Cas. 432; *Musser v. McRae*, 38 Minn. 409.

Where certain lands were within the place limits of the complainant's road and the indemnity limits of the defendant's road, and the complainant's road was definitely located before the defendant made any selection of indemnity lands, though the latter's grant was the earlier, the defence urged the administration of these grants by the land department, both in Minnesota and at Washington, as a construction and determination of the law, and also that the complainant's claim was stale. It was held that whatever force there might be in these defences, if made by a *bona fide* purchaser for value, yet,

government survey must be paid by the railroad company, unless the act provides otherwise.

(3) **Location and Vesting of Title.**—Whether the grant be made through the medium of a State or not, its terms are usually such as to vest in the company a present title, legal or equitable, to the lands granted,¹

that both the parties being volunteers, either party could insist as against the other upon the full measure of its rights under the grants, and neither could set up the staleness of any claim of the other not barred by the statute of limitations. Therefore the complainant's location of its road gave it the better title. *Hastings, etc., R. Co. v. St. P. S. & T. F. R. Co., (Minn.)* 32 Fed. Rep. 821.

Even the withdrawal of such lands from the market by the land commissioner vests no title thereto, nor does it prevent the company from claiming and perfecting its title to lands granted in the first instance. *Atchison, etc., R. Co. v. Rockwood,* 25 Kan. 292; s. c., 5 Am. & Eng. R. R. Cas. 432.

Until it is shown by the approval of the Secretary of the Interior or other proper officer that the lands selected as lieu lands were so selected to cover actual deficiencies in the place lands, no action can be maintained for them. Their selection of lieu lands is not a subject of judicial notice. *Elling v. Thexton, (Mont.)* 16 Pac. Rep. 931.

The fact that the selection of such lands was premature and unauthorized will not, however, affect the company's title, where such selection has been duly ratified, and the lands so selected have been certified as within the grant. *Grinnell v. Chicago, etc., R. Co.* 103 U. S. 739; s. c., 5 Am. & Eng. R. R. Cas. 447; and if a patent therefore has been granted, the United States cannot vacate the patent, by suit brought long afterwards, when neither the United States nor private citizens have been injured. If such patent have been vacated, the company can select the same lands if not yet taken up, or others of equal extent. *U. S. v. C. P. R. Co., (Cal.)* 26 Fed. Rep. 479; s. c., 24 Am. & Eng. R. R. Cas. 120.

The indemnity, being against a failure of quantity, gives a right to select secondarily from larger limits if the quantity intended to be granted be not first found within the narrower limits, and the company must first show that these limits do not contain enough land

to satisfy the grant before it can establish a claim to land for which a patent has issued to a settler, though after the passage of the act authorizing the reservation of indemnity lands. *Cedar Rapids, etc., R. Co., v. Jewell,* 61 Iowa 410; s. c., 12 Am. & Eng. R. R. Cas. 277. In that case the construction and effect of the clause excepting homestead and preemption lands were not noticed by the court.

All general exceptions and reservations out of the place lands apply also to the indemnity lands. *Ryan v. R. Co.,* 99 U. S. 362.

And a forfeiture of the grant removes from them the incumbency of any claim by the railroad. *Neer v. Williams,* 27 Kan. 1; s. c., 10 Am. & Eng. R. R. Cas. 561.

In *Winona R. Co. v. Barney*, 113 U. S. 618, it was held that the indemnity clause in the act covered losses for the grant by reason of sales and the attachment of preemption rights before the date of the act as well as those between that date and the final determination of the route of the railroad.

Second Indemnity.—A resolution of Congress, adopted six years after the grant, giving certain indemnity lands in case of failure in any State or Territory, at the time of the final location of the road, if "the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter," has been held to grant rights in a second indemnity belt, and to apply to a failure of lieu lands as well as of place lands. *N. P. R. Co. v. U. S.,* 36 Fed. Rep. 282; 14 N. O. P. R. Co., v. U. S., 124 U. S. 124.

1. This accords with what has been the uniform interpretation of such language in acts of this character. Where an act of North Carolina declared "that 25,000 acres of land shall be allotted for, and given to, Major-General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners," it was contended that the words gave nothing, that they indicated an intention to give

in the future, but created no present obligation on the State, nor present interest in General Greene. Marshall, C. J. said, however, "The words are words of absolute donation, not indeed of any specific land, but of 25,000 acres in the territory set apart for the officers and soldiers Given when? The answer is unavoidable—when they shall be allotted. Given how? Not by any future act;—for it is not the practice of legislation to enact that a law shall be passed by some future legislature:—but given by force of this act." And he added that if the language had been "are hereby given," it would not have been any stronger. *Rutherford v. Greene*, 2 Wheat. (U. S.) 196. To the same effect *U. S. v. Brooks*, 10 How. (U. S.) 442; *Lessieur v. Price*, 12 How. (U. S.) 59; *Shulenberger v. Harriman*, 21 Wall. (U. S.) 44.

"There be and is hereby granted," are words of absolute donation, and import a grant *in presenti*. This court has held that they can have no other meaning; and the land department on the interpretation of them has uniformly administered every previous similar grant. They vest a present title, though a survey of the lands and a location of the road are necessary to give precision to it and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it had specifically described them. In other words, the grant was a float until the line of road should be definitely located." *L. L. & G. R. Co., v. U. S.*, 92 U. S. 733. To the same effect, *Missouri, etc., R. Co. v. K. P. R. Co.* 97 U. S. 491; *St. Joseph, etc., R. Co. v. Baldwin*, 103 U. S. 427; s. c. 2 Am. & Eng. R. R. Cas. 510; *Southern Pac. R. Co. v. Poole*, (Cal.) 32 Fed. Rep. 451; *Johnson v. Ballou*, 28 Mich. 379; *Jackson, etc., R. Co. v. Davison*, (Mich.) 32 N. W. Rep. 726; *U. S. v. N. P. R. Co.*, 6 Mont. 361; *Tarpey v. Deseret Salt Co.*, (Ut.) 17 Pac. Rep. 631; (no right of the government reserved in the act being involved. N. B.—This is mistated in the syllabus of the report.)

In *U. S. v. Childers*, (Oreg.) 12 Fed. Rep. 586, *Deady, J.*, held that by the Northern Pacific land-grant act of July 2, 1864, providing that on the completion of each twenty-five mile section, patents should be issued confirming the right and title of the company to the adjacent portions of the land granted,

there was no absolute grant to the corporation *in presenti*, but that the legal title and control of the lands remained in the United States until they were earned by the company.

This decision was overruled, however, by *Field, J.*, in *Denny v. Dodson*, 32 Fed. Rep. 899, who held that the words, "that there be, and hereby is, granted" imported the transfer of a present title, not one to arise in the future, and added in regard to the provision for issuing the patents. Why, it is asked, is there a necessity for such patents, if the title passed by the act itself? There are many reasons why patents should issue upon the completion of portions of the road. They would identify the lands which are coterminuous with the road completed; they would be evidence that the grantees in the construction of that portion of the road, had fully complied with the conditions of the grant, and to that extent the grant was relieved of the possibility of forfeiture for breach of its conditions; and they would obviate the necessity of any other evidence of the grantees' title to the lands embraced in them. They would thus be deeds of further assurance confirmatory of the grantees' title, and so be invaluable to them as a source of quiet and peace in their possessions." Until any part of the land was earned, however, the company could not sell or mortgage that part without authority of Congress.

In the previous case of *Northern Pac. R. Co. v. Majors*, 5 Mont. 111; s. c. 14 Am. & Eng. R. R. Cas. 487, *U. S. v. Childers*, (Oreg.) 21 Fed. Rep. 586, had also been dissented from. The court said: "The title of the respondent took effect at the date of the approval of the act of Congress; the location of the route and the survey of the lands gave precision to that title, and caused it to attach to the particular section, as of the date of the approval of the act, as fully as if such particular section had been designated in the act; the character of the title is that of a grant upon conditions subsequent; and the office of the patent is to confirm the title as certain designated portions of the road are completed and reported upon by the commissioners, and render it absolute and unconditional."

This grant did not give the company any right to cut timber from unearned lands. *U. S. v. Ordway*, (Oreg.) 30 Fed. Rep. 35; *Denny v. Dodson*, (Oreg.) 32 Fed. Rep. 879, per *Deady, J.*

in severalty,¹ though the exact territorial bounds of the grant are uncertain until the road is actually located.² To effect such location, a map showing the general route of the proposed road, is first filed in the general land office, which map is supplemented by one of definite location, upon the filing of which the route becomes definitely fixed.³ Some land-grant acts have

A grant of certain sections on each side of a wagon road, "as the same may be located," with a proviso of reversion if the road be not completed within a specified time, is held a grant *in praesenti*, subject to be defeated upon failure so to complete the road. *Pengra v. Munz*, (Oreg.) 29 Fed. Rep. 830; *California, etc., Co. v. Munz*, 29 Fed. Rep. 837.

Similarly, the grant to a State may pass a present title, subject to be divested by breach of the condition subsequent. *Swann v. Larmore*, 70 Ala. 555; s. c., 14 Am. & Eng. R. R. Cas. 510.

The grant may, of course, be such as to vest no title in the company until the road, or the requisite part thereof, is completed. In such case the title remains in the State, and while it so remains, as also while it remains in the United States, the statutes of limitations does not run in favor of any adverse claim. *Swann v. Lindsey*, 70 Ala. 507; s. c., 14 Am. & Eng. R. R. Cas. 504.

The act of March 3, 1875, granting to railroads the right of way through public lands of the United States, is in the nature of a general offer, and is operative as a grant to a railroad company only when it has accepted the terms by compliance with the conditions precedent prescribed in the act, and then only as of that date. *Red Riv. etc. R. Co. v. State*, 32 Minn. 95.

1. *U. S. v. N. P. R. Co.*, 6 Mont. 361.

2. *Parker v. N. O. B. R. & Y. R. Co.*, (La.) 33 Fed. Rep. 693. *Atchinson, etc., R. Co. v. Rockwood*, 25 Kan. 292; s. c., 5 Am. & Eng. R. R. Cas. 432.

Effect of Location.—Immediately on location, all title passes out of the United States. *Swann v. Lindsey*, 70 Ala. 507; s. c., 14 Am. & Eng. R. R. Cas. 504; *Swann v. Larmore*, 70 Ala. 555; s. c., 14 Am. & Eng. R. R. Cas. 510.

If the grant be to a State, location vests the title in the State for the railroad. *Wright v. Gish*, 94 Mo. 110.

Location vests the title as of the date of the grant except as to sections actually taken up prior to location (as to which see *infra* p. 51). *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; *L. & G. R. Co. v. U. S.*, 92 U. S. 733; *Missouri, etc., R. Co. v. K. P. R. Co.* 97 U. S. 491; *St. Joseph, etc., R. Co. v. Baldwin*, 103 U. S. 426; s. c., 5 Am. & Eng. R. R. Cas. 408; *Grinnell v. R. Co.* 103 U. S. 739; *Van Wyck v. Knevals*, 106 U. S. 360; s. c., 10 Am. & Eng. R. R. Cas. 664; *Baltimore, etc., R. Co. v. Lawson*, 58 Io. 145; s. c., 10 Am. & Eng. R. R. Cas. 655; *Missouri, etc., R. Co. v. Noyes*, 25 Kan. 340; s. c. 5 Am. & Eng. R. R. Cas. 440; *Simonson v. Thompson*, 25 Minn. 450.

Location takes out of the body of the lands subject to sale by the United States the sections covered by the float. Hence an application to purchase any of the land from the government would give no right to go upon the lands to cut timber. *Johnson v. Ballou*, 28 Mich. 379.

Location alone, without special selection of the sections granted, vests the title. *Vance v. B. & M. Riv. Co.*, 12 Neb. 285; s. c., 10 Am. & Eng. R. R. Cas. 623.

Rights acquired under an amendatory act, passed after location, cannot be impaired by subsequent legislation, State or National. *Baltimore, etc., R. Co. v. Lawson*, 58 Iowa 145; s. c., 10 Am. & Eng. R. R. Cas. 685.

Under the Southern Pacific grant, it was held that the filing of the map of general location ensured to the benefit of the successor of the original grantee. *Southern Pac. R. Co. v. Poole*, (Cal.) 32 Fed. Rep. 451.

Location does not, however, give any title to the indemnity or lieu lands. See *supra*, n. 1, p. 50.

3. **What is a Sufficient Location or Designation.**—It was said of the Northern Pacific land-grant, "The act of Congress not only contemplates the filing by the company in the office of the commissioner of the general land office, of a map showing the definite location of the lines of its road

required the Secretary of the Interior, on the filing of the first map, to withdraw from sale, entry or preemption, the sections granted within the limits as determined by the line of general location. Other grants have contemplated such withdrawal on the filing of the line of definite location only.¹ After the route

but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or preemption of the adjoining odd sections within forty miles on each side, until the definite location is made. The third section declares that after the general route shall be fixed, the President shall cause the lands to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road, and that the odd sections granted shall not be liable to sale, entry, or preemption, before or after they are surveyed, except by the company. The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass." When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing the map thereof with the commissioners of the general land office or the secretary of the interior, the law withdraws from sale or preemption the odd sections to the extent of forty miles on each side." *Buttz v. N. P. R. Co.*, 119 U. S. 55; s. c., 29 Am. & Eng. R. R. Cas. 455.

Where a grant provided that certain land on each side of the line should be exempt from location and entry after such line should be designated by survey, recognition, or otherwise, a designation of the road as extending from a given point a certain course and distance to another point was held sufficient. *Houston, etc., R. Co. v. T. & P. R. Co.*, (Tex.) 8 S. W. Rep. 498.

In regard to the Kansas Pacific grant, the supreme court has said: "We are of opinion that the duty of filing this map (of the general route), like that of the line of definite location, is performed by filing it in the general land office, which is filing it with the secretary of the interior, and that whatever rights accrue to the company

from the act of filing it accrue from filing it there. What are those rights? This action does not, like the filing of the line of definite location, vest in the company a right to any specific piece of land. It establishes no claim to any particular section with an odd number. It authorizes the secretary to withdraw certain land from sale, preemption, etc." *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629.

See further as to the difference between filing a map of the general route and filing that of the definite location. *U. S. v. McLaughlin*, 30 Fed. Rep. 147.

The route is definitely fixed, within the meaning of the acts of Congress, when the company has filed with the secretary of the interior a map of its lines, approved by the directors, designating the route. *Van Wyck v. Knevals*, 106 U. S. 360; s. c., 10 Am. & Eng. R. R. Cas. 665; *Walden v. Knevals*, 119 U. S. 373.

A railroad is not definitely located when it is first surveyed, but only when the plat is filed in the proper office. *S. C., etc., Co. v. Griffey*, 72 Iowa 505.

1. As to withdrawal after the general route is determined, see *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629; *Buttz v. N. P. R. Co.*, 119 U. S. 55; s. c. 29 Am. & Eng. R. R. Cas. 455; *Denny v. Dodson*, (Org.) 32 Fed. Rep. 899; *Southern Pac. R. Co. v. Poole*, (Cal.) 32 Fed. Rep. 451. In the last case the sections were held to have been withdrawn from preemption or other disposition *by force of the act itself*, without any order of the secretary of the interior, or notice other than that afforded by the filing.

As to withdrawal after the line is definitely located, see *Van Wyck v. Knevals*, 106 U. S. 360; *Walden v. Knevals*, 114 U. S. 373.

Effect of Withdrawal from Sale and Entry.—Such withdrawal prevents parties without any prior interest in the lands from acquiring an interest therein, but does not hinder the perfecting of an interest already acquired. *Atchison, etc., R. Co. v. Rockwood*, 25 Kan. 292; s. c., 5 Am. & Eng. R. R. Cas. 432.

has become definitely fixed, it cannot be changed without the consent of Congress.¹

The title of the railroad company to any part of the land granted, becomes absolute when the required portion of the road is built,²

If such withdrawal is effected, it is presumed to have been made because the road has already located its line, and filed a map of the survey. *Weaver v. Fairchild*, 50 Cal. 360.

Such withdrawal is not essential to the title of the railroad company. *Atchison, etc., R. Co. v. Bobb*, 24 Kan. 673; s. c., 5 Am. & Eng. R. R. Cas. 412.

Unless, by the terms of the act, it has been made the special duty of the secretary of the interior to withdraw the lands upon the location of the road. *Kansas Pac. R. Co. v. Dunmeyer*, 24 Kan. 725; s. c., 5 Am. & Eng. R. R. Cas. 417; affirmed 113 U. S. 629.

If the road has been located, the withdrawal makes its title doubly secure; otherwise it has no effect on previous grants or the rights of third parties. *Atchison, etc., R. Co. v. Rockwood*, 25 Kan. 192; s. c., 5 Am. & Eng. R. R. Cas. 432.

If land be withdrawn, though not yet earned, its enclosure by a license of the railroad company is not void within the act of Congress of Feb. 24, 1885. *U. S. v. Brandestein*, 32 Fed. Rep. 738.

Lands duly reserved by competent authority cannot be preempted. *Ballard v. D. M. & F. D. R. Co.*, 62 Iowa 382; s. c., 14 Am. & Eng. R. R. Cas. 529.

Even if the company grantee could not yet take a perfect title under the State law. *Southern Pac. R. Co. v. Orton*, (Cal.) 32 Fed. Rep. 457.

But mere reservation from sale does not mean reservation from entry under the homestead and preemption laws. *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629; *Stalnaker v. Morrison*, 6 Neb. 363.

If the extent of the grant be in doubt, reservation by competent authority prevents the title from passing to the State for the railroad. *Dubuque, etc., R. Co. v. D. M. Val. R. Co.*, 109 U. S. 329; s. c., 14 Am. & Eng. R. R. Cas. 532.

If the act provide for an unconditional withdrawal, the secretary of the interior cannot modify this, nor restore the land to its former condition.

Southern Pac. R. Co. v. Orton, (Fed.) 32 Fed. Rep. 457.

1. *Van Wyck v. Knevals*, 106 U. S. 360; s. c., 10 Am. & Eng. R. R. Cas. 665.

2. *Johnson v. Ballou*, 28 Mich. 379; *J. L. & S. R. Co. v. Davison*, (Mich.) 32 N. W. Rep. 726.

Whether, in any particular case, the grants give a title *in praesenti* or not, it is certain that when, by the construction of the road, the terms of the grant have been fully complied with, the company becomes entitled to a complete, perfect, and absolute title to the lands, and, if the act so provide, to receive the proper evidence of such title from the United States. *Co. of Cass. v. Morrison*, 28 Minn. 257; s. c., 5 Am. & Eng. R. R. Cas. 404; *Van Wyck v. Knevals*, 106 U. S. 360; s. c., 10 Am. & Eng. R. R. Cas. 664.

In such a case, the fixed title dates from the time of the report of the commissioners to the effect that the particular part of the road has been completed. *Broder v. Natoma W. & M. Co.*, 50 Cal. 621.

Under the terms of the grant in *Rogers v. P. H. & L. M. R. Co.*, 45 Mich. 460; s. c., 10 Am. & Eng. R. R. Cas. 635, the title was held not to vest until the governor had certified to the secretary of the interior that the appropriate twenty miles had been completed.

As is the case in regard to sales and grants by a State (*supra* n. 6, 7, p. 47), so if any part of the lands are sold by the company before the requisite portion of the road is built, no title passes. *Swann v. Miller*, 82 Ala. 530.

But it has been held that sales of land in excess of the quantity earned are valid except as against the United States, if such land be afterwards actually earned. *Jackson, etc., R. Co. v. Davison*, (Mich.) 37 N. W. Rep. 537; overruling s. c., 32 N. W. Rep. 726.

Right of Selection.—This vests in the company as the land is earned, and the sale of any specific parcels, not exceeding the quantity earned is an effectual selection. *Jackson, etc., R. Co. v. Davison*, (Mich.) 37 N. W. Rep. 537.

and the other conditions, if any performed,¹ and the patent, if called for by the act, has been issued.²

(4) **Construction.**—Such grants were at one time strictly construed against the grantees, but latterly the courts have shown a desire to carry out the intention of Congress as fully as possible, especially as to the time of vesting title.³

1. If prepayment by the grantee of the cost of surveying, selecting, and conveying the lands granted be required by the statute making the grant, before any of the lands granted "shall be conveyed," or if the grant contain a proviso that any of the lands granted and not sold by the company within three years after the final completion of the road, shall be liable to be sold to actual settlers under the preemption laws, at a price named per acre, the money to be paid to the company, failure to make such payment or sale will wholly defeat the right of the company to a patent for the lands and in the first instance, unless the patent has been issued, no title vests in the grantee in such a way as that a tax sale will divest the government title. *R. R. Co. v. McShane*, 22 Wall. (U. S.) 444; modifying *Ry. Co. v. Prescott*, 16 Wall. (U. S.) 603.

Congress cannot subsequently attach conditions to a grant originally unconditional. *Cass. Co. v. Morrison*, 28 Minn. 257; s. c., 5 Am. & Eng. R. R. Cas. 404.

2. *Northern Pac. R. Co. v. Majors*, 5 Mont. 111; s. c., 14 Am. & Eng. R. R. Cas. 487.

A grant of lands, however, "may be made by law as well as by a patent issued pursuant to a law, . . . and such grant vests an indefeasible and irrevocable title." *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *Terrett v. Taylor*, 9 Cranch (U. S.) 43; *Wilkinson v. Leland*, 2 Pet. (U. S.) 627; *Strother v. Lucas*, 12 Pet. (U. S.) 410, 454.

Hence it was held in *Courtright v. C. R. & M. R. Co.*, 35 Iowa 386, that the act of Congress conferred on the State of Iowa, and the State law on the railroad company, a valid title, without the need of a patent.

3. The decisions of the Supreme Court of the United States on this point cannot be considered harmonious. On the one hand, as in *Dubuque, etc., R. Co. v. Litchfield*, 23 How. (U. S.) 66, 88, the doctrine of *Charles Riv. Br. v. Warren Br.*, 11 Pet. (U. S.) 420, was applied to land grants, *Catron, J.*,

saying: "All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language; and as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute; and if not thus expressed, they cannot be implied." To the same effect *Rice v. M. & N. R. Co.*, 1 Black. (U. S.) 358. These cases were cited with approval in *L. L. & G. R. Co. v. U. S.*, 92 U. S. 733 (A. D. 1875), where *Davis, J.*, said: "If [the terms] admit of different meanings—one of extension and the other of limitation—they must be accepted in a sense favorable to the grantor. And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them. In other words, what is not given expressly, or by necessary implication, is withheld."

On the other hand, *Field, J.* (who, with *Swayne* and *Strong, J. J.*, dissented from the decision of the court in *L. L. & G. R. Co. v. U. S.*, 92 U. S. 733, as well as in *M. K. & T. R. Co. v. U. S.*, 92 U. S. 760 *π.*) said in *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44, 62: "Unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts. . . . A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the legislature requires. The case of *Rice v. M. & N. R. Co.*, 1 Black. (U. S.) 358, does not conflict with these views. The words of present grant in the first section of the act there under consideration were restrained by a provision in a subsequent section declaring that the title should not vest in the ter-

(5) **Conflicting Grants**.—If the limits of separate grants overlap, the grantee by the first act has the better title.¹ If grants made in the same act overlap, and the terms of the act give no priority, each grantee has an equal interest.²

(6) **Conflict of Grants With Claims**.—Homestead, preemption, or other claims entered before the location of the railroad, though after the passage of the land-grant act, are not affected thereby,³ nor does the land pass by the grant, even though such claim be afterwards abandoned.⁴ But mere occupation of the land by a

ritory of Minnesota until the road or portions of it were built."

So the same judge said in *W. & St. P. R. Co. v. Barney*, 113 U. S. 618: "The acts making the grants . . . are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used, if the grants were by instruments of private conveyance. To ascertain that intent, we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together." See, also, *Sliddell v. Grandjeau*, 111 U. S. 412.

To the same effect are *Missouri, etc., R. Co. v. K. P. R. Co.*, 97 U. S. 491, 497; *St. Paul, etc., R. Co. v. Greenhalgh*, (Minn.) 26 Fed. Rep. 563; *Johnson v. Ballou*, 28 Mich. 379; *Jackson, etc. R. Co. v. Davison* (Mich.) 32 N. W. Rep. 726; *Northern Pac. R. Co. v. Majors*, 5 Mont. 111; s. c., 14 Am. & Eng. R. R. Cas. 487. The case of *Swan v. Jenkins*, 82 Ala. 478, adheres to the doctrine of *Rice v. M. & N. R. Co.*, 1 Black (U. S.) 358.

On the whole, the doctrine of the strict construction of land grants would seem, for the time at least, not to be favored.

1. In such a case, priority of location or construction is not regarded. It is otherwise as to lien lands (*see supra*), where selection according to law gives priority. *St. P., etc., R. Co. v. Winona, etc., R. Co.*, 112 U. S. 720.

In *Northern Pac. R. Co. v. St. P. M. & M. R. Co.*, 26 Fed. Rep. 551; s. c., 25 Am. & Eng. R. R. Cas. 99, a grant had been surrendered, on a change of route, and a new one taken, which, it was held, could not take effect as of the date of the first grant, as against an intermediate one.

2. Each receives an undivided half of the land. But this rule does not

hold as to lien lands (*see supra*). *Chicago, etc., R. Co. v. S. C. & St. P. R. Co.*, 117 U. S. 406; s. c., 24 Am. & Eng. R. R. Cas. 100, reversing, in part, 10 Fed. Rep. 435.

3. *Glidden v. U. P. R. Co.*, 30 Fed. Rep. 660; *Missouri, etc., R. Co. v. Noyes*, 25 Kan. 340; s. c., 5 Am. & Eng. R. R. Cas. 440; *Atchison, etc., R. Co. v. Pracht*, 30 Kan. 66; s. c., 12 Am. & Eng. R. R. Cas. 267; *Winona, etc., R. Co. v. Randall*, 29 Minn. 283; s. c., 10 Am. & Eng. R. R. Cas. 558; *Stalaker v. Morrison*, 6 Neb. 363.

Where a homesteader's entry had been cancelled on the ground that the land had been previously granted to a railroad, and his wife contracted to purchase the land from the company, and the contract of purchase was assigned as security for his debts, and sold on foreclosure, and he was subsequently enabled to make proof of his entry and to receive a patent for the land, his title was held paramount to that of a purchaser at the foreclosure sale unless he had effected the assignment by false representations as to the title. *Kraft v. Baxter*, 38 Kan. 351.

If, through a false representation by the company, a patent issue to it for land that has actually been taken up by a settler, such patent is void. *Campbell v. Burkman*, 49 Cal. 362.

4. *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629, affirming 24 Kan. 725; s. c., 5 Am. & Eng. R. R. Cas. 417.

Where the act excepts lands to which such claims have attached, the word "claim" includes any claim made in due form, whether afterwards perfected, or abandoned, or forfeited. *Baltimore, etc., R. Co. v. Abink*, 14 Neb. 95; s. c., 10 Am. & Eng. R. R. Cas. 686.

The principle is that no land can pass, which is not in the control of the government at the time of location. Hence where the land entered has

settler before the location is insufficient without an actual filing of his claim in the land office,¹ and no such claim can be initiated pending the existence of an Indian title to the land.² After the location of the road, or the selection of indemnity lands, the lands affected by such location or selection, are not subject to entry,³ unless, by the terms of the act, their withdrawal from the market be a condition precedent to the vesting of the railroad company's rights.⁴ A settler, who has actual notice of the construction of a railroad, cannot take advantage of any delay of the company in filing a plan of their line in the land office.⁵

A railroad company is affected with notice of a settler's open, notorious, and exclusive possession of any of the land⁶ granted, and the statute of limitations runs against the company from the entry of the occupant.⁷

Compromises between the railroad companies and adverse claimants are always favored by the courts.⁸ In a contested case the findings of fact by the land officers are conclusive.⁹

(7) **Alteration of Grant.**—If the company performs the conditions of the grant, Congress cannot by subsequent legislation invalidate

been already abandoned before the location of the road, it does pass by grant, even though the entry be not cancelled till after the location. *Elmslie v. Young*, 24 Kan. 732; s. c., 5 Am. & Eng. R. R. Cas. 422.

1. *Weaver v. Fairchild*, 50 Cal. 360; *Atchison, etc., R. Co. v. Mecklim*, 23 Kan. 167.

2. *Buttz v. N. P. R. Co.*, 119 U. S. 55; s. c., 29 Am. & Eng. R. R. Cas. 455; *Northern Pac. R. Co. v. Peronto*, 3 Dak. 217; s. c., 10 Am. & Eng. R. R. Cas. 670.

3. *Southern Pac. R. Co. v. Poole*, (Cal.) 32 Fed. Rep. 451.

Northern Pac. R. Co. v. Peronto, 3 Dak. 217; s. c., 10 Am. & Eng. R. R. Cas. 670; *Burlington, etc., R. Co. v. Lawson*, 58 Iowa 145; s. c., 10 Am. & Eng. R. R. Cas. 655; *Atchison, etc., R. Co. v. Bobb*, 24 Kan. 673; s. c., 5 Am. & Eng. R. R. Cas. 412; *Atchison, etc., R. Co. v. Rockwood*, 25 Kan. 292; s. c., 5 Am. & Eng. R. R. Cas. 432; *Ill. Cent. R. Co. v. Union County*, 94 Ill. 70; *Wright v. Gish*, 94 Mo. 110; *Wright v. Howe*, (Mo.) 8 S. W. Rep. 561.

Even when, at the time of the entry, no instructions had been received at the local land office that the road had been located and the lands had been ordered to be withdrawn from the market, and that patentee had no actual knowledge of these facts. *Walden v. Knevals*, 114 U. S. 373.

Where at the time of the grant a part of the lien lands were covered by an alleged Mexican grant, which was finally declared invalid before their actual selection by the company, they passed to the company, and were not subject to entry. *Ryan v. R. Co.*, 99 U. S. 382.

An entry made after location can, however, be perfected after the forfeiture of the grant, and reversion of the land to the United States. *Stark v. Baldwin*, 7 Neb. 114.

And a preemption title attaching after the grant has expired by limitation, will be protected, even if the grant be renewed. *S. & N. Ala. R. Co. v. Gillian* (Ala.) 4 So. Rep. 694.

4. *Kansas Pac. R. Co. v. Dunmeyer*, 24 Kans. 725; s. c., 5 Am. & Eng. R. R. Cas. 417; affirmed 113 U. S. 629.

5. *Northern Pac. R. Co. v. Peronto*, 3 Dak. 217; s. c., 10 Am. & Eng. R. R. Cas. 670.

6. *Fearus v. A. T. & S. F. R. Co.*, 33 Kan. 275.

7. *St. Louis, etc., R. Co. v. McGee*, 75 Mo. 522; s. c., 10 Am. & Eng. Corp. Cas. 649.

8. *Atchison, etc., R. Co. v. Starkweather*, 21 Kans. 322; *Kansas Pac. R. v. Dunmeyer*, 24 Kan. 725; s. c., 5 Am. & Eng. R. R. Cas. 417.

9. But not in *ex parte* proceedings, as against parties not before them. *Tatro v. French*, 33 Kan. 49; *Fearus v. A. F. & S. F. R. Co.*, 33 Kan. 275.

it or impose new conditions,¹ but if a shorter route be authorized by Congress after a grant has been made, the latter is proportionately reduced.² The terms of a grant may be enlarged by a later act,³ and in such case the title to the lands granted by the new act dates back to the old act.⁴

(8) **Forfeiture and Renewal.**—Land-grant acts usually provide for a total or partial forfeiture of the grant on failure to build the road within the time specified, or to comply with other conditions.⁵ Such forfeiture cannot be taken advantage of by an individual, but only by the Government,⁶ and this must usually be formally done by an act of Congress.⁷ Congress may, how-

1. *Cass Co. v. Morrison*, 28 Minn. 257; s. c., 5 Am. & Eng. R. R. Cas. 404; *Northern Pac. R. Co. v. Carland*, 5 Mont. 146.

2. It has been an invariable rule that the quantity of land granted is to be measured by the length of road constructed, without regard to the length of road located; and where the route was shortened under an act entitling the company to "the same lands, and the same amount of land per mile," this was construed as granting lands proportioned in amount to the decreased length. *Cedar Rapids & M. R. Co. v. Herring*, 52 Iowa 687; *affd.* 110 U. S. 27; s. c., 14 Am. & Eng. R. R. Cas. 537.

A change of line authorized in consideration of relinquishment of lands calls only for a relinquishment of lands on the abandoned line. *Nash v. Sullivan*, 29 Minn. 206; s. c., 10 Am. & Eng. R. R. Cas. 552.

After lands have been duly certified to a State, or to a railroad company, a change of route can only be taken advantage of by the United States. Settlers can acquire no rights to the land on that account. *Grinnell v. R. R. Co.*, 103 U. S. 739.

Insignificant changes in a subsequent survey will not divest the title which has already attached to the lands. *Atchison, etc., R. Co. v. Mecklim*, 23 Kan. 167.

3. *Winona, etc., R. Co. v. Barney*, 113 U. S. 618.

4. *Missouri, etc., R. Co. v. K. P. R. Co.*, 97 U. S. 491.

5. *Iowa v. Kirkwood*, 14 Iowa 162.

The statutes are usually, however, only declaratory of the conditions out of which a forfeiture arises. *Bybee v. O. & C. R. Co. (Oreg.)*, 26 Fed. Rep. 586; s. c., 24 Am. & Eng. R. R. Cas. 127.

6. *Schulenberger v. Harrison*, 21 Wall. (U. S.) 44; *Van Wyck v. Knevals*, 106 U. S. 360; s. c., 10 Am. & Eng. R. R. Cas. 665; *Southern Pac. R. Co. v. Poole (Cal.)* 32 Fed. Rep. 451; *Southern Pac. R. Co. v. Orton (Cal.)* 32 Fed. Rep. 457; *Northern Pac. R. Co. v. Peronto*, 3 Dak. 217; s. c., 10 Am. & Eng. R. R. Cas. 670; *Northern Pac. R. Co. v. Majors*, 5 Mont. 111; s. c., 5 Am. & Eng. R. R. Cas. 447.

Where a State reserves the right to resume its grant on certain contingencies, the title of the company is not affected until this right is exercised. *C. B. & Q. R. Co. v. Lewis*, 53 Iowa 101.

Until the government takes steps to forfeit the grant, the railroad can bring ejectment on its legal title, though defensible. *Denny v. Dodson (Oreg.)* 32 Fed. Rep. 899.

Where, after a grant has been made, the route is changed under authority of Congress, by virtue of which a new "float" is granted, no forfeiture of the first grant is deemed to have taken place. Even if it had, a disseizor could not have set it up as a defence. *Grinnell v. C. R. I. & P. R. Co.*, 103 U. S. 739; s. c., 5 Am. & Eng. R. R. Cas. 447.

A preemption right attaching after the grant has expired by limitation is, however, valid. *S. & N. Ala. R. Co. v. Gilliam (Ala.)* 4 So. Rep. 694.

7. Such an act virtually annuls and revokes the former grant, in so far as it is within the power of Congress to do so. *State v. Rusk*, 55 Wis. 465; s. c., 10 Am. & Eng. R. R. Cas. 642.

Where a road has not been completed within the time, and all unearned lands have been forfeited by a resolution of Congress, they are freed (both lien lands and original grant) from all

ever, by a renewal of the grant, extend the time specified,¹ or even waive the forfeiture by express act.²

(9) **Substitution of Grantees.**—If the building of the road for which the grant was intended be abandoned by the original grantee and undertaken by another company, Congress or a State legislature may transfer the grant, but this cannot be done by the act of the parties themselves.³

(10) **Taxation of Lands Granted.**—The lands granted are not subject to taxation under the laws of any State or Territory until, all preliminary steps having been taken in accordance with the terms of the act, the company has either obtained a patent or is entitled to do so.⁴ The State laws often exempt such lands from

rights and claims under the grant, and a patent for any unearned lands is held to have passed no title. *Neer v. Williams*, 27 Kans. 1; s. c., 10 Am. & Eng. R. R. Cas. 561.

1. If the United States have the right and the power to forfeit the entire grant absolutely on account of non-compliance with its terms, this includes the power to forfeit it in part and conditionally, as by extending the time to a certain limit, while protecting the rights of actual settlers. *St. Paul M. & M. R. Co. v. Greenhalgh*, (Minn.) 26 Fed. Rp. 563.

On such renewal, new conditions can be imposed. *New Orleans P. R. Co. v. U. S.*, 124 U. S. 124.

And where a grant had expired by limitation of time, but was renewed three years afterwards, subject to all the conditions of the original grant, one of which preserved preemption rights which had previously attached, this condition was held to apply to preemption rights attaching between the expiration and the renewal. *S. & N. Ala. R. Co. v. Gilliam*, (Ala.) 4 So. R. 694.

A renewal is not a new and original grant, but an extension of the time named in the original act for completion. *Doe v. Larmore*, 116 U. S. 198.

But it is otherwise if the grant be surrendered and a new one taken. *Northern Pac. R. Co. v. St. P. M. & M. R. Co.*, (Minn.) 26 Fed. Rp. 551; s. c., 25 Am. & Eng. R. R. Cas. 99.

If a grant to a State be renewed, it cannot be used for other railroads than those named in the original act. *Kansas Cy., etc., R. Co. v. Att. Gen.*, 118 U. S. 682; s. c., 29 Am. & Eng. R. R. Cas. 467.

2. *St. Louis, etc., R. Co. v. McGee*, 75 Mo. 522; s. c., 10 Am. & Eng. R. R. Cas. 649.

3. After the consolidation of the grantee company with others, and the adoption of a new corporate name, the same "rights, grants, and privileges" may be granted to the new company. *Southern Pac. R. Co. v. Poole*, (Cal.) 32 Fed. Rp. 451.

Where a local statute authorized a railroad company, under an agreement with the grantee company, to locate its road on the former's lines, to receive its grant, and to purchase its road (so far as built), and all its other property, and the former company, in pursuance of the agreement, bought the latter's property, completed the road and received patents for the land, it was held that the rights under the grant were not transferable, that the assignment of them worked a surrender to the State, which was authorized to reconfer them, and that it had conferred them on the new company. *Jackson, etc., R. Co. v. Davison*, (Mich.) 32 N. W. Rep. 726; 37 N. W. Rep. 537.

Such substitution cannot, however, be allowed to affect injuriously rights previously acquired by third parties. *Johnson v. Ballou*, 28 Mich. 379.

Where a local statute authorizes an amendment of the articles of association of the grantee company, and its consolidation with other companies, this does not affect the validity of its title under the grant. *Southern Pac. R. Co. v. Orton*, 32 Fed. Rp. 457.

4. *R. R. Co. v. Prescott*, 16 Wall. (U. S.) 603; *Ry. Co. v. McShane*, 22 Wall. (U. S.) 444; *Cnt. Pac. R. Co. v. Howard*, 52 Cal. 227; *Burlington, etc., R. Co. v. Hayne*, 19 Iowa 137; *Iowa Homestead Co. v. Webster Co.*, 21 Iowa 221; *Sioux City, etc., R. Co. v. Osceda Co.*, 43 Iowa 318; *C. B. & Q. R. Co. v. Holdworth*, 47 Iowa 20; *Cass. Co. v. Morrison*, 28 Minn. 257; s. c., 5 Am. & Eng. R. R. Cas. 404; *Wis.*

GRANTS—GRASS—GRATUITY—GREENBACK.

taxation while they remain in the possession of the company.¹

GRASS.—(See CROPS.)

GRATUITY.—Something given freely, or without recompense; a free gift; a present; a donation.² See also GIFT; DONATION.

GRAVE.—See CEMETERIES; DEAD BODY.

GREENBACK.—A United States Treasury note.³

Cent. R. Co. v. Taylor Co., 52 Wis. 37; s. c., 1 Am. & Eng. R. R. Cas. 532.

Even if the patent be withheld, the land is taxable if the company have a clear equitable title. Wis. Cent. R. Co. v. Price Co., 64 Wis. 579.

Under the grant to the Northern Pacific company, the lands cannot be taxed until the costs of survey and selection have been paid to the government, as until then the title is not absolute. Northern Pac. R. Co. v. Traill Co., 115 U. S. 600.

1. In such a case, a conveyance of the entire beneficial interest in the lands granted, to third parties, even if stockholders of the company, would subject the lands to taxation, but a mortgage would not have this effect. St. Paul, etc., R. Co. v. McDonald, 34 Minn. 182; s. c., 22 Am. & Eng. R. R. Cas. 208.

An exemption of the capital stock and dividends of a company, to a certain amount, from taxation, does not exempt lands granted to aid in the construction of its road. Memphis, etc., R. Co. v. Loftin, 105 U. S. 258; s. c., 13 Am. & Eng. R. R. Cas. 377.

Where the legislature had exempted railroad lands from taxation until they were sold and conveyed by the railroad company, and the company mortgaged to the State all its property and franchises, including the contract right of exemption from taxation, and the State bought in the lands on a foreclosure sale, and subsequently granted them to another company, it was held that the sale worked no merger or extinguishment of the right to exemption, and that the second grantees succeeded to it. Winona, etc., R. Co. v. Denel Co., 3 Dak. 1; s. c., 7 Am. & Eng. R. R. Cas. 348.

2. Webster's Dict. The Georgia constitution provides as follows: "No vote, resolution or order shall pass granting a donation or gratuity in favor of any person except by the concurrence of two-thirds of each branch of the General Assembly." Under this provision, an act authorizing the governor to

furnish a certain railroad company with a certain number of convicts, without charge, for three years, upon "their giving satisfactory obligations to feed, clothe, and provide for the same under such regulations as his excellency, the governor, may require for the safe keeping and proper care of said convicts" is not unconstitutional. Said the court: "The saving to the State of the burden of confining in proper prisons, or by guards, feeding, clothing, furnishing medical treatment to the convicts, was a valid and legal consideration, paid by The ——— Railroad for these — convicts, and relieves the transfer made to the company of the control and labor of the same by the State from being either a 'donation' or 'gratuity' within the meaning of the constitution." Ga. Penitentiary Co. v. Nelms, 65 Ga. 499; s. c., 38 Am. Rep. 793.

3. "The term 'greenback' is the popular and almost exclusive name applied to all United States Treasury issues, and is not applied to any other species of paper currency." An indictment for larceny of treasury notes is sustained by evidence that "greenbacks" were taken. Hickey v. State, 23 Ind. 21.

"A note made payable in greenback currency means the same as if payable in United States currency or legal tender notes," and is of the same validity as if the kind of currency in which it is payable were not described or stated. Burton v. Brooks, 25 Ark. 121.

"Greenbacks" is but a nick-name, originally, or slang word, derived from the color of the engraving on the backs of the currency so denominated, and not either the legal designation or a proper description of the things alleged to be feloniously taken. The fact that the word has, from its convenience, come into common use, does not make it by itself, without connection with something else indicating the notes called by that name, a proper denomination of them in an indictment." Its use does not, however, vitiate the indictment. Wesley v. State, 61 Ala. 282.

GROCERIES—GROSS—GROUND—GROUND RENTS.

GROCERIES.¹

GROSS.—(See DIVORCE; NEGLIGENCE.) Whole, entire, absolute.²

GROUND.³

GROUND RENTS.—This word is used in American law books in two entirely distinct senses. One, which is the sense applied to it in *Maryland*, is that of a rent reserved upon a lease for ninety-nine years, renewable forever. In *Pennsylvania*, however, a ground rent is the rent reserved to himself and his heirs by the grantor of land in fee simple out of the land so conveyed.⁴ We shall treat this sense of the word first.

The rent reserved is a rent service and the common law principles governing that species of rent are applicable to ground rents.⁵

1. "Groceries" in a chattel mortgage of the stock of a country store, do not include such articles as shovels, snaths, pails, baskets, traps and cards. The fact that such articles are usually kept in a country store does not make them groceries within the meaning of the mortgage. *Fletcher v. Powers*, 131 Mass. 333.

In an action on a policy of insurance, "perhaps it would be the duty of the court to tell the jury, as matter of law, that the terms 'dry goods and groceries,' as used in such policy, include all such goods and merchandise as are usually kept in such stores as are called dry goods and grocery stores at the place where the insured did business." *Germania F. Ins. Co. v. Francis*, 52 Miss. 457. Whether spirituous liquors were groceries within the meaning of the term in a policy of insurance was left to the jury in *Niagara F. Ins. Co. v. De Graff*, 12 Mich. 124. In this case alcohol was classed as extra hazardous, and there was conflicting evidence as to the knowledge of the agent for the company who wrote the insurance that the liquor was among the stock of groceries.

2. Webster, Tomlins; quoted in *Hawley v. James*, 16 Wend., (N. Y.) 262.

A sum in gross is one single, entire sum, and not several sums. *Hawley v. James*, 16 Wend. (N. Y.) 262.

"Gross receipts from passengers" in a taxation act, includes not only the receipts for the carriage of passengers, but also for the use of births and state-rooms. *N. J. Steamboat Co. v. Pleasanton*, 8 Blatchf. 259.

In Gross.—At large; not appurtenant or appendant, but annexed to a man's

person. *Bouv. Law. Dict.*, 2 Bl. Com. 34.

3. "Ground" is synonymous with "land" and includes the buildings erected thereon. *Ferree v. School District*, 76 Pa. St. 376. No stress is to be laid upon the use of "ground" instead of "land" in a grant, "though by the term 'rest of the ground,' where lands had been granted for cultivation and settlement, it could hardly be contended that lands flowed by tide water was intended, without some contest or qualifying word of description indicating such an intent." *Comm. v. City of Roxbury*, 9 Gray (Mass.) 491.

Ground of Action.—This expression in a statute of Jeofails, is not used in any technical or narrow sense, but refers to the real object of the plaintiff in bringing the suit. *Nash v. Adams*, 24 Conn. 33; *Spencer v. Howe*, 26 Conn. 200; *Howland v. Couch*, 45 Conn. 47. See AMENDMENTS, CAUSE.

Depot Grounds.—See DEPOT.

Public Grounds.—A canal is not within this term. *State v. Cin. Cent. Ry. Co.*, 37 O. St. 171.

Sea-Grounds.—Land between high and low water marks passes under the description "sea-grounds, oyster laying, shores and fisheries." "If the words sea-grounds had stood alone, the soil would have passed under them. Sea-ground is either ground bordering on the sea or covered with the sea. The word 'ground' itself is sufficient to pass the soil, and the word sea annexed only shows where it is situate." *Scratton v. Brown*, 4 B. & C. 502.

4. *Bouv. Law Dict.* Ground rent. *Kenege v. Elliott*, 9 Watts. (Pa.) 226.

5. *Ingersoll v. Sargeant*, 1 Wharton (Pa.) 337. This case decides that the

Consequently the landlord has the right of distress,¹ which is reserved in the deed creating the rent. A proviso of re-entry on failure to make the returns or observe the covenants is also usual. The form of the conveyance is a deed of the fee in the property with a rent reserved as the entire consideration for the sale.² In these respects only does a sale on a ground rent differ from an ordinary sale.

The relations of the grantor and grantee in these conveyances are quite anomalous since the estate of each is a real estate and each holds in fee simple.³ Nevertheless, as would occur in a lease, it is usual to insert in the deeds originating the ground rents, clauses giving the grantor and his heirs the right to distrain for the rent, and to re-enter and hold the land.⁴

There is a lien upon the land for the rent, which is not divested by a judicial sale.⁵ The right to the rent is considered as an estate subject to which the buyer takes. Nor is there any apportionment as to time of the rent accruing after the sale.⁶ But on a sale of part of the land, and a release of the rent as to that part, the rent will be apportioned upon the remainder in proportion to the value of the part remaining.⁷ So, too, the rent can be divided among any number of persons, and the tenant must pay to each his share and no more.⁸ The covenant to pay the rent is not a covenant to pay a debt,⁹ but a security for the performance of a collateral act. The remedies of the landlord are cumulative.¹⁰

It was the intention of the framers of the Pennsylvania ground rent system to make the rents irredeemable and many irredeemable rents have been created.¹¹ The creation of such rents is now prohibited, however, by statute.¹²

statute of *Qua Emptores*, 18 Edw. I, st. 1, c. 1, was never in force in Pennsylvania, that a rent reserved to the grantor and his heirs on a grant in fee, is a rent service and not a rent charge, and that a ground rent is not extinguished by a conveyance to one in trust for another, nor by an extension of the time of redemption, nor by a release as to a part of the lot originally conveyed when the rent was created.

1. Fry v. Jones, 2 Rawle (Pa.) 13; Helser v. Pott, 3 Barr. (Pa.) 179; Franciscus v. Reigart, 4 Watts. (Pa.) 98.

2. Cadwalader on Ground Rents, § 100.

3. Robb v. Weaver, 8 W. & S. (Pa.) 126; Boslen v. Kuhn, 8 W. & S. (Pa.) 183; Weidener v. Foster, 2 P. & W. (Pa.) 23; Franciscus v. Reigart 4 Watts (Pa.) 98; McQuesney v. Hies-ter, 9 Casey (Pa.) 435.

Note.—"Each party has an estate in fee."

4. Cadwalader on Ground Rents, § 426,

5. Cadwalader on Ground Rents, § 253; Act of Jan. 23, 1849.

6. Walton v. West, 4 Whart. (Pa.) 221; Appold's Case, 20 Wall. (U. S.) 575.

7. Ingersoll v. Sargeant, 1 Whart. (Pa.) 337.

8. Reed v. Ward, 10 Harris (Pa.) 144; Linton v. Hart, 1 Casey (Pa.) 193; Corporation v. Wallace, 3 Rawle (Pa.) 165; Nailor v. Stanley, 10 S. & R. (Pa.) 453.

9. Bossler v. Kuhn, 8 W. & S. (Pa.) 184.

10. Boutleove v. Smith, 2 Binny (Pa.) 146.

11. Cadwalader on Ground Rents, chaps. 12 and 13.

12. No irredeemable or non-extinguishable ground rent shall be charged upon or be reserved out of, or for, any land within this commonwealth. Nor shall the omission to provide for the redemption of any ground rent . . . nor covenant or condition contained in any deed to be hereafter made

The ground rent system prevailing in Maryland, is altogether different from that of Pennsylvania. In Maryland a ground rent is a rent reserved upon a lease for a long term, generally ninety-nine years; with conditions permitting the landlord to distrain whenever the rent is arrear; and to re-enter and hold the premises if it is in arrear for one year; and with covenants on the lessee's part to pay the rent and all taxes. It has been decided that the object of these leases was to create a perpetual tenancy.¹

They are true leases, inasmuch as the relation of landlord and tenant subsists between the parties to them.² The interest of the landlord is real estate, while that of the tenant is a chattel real.³ From this the consequence follows that the usual rules of real property law are applicable to the reversion. The rent passes with the reversion by descent to the lessee's heirs at law, or to his devisees, or to his grantees. It is subject to partition among heirs, and is subject to dower interests.⁴ The form of a fee simple deed with a clause referring to the leasehold estate is used to convey the reversion.

The interest of the lessee, being a chattel real, passes by a deed of assignment, to the assignee, his personal representatives, and assigns. This deed is within the registry laws, but the property of lessee is treated as personalty.⁵ It passes as assets to the administration of the lessee, or under a will of personalty.⁶ The wife is not dowerable of this estate.⁷

The rent reserved on these leases is a rent service⁸ and can be apportioned.⁹

... be ... construed or interpreted to be or become irredeemable ... by reason of any failure to pay any sum mentioned in the deed to be paid for the extinguishment of the rent, within the time fixed by the deed, nor shall the period for the extinguishment of any such rent be postponed longer than twenty-one years, or a life or lives in being.

"In case there shall not be any principal sum fixed for the extinguishment of the ground rent in the deed ... then [it] may be redeemed ... by the payment of such sum as will produce a yearly interest equal in amount to said rent, at the legal rate ... in force at the time of the reservation of said rent, together with all arrearages." ... Brightly's Purdon's Digest, Supplement, p. 2214. See, also, Brightly's Purdon's Digest, title, *Ground Rent*; Cadwalader on Ground Rents; Legal Intelligencer, 26, 108, and Amer. Law Reg., v. 2, p. 577, and v. 3, p. 64; Elcoch v. Conner, 11 W. N. C. (Pa.) 216; Donagan v. McKee, 13 Phila. 48; Palafret v. Snyder, 106 Pa. St. 227;

Foulke v. Millard, 108 Pa. St. 230; Wallace v. Fourth Presby. Church, 111 Pa. St. 164; Rushton v. Lippincott, 119 Pa. St. 12; Biddle v. Hoover, 120 Pa. St. 221.

1. Banks v. Haskie, 45 Md. 213; Taylor v. Taylor, 47 Md. 298; Presstman v. Silljacks, 58 Md. 329.

2. Isaac v. Clark, 2 Gill. (Md.) 1; Martin v. Martin, 7 Md. 576; Getzen-daffer v. Cayler, 38 Md. 380; Mayer v. Ehrman, 57 Md. 624; Presstman v. Silljacks, 58 Md. 334.

3. Taylor v. Taylor, 47 Md. 300.

4. Chew v. Chew, 1 Md. 172; Williams v. Holmes, 9 Md. 287; Presstman v. Silljacks, 58 Md. 330.

5. Presstman v. Silljacks, 58 Md. 330.

6. Williams v. Holmes, 9 Md. 288; Allender v. Price, 33 Md. 11; Divermon v. Divermon, 43 Md. 346; Provitt, etc., of Dumpies v. Abercrombie, 46 Md. 172.

7. Spangler v. Stanler, 1 Md. Ch. 36.

8. Mayer v. Ehrman, 59 Md. 621.

9. Presstman v. Silljacks, 58 Md. 323; Worthington v. Cooke, 56 Md. 51.

GROUND RENTS—GUARANTEE INSURANCE.

Where the original term of one of these ninety-nine year leases, renewable forever, has expired, without the grant of a renewal during the term, equity will compel a renewal, provided the rent and taxes are paid up to date, and there has been no laches.¹ But after the expiration of the term, when there has been no renewal within a reasonable time, the reversioner may recover possession of the premises by ejectment.²

Recent legislation has prohibited the creation of any more of these leases for ninety-nine years renewable forever. In 1884 the legislature made all leases for a longer period than fifteen years redeemable after the expiration of fifteen years upon the payment of the value of the rent capitalized at six per centum, unless some other sum not exceeding four per centum were specified in the lease.³ This provision gave rise to a number of leases practically irredeemable, and now has been superseded by a later act making all leases for longer terms than fifteen years redeemable after ten years at a capitalization of six per centum. These acts have not been the subject of judicial decision as yet.⁴

GUARANTEE INSURANCE.

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WHAT IS—Guarantee insurance is, in its practical sense, a guarantee or insurance against loss in case a person named shall make a designated default or be guilty of specified conduct. It is usually against the misconduct or dishonesty of an employe or officer, though sometimes against the breach of a contract. This

1. Banks v. Haskie, 45 Md. 207; Presstman v. Sillocks, 58 Md. 323.

2. Presstman v. Sillocks, 58 Md. 331.

3. Acts of 1884, c. 485.

4. Md. Code, P. G. L. 1888, Art. LIII, §§ 24, 26, are as follows: "All rents reserved by leases or sub-leases of land made in this State after April 5th, eighteen hundred and eighty-eight, for a longer period than fifteen years, shall be redeemable at any time, after the expiration of ten years from the date of such lease or sub-lease, at the option of the tenant, after a notice of six months to the landlord, for a sum of money equal to the capitalization of the rent reserved at a rate not to exceed six per centum.

"Whenever the lessee named in a lease or the assignee of a lease shall or may apply to his landlord for a renewal of the lease under covenant contained in it, giving him the right to demand and have such renewal, the landlord shall, in case the tenant cannot produce

vouchers or satisfactory evidence, showing the payment of the rent accrued for three years next preceding his demand and application, be entitled to demand and recover three years' back rent, and no more (in addition to any renewal fine that may be provided for in the lease), before executing or causing to be executed such renewed lease, and the tenant may plead this section in bar of the recovery of any larger or greater amount of rent.

"Whenever there has been no demand or payment for more than twenty consecutive years of any specific rent reserved out of a particular lot . . . such rent shall be conclusively presumed to have been extinguished . . . but in case the landlord shall have been under any legal disability when such period . . . shall expire, he shall have two years after the removal of such disability within which to assert his rights . . ."

Art. XVI, § 93, provides for decrees in chancery compelling renewals of leases.

branch of insurance is so much more modern in origin and development than fire, marine, life, and accident insurance, that there are few decisions upon the subject; but the business is gradually increasing, and is doubtless destined to take an important place in the commercial world.

GENERAL PRINCIPLES APPLICABLE.—It may be confidently stated, notwithstanding the comparative absence of specific decisions, that the general principles applicable to other classes of insurance are applicable here as well. Thus the general doctrine of warranty, representation, and concealment, as applied to fire, life, and marine insurance, is applicable also to the subject of guarantee insurance.¹

INSTANCES OF LIABILITY.—It was held in a Canadian case that a company was liable on a policy guaranteeing the faithful and diligent performance of the duty of a clerk, where such clerk went to lunch leaving a large sum of money in open bags in his room, which money disappeared while he was gone.²

Overdrafts allowed without security by collusion with the party making the overdrafts, is within a policy which insures against loss "by the want of integrity, honesty, and fidelity, or by the negligence, default, or irregularities of the manager."³

ASSIGNMENT.—In a Maryland case, where the due payment of a promissory note was insured, it was held that the policy was available in the hands of a third party.⁴

TERMINATION OF THE INSURANCE.—Where the insurance was in favor of a partnership against loss on trade debts, and a provision of the policy was, that "if a member of the company shall die, or if any member, guaranteed with respect to his gross or particular trade debts, shall cease to be such a trader, his guarantee or contract shall become void on such death, or (if such trader) on his retiring from such trade," it was held that the retiring of a member of the partnership terminated the insurance.⁵

RENEWALS.—The principles applicable to the renewal of policies of insurance generally, are undoubtedly in the main applicable here, but some special decisions are worthy of notice. In a case where the policy was against loss by the bankruptcy of the purchasers of goods, with a provision that it should be considered as renewed unless one of the parties should give two months' notice, prior to the expiration of the original contract, of an intention not

1. *Towle v. Nat. Guardian Life Ins. Co.*, 7 Jur. (N. S.) 1109; *Board of Education v. Citizens' Ins. Co.*, 30 U. C. (C. P.) 132.

See, also, in this connection, the case of *Benham v. United Guarantee and Life Ins. Co.*, 7 Exch. 744.

A representation that the person whose conduct is insured "has never been in arrears or default in his accounts," extends to arrears and de-

faults prior to the time when he entered the service of the insured. *Ottawa Agr. Ins. Co. v. Canada Guarantee Ins. Co.*, 30 U. C. (C. P.) 360.

2. *Re Citizens' Ins. Co. &c.*, (Q. B. *Quebeck*) 16 Can. L. J. 334.

3. *Bank of Toronto v. European Ins. Co.*, 14 L. C. Jur. 186.

4. *Ellicott v. U. S. Ins. Co.*, 8 Gill & Johns. (Md.) 166.

5. 7 H. & N. 17.

GUARANTEE INSURANCE—GUARANTY.

to renew, it was held that this was an agreement for a single renewal only.¹

In another case the policy provided that it should be good for a year, "and for every subsequent year that the society shall agree to renew, and the insured to pay." Nothing was done with regard to a renewal, and it was held that the policy was at an end.²

CONDITIONS OF RECOVERY.—As in fire and other classes of insurance, if any conditions are required by the policy to be performed subsequent to the loss and prior to recovery, they must be substantially complied with before the policy can be enforced. Thus if the policy requires the insured to prosecute the party against whose act he is insured, as a condition precedent to recovery, such requirement must be satisfied before recovery can be had, even though to conform thereto would subject the insured to an action for damages.³

SUBROGATION.—The doctrine of subrogation undoubtedly applies in a case of guarantee insurance, where the transaction is in the nature of a suretyship. That is to say, the insurers, after payment of the loss, will be subrogated to the rights of the insured and entitled to the securities which he holds in respect of the matter of the insurance.⁴

GUARANTY.

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1. DEFINITION.—A guaranty is a collateral undertaking to pay a debt or perform a duty, in case of the failure of another person, who is in the first instance liable to such payment or performance.⁵

1. *Solvency Mut. Guarantee Co. v. Froane*, 7 H. & N. 5. See, also, *Solvency Mut. Guarantee Co. v. York*, 3 H. & N. 588.

2. *Towle v. Nat. Guardian Ins. Co.*, 7 Jur. (N. S.) 1109.

3. *Sup. Ct. of Judicature (Ireland)*, 9 Ins. L. J. 160.

4. *Montague v. Tidcombe*, 2 Vt. 518.

5. Guaranty is an undertaking by one person that another shall perform his contract or fulfill his obligation, or that, if he does not, the guarantor will do it for him. *Gridley v. Copen*, 72 Ill. 13. A guarantee, according to its derivative and essential meaning, is the warranty of some act or debt of another. It is an undertaking that the engagement or promise of some other person shall be performed. In its legal and commercial sense it is an under-

taking to be answerable for the payment of some debt, or the due performance of some contract or duty by another person, who himself remains liable for his own default. *McLaren v. Watson's Exrs.*, 26 Wend. (N. Y.) 435. A guaranty has also been defined as an agreement not under seal "whereby one person engages to be answerable for the debt, default or miscarriage of another." *Hall v. Farmer*, 5 Denio (N. Y.) 487.

The word has also been judicially defined in *Brown v. Brooks*, 25 Pa. St. 212; *Dale v. Young*, 24 Pick. (Mass.) 252; *Redfield v. Haight*, 27 Conn. 37; *Gallagher v. Nicholls*, 60 N. Y. 438; *Durham v. Manrow*, 2 N. Y. 549, and *Welsh v. Ebersole*, 75 Va. 656; *Sturges v. Bank of Circleville*, 11 Ohio 169.

The person who binds himself by the guaranty is called the guarantor, the person to whom it is made, the guarantee, and the person for whom it is made, is called the principal.

2. DISTINGUISHED FROM SURETYSHIP.—Guaranty is distinguished from suretyship in being a secondary, while the latter is a primary obligation. The contract of the guarantor is his own separate undertaking in which the principal does not join. The guarantor contracts to pay, if by the use of due diligence the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment, and so is responsible at once if the principal debtor makes default; or in other words, guaranty is an undertaking that the debtor shall pay. Suretyship, that the debt shall be paid. A guarantor is often discharged by the indulgence of the creditor to the principal and is usually not liable unless notified of the default of the principal. A surety, on the other hand, is an original promisor and debtor and is held ordinarily to know every default of his principal. The principal and surety being equally bound may be joined in the same suit, but the guarantor being bound by a separate contract must ordinarily be sued separately.¹

3. CONSIDERATION.—A contract of guaranty if not under seal requires a consideration to support it.² The consideration of the

1. In *Reigart v. White*, 52 Pa. St. 440, AGNEW, J., distinguished suretyship from guaranty as follows: "A contract of suretyship is a direct liability to the creditor for the act to be performed by the debtor, and a guaranty is a liability only for his ability to perform this act. In the former the surety assumes to perform the contract of the principal debtor if he should not; and in the latter the guarantor undertakes that his principal can perform; that he is able to do so. From the nature of the former the undertaking is immediate and direct that the act shall be done, which if not done makes the surety responsible at once, but from the nature of the latter, non-ability (in other words, insolvency) must be shown." See, also, *Curtis v. Dennis*, 7 Met. (Mass.) 510; *Kearnes v. Montgomery*, 4 W. Va. 29. In *Krample's Exrs. v. Hatz*, 52 Pa. St. 525, WOODWARD, C. J., said: "A surety, by his contract, undertakes to pay if the debtor do not; the guarantor undertakes to pay if the debtor cannot. The one is an insurer of the debt, the other an insurer of the solvency of the debtor."

Examples.—The following examples will illustrate the difference between suretyship and guaranty:

"Please send W. goods to the amount of \$100 and I will guarantee the same in four months," was held a guaranty. *Dale v. Young*, 24 Pick. (Mass.) 24.

"If you have not shipped the goods, ship immediately, and I will be responsible for the delivery of the nails to E." is a suretyship. *Reigart v. White*, 52 Pa. St. 438.

"For consideration received I hereby agree to become security for the faithful performance of the above agreement," is a suretyship. *Allan v. Hubert*, 49 Pa. St. 259.

"I hereby acknowledge to be security for the within amount of \$500 until satisfactorily paid by W. A." is a suretyship. *Marberger v. Potts*, 16 Va. St. 9.

Guaranty and suretyship are distinguished in annotated cases in *Amer. L. R.* (N. S.) vol. 18, p. 751, and vol. 10, p. 431. See, also, *Zahm v. Bank*, 103 Pa. St. 576.

2. *Barrell v. Trussell*, 4 Taunton 117; *Saunders v. Wakefield*, 4 B. & Ald. 595; *Pillan v. Van Mierop & Hopkins*, 3 Burr. 1663; *French v. French*, 2 Man. & Gr. 644; *Cobb v. Page*, 17 Pa. St. 469; *Tenny v. Prince*, 4 Pick. (Mass.) 385; *Neelson v. Sandborne*, 2 N. H. 414; *Leonard v. Vreedenburgh*, 8 John. (N. Y.) 29; *Pfeiffer v. Kingaland*,

promise may be any benefit or advantage to the promisor, or any loss, trouble, inconvenience, or charge upon the promisee.¹ If the original debt or obligation has already been incurred or undertaken previous to the collateral undertaking, there must be a new and distinct consideration to sustain the guaranty. But where the original obligation is founded upon a good consideration and the contract of guaranty is entered into contemporaneously therewith, or where the original obligation is the inducement for giving credit, it may also be the consideration for the guaranty.²

Forbearance by the creditor to sue the principal debtor for a past debt, is a sufficient consideration to support the guaranty.³

25 Mo. 66; *Bailey v. Freeman*, 4 John. (N. Y.) 280; *Clark v. Small*, 6 Yerg. (Tenn.) 418; *Lawrence v. McCalmont*, 2 How. (U. S.) 426; *Jackson v. Jackson*, 7 Ala. 791; *Belknap v. Bender*, 75 N. Y. 446.

1. *Bickford v. Gibbs*, 8 Cushing (Mass.) 156; *Morly v. Boothby*, 3 Beng. 113; *In Leonard v. Vredenburg*, 8 John. (N. Y.) 29, X applied to P for goods on credit, and P refused to let him have them without security, on which X drew a promissory note for the amount, under which D wrote, "I guarantee the above," and the goods were then delivered. *Held*, that this was a collateral undertaking of D, but that, as the consideration was one and entire, the consideration passing between X and P was sufficient to support as well the promise of D as that of X, and no distinct consideration passing between P and D was necessary. Leaving a claim in the hands of an attorney to control and collect, is a sufficient consideration for a contemporaneous guaranty of the claim by him. *Gregory v. Gleed*, 33 Vt. 405; see, also, *Miles v. Linnell*, 97 Mass. 298; *Buckner v. Clark's Exr.*, 6 Bush. (Ky.) 168.

2. A past or executed consideration unless moved at the defendant's request, is not binding without some new consideration. *Raband v. De Wolf*, 1 Paine (U. S.) 580; *Elder v. Warfield*, 7 H. & J. (Md.) 391; *Yale v. Edgerton*, 14 Minn. 194; *Wyman v. Goodrich*, 26 Wis. 21; *Ware v. Adams*, 24 Me. 177; *Ludwick v. Watson*, 3 Oregon 256; *Parker v. Barker*, 2 Met. (Mass.) 423; *Anderson v. Davis*, 9 Vt. 136; *Hedges v. Strong*, 3 Oregon 256; *Stewart v. Hinkle*, 1 Bond. (U. S.) 506; *Blake v. Parlin*, 22 Me. 395; *Bell v. Welch*, 9 C. B. 154; *McCreary v. Van Hook*, 35

Tex. 631; *Ellenwood v. Fults*, 63 Barb. (N. Y.) 321; *Lessee v. Williams*, 6 Lans. (N. Y.) 228; *Putney v. Farnham*, 27 Wis. 187; *Carothers v. Conolly*, 1 Montana 433; *Wilson v. Beavans*, 58 Ill. 233; *Brown v. Brown*, 47 Mo. 130; *Davis v. Banks*, 45 Ga. 138; *Barker v. Bradley*, 42 N. Y. 316; *Uhler v. Farmers' Nat'l Bank*, 64 Pa. St. 406; *Harris v. Young*, 40 Ga. 65; *Besshears v. Rowe*, 46 Mo. 501. "If the debt or obligation of the principal debtor is already incurred previous to the undertaking of the surety, then there must be a new and distinct consideration to sustain the promise of the surety. But if the obligation of the principal debtor be founded upon a good consideration, and at the time it is incurred or before that time the promise of the surety is made and enters into the inducement for giving the credit, then the consideration for which the principal debt is created, is considered as a valid consideration also for the undertaking of the surety." *Williams v. Perkins*, 21 Ark. 18. See, also, *Howard v. Lovegrove*, 40 L. J. Exch. 13.

3. *Oldershaw v. King*, 27 L. J. Exch. 120; *Harris v. Venables*, 41 L. J. Exch. 180.

Sanders v. Barlow, 21 Fed. Rep. 836; *Underwood v. Hassack*, 38 Ill. 208; *Fuller v. Scott*, 8 Kan. 25; *Breed v. Hillhouse*, 7 Conn. 523; *Lonsdale v. Brown*, 4 Wash. (U. S.) 148; *Sage v. Wilcox*, 6 Conn. 81; *Russell v. Babcock*, 14 Me. 138; *Watson v. Randall*, 20 Wend. (N. Y.) 201; *Smith v. Finch*, 2 Scam. (Ill.) 321; *Oldershaw v. King*, 2 Hurl. & N. 517; *Wells v. Ross*, 77 Ind. 1. The promise to forbear must be in a case where there is a good cause of action. A promise to forbear prosecution of a claim which has no foundation forms no consideration. *Cabot*

A guaranty is sufficiently supported by a future or executory consideration. An agreement to supply goods or make advances to a third person in the future, is a sufficient consideration for a promise to be answerable for the payment of the past and future debts of the person to whom the goods are supplied or the advances made.¹

On the failure of the consideration the guaranty may also fail.²

v. Haskins, 3 Pick. (Mass.) 83; *Freeman v. Boynton*, 7 Mass. 483. *Contra*, *Hamaker v. Eberley*, 2 Binn. (Penn.) 506; *Empton v. Knowles*, 18 L. J. C. P. 222. Forbearance must be for a reasonable time. *Lonsdale v. Brown*, 4 Wash. (U. S.) 148. The promise to forbear will be void unless it stipulates for some actual delay, and affords the means of determining how long that delay is to continue. *Semple v. Pink*, 1 Exch. 74; *Shupe v. Galbreath*, 8 Casey (Pa.) 10; *Kidwell v. Evans*, 1 Pa. St. 385; *Lonsdale v. Brown*, 4 Wash. (U. S.) 148; *Pittsburg R. R. Co. v. Banker*, 5 Casey (Pa.) 160; *Semple v. Pink*, 1 Exch. 74; *Oldershaw v. King*, 2 H. & N. 599; *Elling v. Vanderlyn*, 4 John. Ch. (N. Y.) 237; *King v. Upton*, 4 Greenl. (Me.) 387. In *Clark v. Russell*, 3 Watts (Pa.) 213, a general forbearance, without expressing any date was held to be a perpetual forbearance. See, also, *Hamaker v. Eberly*, 2 Binn. (Pa.) 506; *Sidwell v. Evans*, 1 Pa. St. 383. A promise to pay the debt of another in consideration of forbearance, is not binding, unless accepted by the other party. There must be a mutual agreement, the consideration being promise for promise. *Shupe v. Galbreath*, 32 Pa. St. 10; *Snyder v. Leibengood*, 4 Pa. St. 305; *Cobb v. Page*, 17 Pa. St. 469. "When, however, the language of the parties, or the circumstances of the case, are such as to remove all reasonable doubt that the object of the promisor was to induce the creditor to delay for a reasonable time, or a fixed period, and the evidence shows that he has acted in reliance upon the assurance thus given by delaying as long as its terms require, it would be unjust to refuse to enforce it merely because he did not bind himself by a stipulation which he was not asked to make, and simply did what was required without promising to do it." 2 Am. Lead. Cases 99; *Downing v. Funk*, 5 Rawle (Pa.) 69; *Clark v. Russell*, 3 Watts (Pa.) 213; *Weaver v. Wood*, 9 Pa. St. 220; *Hakes v. Hatch*, 23 Vt. 231; *Kean v. McKenney*, 2 Pa.

St. 30; *Lonsdale v. Brown*, 4 W. C. C. R. 148; *Morton v. Burns*, 7 A. & E. 19; *Yard v. Eland*, Ld. Raym. 368; *Butcher v. Stewart*, 9 M. & W. 405.

An agreement to withdraw a suit against a principal is a sufficient consideration. *Worcester Savings Bank v. Hill*, 113 Mass. 25; *Harris v. Venables*, L. R. 7 Exch. 235.

1. *Paul v. Stackhouse*, 38 Pa. St. 302; *Standley v. Miles*, 36 Miss. 434; *McNaught v. McClaughry*, 42 N. Y. 22; *White v. Woodward*, 5 C. B. 810; *Chapman v. Sutton*, 2 C. B. 634; *Boyd v. Moyle*, 2 C. B. 644; *Russell v. Moseley*, 3 B. & B. 211. *DeColyar on Guarantees*, 30; *Wheelright v. Moore*, 2 Hall (N. Y.) 162; *Gillingham v. Boardman*, 29 Me. 79. A guaranty is binding when goods are contracted for one day by the principal and the guaranty is executed on the following day and delivered to the seller before the goods are delivered by him, the sale in such a case not being complete till the goods are delivered. *Simmons v. Keating*, 2 Starkie 375. But in *Westhead v. Sproson*, 30 L. J. Exch. 265, an undertaking by A at B's request to supply such goods to C, as C may require, and A may think fit to supply, was held not to be a sufficient consideration to support a promise.

In general a moral consideration will not support an express promise of guaranty. Thus in *Hendricks v. Robinson*, 56 Miss. 694 (1880), it was held that the fact that goods were bought for and used by a certain person did not afford such a moral obligation as would support his parol promise to pay for them, where he was under no legal obligation to pay for the same, and no arrangement had been made for discharging the primary debtor. See *Lee v. Mugeridge*, 5 Taunt. 36.

2. Thus where property was about to be sold by the sheriff, A (a stranger) agreed to guarantee the judgment debts, upon the judgment creditor consenting to postpone the sale under the execution. It turned out that the consent of another party was necessary in

4. STATUTE OF FRAUDS.—The fourth section of the Statute of Frauds provides *inter alia* that “no action shall be brought whereby * * * to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”¹ In order to make a promise to answer for the debt, default or miscarriage of another collateral, so as to bring it within the statute, there must be a present or future primary liability of another person to the person to whom the promise is made, and there must be no other liability on the part of the promisor except such as arises from his express promise on the guaranty. The promise must be made to the creditor of the person for whose benefit it is made and its immediate object must be to secure the payment of a debt or the fulfillment of a duty by such person.²

order to prevent the sale, and in consequence the sale took place. A gave notice that the consideration having failed the guaranty was at an end, and it was held that he was not liable on the guaranty. 27 Beav. (Eng.) 313.

1. The fourth section of the English Statute of Frauds (29 Car. 2, c. 3), has been re-enacted with certain modifications throughout the United States. In *Pennsylvania* the word “miscarriage” is omitted and the statute does not apply to any contract the consideration of which is less than \$20.

2. In *DeGolyar on Guarantees* 66, the following rules are laid down for ascertaining whether a promise is within the statute or not:

(1.) “At the time the promise is made there must be some person actually liable, in the first instance, to the promisee for the debt, default or miscarriage guaranteed against, or, at all events, the creation of such liability at some future time, must be contemplated as the foundation of the contract.

(2.) The promise must be made to the creditor, *i. e.*, to the person to whom another is already or is thereafter to become liable.

(3.) There must be an absence of any liability on the part of the promisor except such as arises from his express promise.

(4.) The *main* or *immediate* object of the agreement must be the payment of a debt or the fulfillment of a duty by a third person.

(5.) The agreement between the

promisor and the creditor, to whom the promise is made, must not amount to a sale by the latter to the former, either of the security for a debt or of the debt itself.

JUDGE HARE, in the note to *Birkmyr v. Darnell*, 1 Sm. L. Cas. 528, says: “At common law any number of persons may be bound by a joint or joint and several promise, although the consideration moves only to one, and it is important to determine whether this rule has been varied by the provisions of the statute of frauds. It would seem that as the obligation imposed by such a contract is common to all the parties, it can hardly be said that the promise of any of them, is to answer for the default or miscarriage of another, and not for his own. And this appears to be true, even where one or more of the parties to the contract are sureties; if they have bound themselves directly for its performance and not merely that it shall be performed by the principal, for the undertaking is not the less theirs, because he receives the benefit of the consideration. But when the contract in question is merely one of guaranty, that is, when it does not impose any direct liability, and consists solely in an engagement for performance by the principal, it is manifestly within the terms of the statute, and will not be valid unless in writing. Whether, therefore, the engagement of a party who intervenes in a contract for the benefit of another, is within the statute, may be thought to depend on the nature of his liability, and not on

that of the principal. *Hodges v. Hall*, 29 Vt. 209. If he assumes to be the paymaster, and thus makes himself directly and unconditionally, although jointly answerable for the debt, the statute would seem to be inapplicable. *Hatfield v. Dow*, 27 (N. J.) 443, 445; but if his engagement be merely to pay if the other does not, that is, if it be one of guaranty and not merely of suretyship, it will be within the direct terms of the statute, and must be expressed in writing. *Elder v. Warfield*, 7 H. & J. (Md.) 391."

In *Birkmyr v. Darnell*, Salkeld 27, the leading case on guaranty, the distinction between a promise within the statute and one without it, was made as follows: "If two come to a shop and one buys and the other to gain him credit, promises the seller, *If he does not pay you, I will*, this is a collateral undertaking and void without writing by the statute of frauds. But if he says, *Let him have the goods, I will be your pay-master, or I will see you paid*, this is an undertaking as for himself, and he shall be intended to be the very buyer and the other to act but as a servant."

Examples of Cases Within the Statute.

—Labor and Material.—A let a contract to B for furnishing material and building a house for a stipulated sum. B employed C to furnish material and perform the labor of plastering. When the building was completed except a small part of the plastering, C, in the absence of B, informed A that he would not finish the plastering unless A would agree to pay him, and A replied, "Finish the plastering and I will see you paid;" the obligation of B to complete the house and pay C not being released. *Held*, that the verbal promise of A to see C paid was within the statute. *Birchell v. Nester*, 36 Ohio St. 331; *Farnham v. Davis*, 79 Me. 282. So, also, is a verbal promise to make or endorse a note with others to pay the debt of a third party. *State v. Shinn*, 42 N. J. L. 138.

Execution of Note.—An agreement to execute a note as a surety for another is the promise to answer for the debt of another within the statute. *Dee v. Downs*, 57 Iowa 589.

Antecedent Debt.—Where the undertaking of a third party is to further secure the payment of a debt already created between the regular parties to a note, it is a collateral contract within the statute. A simple indorsement in

blank before that of the payee is not such a "writing" as will satisfy the statute. *Hayden v. Weldon*, 43 N. J. L. 128.

Goods Furnished.—If any credit is given to the person to whom goods are delivered the promise of another to pay for them is collateral and within the statute. *Matson v. Wharam*, 2 T. R. 80; *Bugbee v. Kendrick*, 130 Mass. 437; *Langdon v. Richardson*, 58 Iowa 610; *Anderson v. Hayman*, 1 H. Bl. 120; *Mallet v. Bateman*, 1 L. R. C. P. 163.

Work to Be Done.—The firm of A & B made a contract with that of C & D, whereby the latter were to convert the timber on certain premises into shingles. C & D made an independent contract with E to cut the timber, but subsequently A & B verbally agreed with E to pay him on orders from C & D. Several payments were made in this way, and on refusal by A & B to pay E the balance, he sued on the agreement. *Held*, that the suit could not be maintained, the verbal agreement being a promise within the statute. *Preston v. Young*, 46 Mich. 103; s. c., 41 Am. Rep. 148. See, also, *Re Tozer's Est.*, 46 Mich. 299. *Pfaff v. Cummings* (Mich.), 34 N. W. Rep. 281.

For Becoming Bail.—An oral promise to indemnify one for becoming bail for another is within the statute and invalid. *Nugent v. Wolfe*, 111 Pa. 471; *May v. Williams*, 61 Miss. 125; s. c., 48 Am. Rep. 80; *Brand v. Whelan*, 81 Ill. Ap. 186. But see *Anderson v. Spence*, 72 Ind. 315.

For Money, Etc., to Be Furnished.—Where the consideration of A's undertaking is for money to be furnished by C to B, if the transaction be such that B remains responsible to C, A's undertaking is collateral and will not bind him unless in writing. *Radcliffe v. Prondstone*, 23 W. Va. 724; *Hill v. Frost*, 59 Tex. 25; *Mullen v. Rivieue*, Tex. 640; *Willard v. Bosshard*, 68 Wis. 454.

For Note.—An oral guaranty of the payment of the note of a third person, given in payment of a debt of the guarantor, is within the statute of frauds, though the object of the transaction is payment of the guarantor's own debt. *Dows v. Sweet*, 134 Mass. 140. See, also, *Hassenger v. Newman*, 83 Ind. 124; *Chapline v. Atkinson*, 45 Ark. 67; *Gump v. Halter-sladt*, 15 Oreg. 356. B indorses notes

for H. at H.'s father's request and in reliance on the father's promise to save B. harmless. *Held*, that the promise was within the statute. *Clement's Ap.* 52 Conn. 464.

For Loan of Instruments.—A lent to B certain instruments on the strength of C's verbal promise to be answerable for their return. *Held*, that the promise was within the statute. *Hollowbush's Estate*, 13 Phila. (Pa.) 217.

Money of Principal in Guarantor's Hands.—A promise by A to pay B's debt out of money belonging to B, which may be in A's hands when the debt matures, is a promise to pay the debt of another, which must be in writing. 105 Pa. St. 514.

Widow's Guaranty of Husband's Debt.—A retail trader died indebted to plaintiffs for goods purchased. His widow continued the business and orally promised plaintiffs to pay her husband's indebtedness if they would sell goods to her on credit. *Held*, that the widow was not liable for the husband's debt under the statute, her promise to pay being merely collateral. *Ruppe v. Peterson*, (Mich.) 35 N. W. Rep. 82; but see *Muller v. Reviere*, 59 Tex. 640.

Forbearance.—A having wrongfully ridden a horse belonging to B and caused its death, a promise by a third person to pay the damage thereby sustained in consideration that B would not bring any action against A, is a collateral promise within the statute and must be in writing. *Kirkham v. Marter*, 2 B. & A. 613; *Fish v. Hutchinson*, 2 Wils. 94; *Tomlinson v. Gell*, 6 A. & E. 564; *Maggs v. Amos*, 4 Bing. 474; *Colman v. Eyles*, 2 Stark. 62.

General Principles.—If the evidence shows that the party who receives and profits by the consideration is liable, and may be sued for the debt in assumpsit or that credit was given primarily to him in any form, the case will fall within the statute and no recovery can be had on a collateral promise unless reduced to writing or based upon a distinct and independent consideration moving to the promisor.

Smith, L. Cas. 533; *Allhouse v. Ramsay*, 6 Whart. (Pa.) 331; *Blake v. Parlin*, 22 Me. 395; *Moses v. Norton*, 36 Me. 113; *Aldrich v. Jewell*, 12 Vt. 125; *Busbee v. Allen*, 31 Vt. 631; *Gleason v. Briggs*, 28 Vt. 135; *Hodges v. Hall*, 29 Vt. 209; *Newell v. Ingraham*, 15 Vt. 422; *Kinloch v. Brown*, 1 Rich. (S. C.) 223; *Matthews v. Miller*, 4 Yerg. (Tenn.) 576; *Larson v. Wyman*,

14 Wend. (N. Y.) 246; *Chase v. Day*, 17 John. (N. Y.) 114; *Adams v. Hill*, 4 John. (N. Y.) 215; *Ware v. Stephenson*, 10 Leigh (Va.) 155; *Noyes v. Humphreys*, 11 Gratt. (Va.) 346; *Hayes v. Burkam*, 51 Ind. 130; *Bloom v. McGrath*, 53 Miss. 249; *Connolly v. Kettlewell*, 1 Gill. (Md.) 260; *Railroad Co. v. Prentiss*, 11 Md. 119; *McLendon v. Frost*, 57 Ga. 448; *Buchanan v. Sterling*, 63 Ga. 227; *Coal Co. v. Liddell*, 69 Ill. 639; *Sinclair v. Bradley*, 52 Mo. 180; *Berry v. Brown*, 107 N. Y. 659; *Jones v. Cooper*, Cowp. 227; *Peckham v. Faria*, 3 Dougl. (Mich.) 13; *Raens v. Story*, 3 C. & P. 130; *Barber v. Fox*, 1 Stark. 270; *Gull v. Lindsay*, 4 Exch. 45; s. c., 18 L. J., Exch. 355; *Mallet v. Bateman*, 1 L. R. C. P. 163; *Wenckworth v. Mills*, 2 Esp. 484; *Green v. Cresswell*, 10 A. & E. 453; *Cresswell v. Wood*, 10 A. & E. 460.

Examples of Cases Not Within the Statute.—**Transfer of Debts.**—A surrendered a bond for a deed which he held against B in consideration that B would pay to C the amount of a note. *Held*, that the promise was not within the statute of frauds as being to pay the debt of another; it was an independent contract on which C might maintain an action in his own name against B. *Mathers v. Carter*, 7 Ill. App. 225. See, also, *Budd v. Thurber*, 61 How. (N. Y.) Pr. 206; *Milks v. Rich*, 80 N. Y. 269; *Power v. Rankin*, 114 Ill. 52.

Boarding of Laborers.—A objected to boarding certain laborers of B on the ground that the pay would be doubtful, to which B replied that he would see the board paid; whereupon A took them to board. *Held*, that B's agreement was not a promise to answer for the debt of another. *Brown v. Harrell*, 40 Ark. 429.

Goods to be Charged.—If A and B agree by parol, jointly to pay for goods for A, the goods to be charged to both, B's promise is not within the statute, being original, not collateral. *Boyce v. Murphy*, 91 Ind. 1. See *Lance v. Pearce*, 101 Ind. 595; *Maurin v. Fogelberg*, 37 Minn. 23.

By Purchaser of Real Estate.—Where B after buying property of A on credit sells it to C, who in consideration thereof and as a part of the purchase money orally promises to pay B's debt to A on the former purchase, C's promise is merely an agreement to pay his own debt, though the incidental effect of such payment is to discharge B's debt to A; it is not within the statute

of frauds and may be enforced by A. *Hoile v. Bailey*, 58 Wis. 434.

By Judgment Creditor to Prior Lien-Holder.—A judgment creditor of A promised B, who had a prior lien on A's property, that if he would suspend sale under his lien, he would pay A's debt to him. *Held*, not to be a promise to pay the debt of another within the statute, the creditor making the promise for his own benefit. *Williamson v. Hill*, 3 Mackey (D. C.) 100; *Houlditch v. Milne*, 3 Esp. 86; *Castling v. Aubert*, 2 East. 325.

Goods to be Furnished.—A father whose son wished to buy goods agreed with the owner that if he would let the son have the goods, the father would see the debt paid or would pay it. *Held*, an original promise not within the statute. *Baldwin v. Heirs*, 73 Ga. 739; *Morris v. Osterhout*, 55 Mich. 262; *Simpson v. Benton*, 2 C. & M. 430; *Taylor v. Hillary*, 1 C., M. & R. 741; *Wilson v. Marshall*, 15 Ir. C. L. 467.

Discharge of Principal.—The statute does not apply to an agreement to pay the debt of a third person where as part of the agreement such person is discharged from his original indebtedness. *Mulcrone v. American Lumber Co.*, 55 Mich. 622.

Indemnity to Sheriff.—A promise to indemnify a sheriff for levying on property in case it turns out that property is not subject to levy, is not within the statute. *Lerch v. Gallup*, 67 Cal. 595.

Costs.—A promise by a defendant to his co-defendant who appealed from the judgment that he would pay one-half of the costs of the appeal, is not within the statute. *Wilson v. Smith*, (Iowa) 35 N. W. Rep. 506.

By Purchaser of Mortgaged Premises.

—An agreement by a purchaser of mortgaged premises, default having been made in payment of interest of the mortgaged debt, that if the holders of the mortgage would not foreclose, he would pay the arrear when the next installment of interest fell due, was held not to be a promise to answer for the debt of another within the statute of frauds, the promisor had a presumptive interest in protecting the land from sale. *Prune v. Koehler*, 77 N. Y. 91; see, also, *Moore v. Stovall*, 2 Lea. (Tenn.) 543; *Morrison v. Hogue*, 49 Iowa 574; see, also, *Blackford v. Plainfield Gas Light Co.*, 43 N. J. L. 438; *Fears v. Story*, 131 Mass. 47; *Cloffer v. Poland*, 12 Neb. 69; *Stahira v.*

Greenwood, 28 Minn. 521; *Weisel v. Spence*, 59 Wis. 301; *Wolke v. Fleming*, 103 Ind. 105; *Graham v. Mason*, 17 Ill. App. 399; *McCraith v. National Mohawk Valley Bank*, 104 N. Y. 414.

Note.—A new note given in sole consideration of the release of all obligation on the part of another on another note, is not a promise to answer for the debt of another within the statute of frauds. *Thornton v. Guice*, 73 Ala. 321.

To Physician.—A physician told B that he could render no further medical services for A's wife and children unless secured as to his compensation, whereupon B told the physician to render the services and that he would pay the bill. A had no knowledge of what was said. *Held*, that B was liable for the services afterwards rendered, credit having been given to him and not to A, and that the statute of frauds had no application. *Kessler v. Sonneborn*, 10 Daly. (N. Y.) 383; *DeWitt v. Root*, 18 Neb. 567.

Work and Labor.—A agreed to do certain work for B. C, afterwards when B became unable to fulfill his engagements, made a parol agreement with A under which A was to finish the work on the terms originally agreed upon. *Held*, that this was a new agreement between A and C not within the statute. *Merriman v. McManus*, 102 Pa. St. 102; see *Belknap v. Bender*, 75 N. Y. 446; *Green v. Burton*, (Vt.) 10 Atl. Rep. 575; *Crawford v. Edison*, (Ohio) 13 N. E. Rep. 80; *Ware v. Allen*, (Miss.) 1 So. Rep. 738; *Dixon v. Hatfield*, 2 Bing. 439; *Andrews v. Smith*, 2 C. M. & R. 627; *Lakeman v. Mountstephen*, 7 L. R. H. L. Cas. 17.

Property of Principal in Hands of

Guarantor.—A parol promise to pay the debt of another out of property placed by the debtor in the hands of the promisor, who converts the same into money, is not within the statute. *Mason v. Wilson*, 84 N. Car. 51; *Cock v. Moore*, 18 Hun. (N. Y.) 31; *Dock v. Boyd*, 93 Pa. St. 92; *Wynn v. Wood*, 97 Pa. St. 216; *Conger v. Cotton*, 37 Ark. 286; *Borchsenius v. Canutson*, 100 Ill. 82.

Assignments of Debts.—A bought lumber on the credit of B and paid B therefor. B then promised the seller to pay him for the lumber. *Held*, not to be within the statute. *Walkins v. Sands*, 4 Ill. App. 207; see, also, *Rhodes v. McKean*, 55 Iowa 547; *Bailey v. Bailey*, 56 Vt. 398; *Ackley v. Parmenter*, 31 Hun. (N. Y.) 476; s. c., 98 N.

Y. 425; *Shaaber v. Bushong*, 105 Pa. St. 514; *Clay v. Tyson*, 19 Neb. 530; *Hughes v. Fisher*, (Colo.) 15 Pac. Rep. 702; *Browning v. Stallard*, 5 Taunt. 450; *Lacy v. McNeile*, 4 D. & R. 7; *Hodgson v. Anderson*, 5 D. & R. 735; *Austey v. Marden*, 1 N. R. 124; *Walker v. Hill*, 5 H. & N. 419.

Guaranty of Dividends on Stock.—C, who was a large stockholder of a business corporation and president thereof, verbally promised M that if he would subscribe and pay \$500 to the capital stock of the company, he should within one year receive 15 per cent. on the amount invested. M in consideration of this promise subscribed and paid for the stock. No dividends were made or earned within the year. *Held*, that this was not a contract to answer for the debt, default or miscarriage of another within the statute. *Morehouse v. Crangle*, 36 Ohio St. 130.

Guarantor's Payment of His Debt by Note of Third Person.—Where a debtor induces his creditor to take in settlement of the indebtedness the note of a third person, with such debtor's guaranty of its payment, not stating the consideration, this is in effect a promise by such debtor to pay his own debt in a particular manner, and is not within the statute. *Eagle Mowing Co. v. Shattuck*, 53 Wis. 455.

Promise After Bankruptcy.—Two partners obtained a discharge in bankruptcy. Afterwards one of them promised to pay a note which had been given by the partnership. *Held*, that this was not a promise (as to one-half) to pay the debt of another, and therefore it was not a promise within the statute. *Weatherly v. Hardmann*, 68 Ga. 592.

Guaranty of Solvency.—An oral guaranty of the solvency of the maker of a note, made by the holder to induce another to take it in payment for property, is not within the statute. *Hassenger v. Newman*, 83 Ind. 124.

Husband's Promise to Settle Suits Against His Wife's Real Estate.—A promise by a husband to pay a certain sum for the settlement of suits involving his wife's title to real estate, is not within the statute. *Shaffer v. Ryan*, 84 Ind. 140.

Forbearance.—A promise to pay rent to a landlord who is about to distrain, by a person who is in possession of the goods under a bill of sale, by which promise the landlord is induced to forbear his distress, is not a contract

within the statute and therefore is good without being in writing. *Williams v. Leper*, 2 Wils. 302; *Bamplon v. Paulin*, 4 Bingh. 264; *Read v. Nash*, 1 Wils. 305; *Stewart v. Hinkle*, 1 Bond. (U. S.) 506.

Miscellaneous Cases.—If A agrees with B that if B will become the surety of C on a note to D, A will see the note paid and indemnify B, and B becomes surety, relying solely upon the promise of A, the agreement is not within the statute. *Demeritt v. Bickford*, 58 N. H. 523.

If A says to B "I will guarantee the horse to you in case you will buy him of L," this is not an agreement within the statute of frauds; nor if B says to A "I will buy the horse of L if you will guarantee the title, but not otherwise," and A answers "All right, I will so guarantee the title if you will pay me \$50 of the purchase money." *Stratton v. Hill*, 134 Mass. 27.

Where a wife pledged her trunk to the conductor for the fare of a child traveling with her; and her husband agreed afterwards with the baggage-master to settle the claim if the trunk was sent C. O. D., and then brought replevin for the trunk. *Held*, that he could not recover, the husband's agreement not being to pay the debt of another under the statute. *Coquard v. Union Deppt Co.*, 10 Mo. App. 261. See, also, *Palmer v. Witcherly*, 15 Neb. 98.

A promise by A that if B would work for him, he would pay C's indebtedness to B, is not a promise within the statute. *Fitzgerald v. Morrissey*, 14 Neb. 198.

A promise by railroad contractors to pay to merchants orders and time checks issued by a sub-contractor to his employes, upon the faith of which, and giving credit exclusively to the contractors, the merchants accepted such time checks and orders in exchange for goods. *Held*, not within the statute. *West v. O'Hara*, 55 Wis. 645.

Where the holder of another person's contract transfers the same to a third person upon a consideration moving to himself, his guaranty thereof, made simultaneously with the transfer, and as a part of the transaction, is not a special promise to answer for the debt or default of another within the statute. *Wilson v. Hentges*, 29 Minn. 102; *Smart v. Smart*, 97 N. Y. 559.

See in general, *Barrett v. McHugh*,

5. GUARANTY FOR THE TORT OF ANOTHER.—A guaranty may be made for the tort of another. In such a case the guaranty comes under the term "miscarriage" in the statutes of frauds. It was at one time thought that if the principal was not chargeable on a contract, but was only liable in tort, the promise to answer for him would not fall within the statute.¹ It is, however, now well settled that such a promise falls within the statute.²

6. NEGOTIABILITY OF THE GUARANTY.—A guarantee is in general not separately negotiable. It is a separate contract which can be enforced only by a party to it.³ But whether a guaranty written on the back of a promissory note or bill of exchange is itself nego-

28 Mass. 165; *Davis v. Taft*, 70 Ga. 52; *Howell v. Field*, 70 Ga. 592; *Thornton v. Williams*, 71 Ala. 555; *Whittemore v. Wentworth*, 76 Me. 20; *Westmoreland v. Porter*, 75 Ala. 452; *Carlisle v. Campbell*, 76 Ala. 247; *Spann v. Cochran*, 63 Tex. 240; *Green v. Estes*, 82 Mo. 337; *Louisville, Evansville, etc. Ry. Co. v. Caldwell*, 98 Ind. 245; *Elson v. Spraker*, 100 Ind. 374; *Sutherland v. Carter*, 52 Mich. 151; *Larson v. Jansen*, 53 Mich. 427; *Wood v. Moriarty*, (R. I.) 9 At. Rep. 427; *Kelley v. Schupp*, 60 Wis. 76; *De Walt v. Hartzell*, 7 Col. 601; *Summons v. Moore*, 100 N. Y. 140; *Morgan v. Woodruff*, 12 Daly (N. Y.) 207; *Teeters v. Lamborn*, 43 Ohio 144; *Wendell v. Hudson*, 102 Ind. 521; *Vaugh v. Smith*, 65 Iowa 579; *Woodruff v. Scaffie*, (Ala.) 3 So. Rep. 311; *Farnham v. Davis*, (Me.) 9 Al. Rep. 725; *Daniel v. Robinson*, (Mich.) 33 N. W. Rep. 497; *King v. Summit*, 73 Ind. 312; *Read v. Nash*, 1 Wils. 305; *Jarmin v. Algar*, 2 C. & P. 249; *Fitzgerald v. Dressler*, 29 L. J. C. P. 113; *Howes v. Martin*, 1 Esp. 162; *Darnell v. Fealt*, 2 C. & P. 82; *Bushell v. Bevan*, 4 M. & Scott 622; *Balson v. King*, 4 H. & N. 739; *Adams v. Dansey*, 6 Bingh. 506; *Wildes v. Dudlow*, 19 L. R. Eq. 198.

1. *Buckmyr v. Darnell*, 2 Ld. Raymond 1088; *Reed v. Nash*, 1 Wils. 305.

2. *Kirkham v. Martin*, 2 Barn. & Ald. 613; *Turner v. Hubbell*, 2 Day (Conn.) 457; *Brandt on Suretyship and Guaranty*, § 40.

3. In *Walson v. McLaren*, 19 Wend. (N. Y.) 557; s. c., 26 Wend. (N. Y.) 425, it was held that a general guarantee of payment, by a separate instrument, without naming anyone as the person guaranteed, may be enforced by anyone who advances money upon it; but such guarantee is not negotiable and therefore must be sued on in the

name of the person in whose hands it first became available. See, also, *M'Doal v. Yeomans*, 8 Watts. (Pa.) 361; *Beckley v. Eckert*, 3 Pa. St. 292; *True v. Fuller*, 21 Pick. (Mass.) 140; *Tuttle v. Bartholomew*, 12 Met. (Mass.) 452; *Belcher v. Smith*, 7 Cush. (Mass.) 482; *Irish v. Cutter*, 31 Me. 536; *Tinker v. McCauley*, 3 Gibbs (Mich.) 188; *Ten Eyck v. Brown*, 4 Chand. (Wis.) 151; *Gallagher v. White*, 31 Barb. (N. Y.) 92.

In *Iowa* a contract of guaranty is by statute assignable, and the assignee may maintain an action in his own name. *First National Bank v. Carpenter*, 41 Iowa 518.

In *New York* the transfer of a debt or obligation carries with it as an incident all securities for its payment, and that any person who can enforce the principal contract can enforce a guaranty of it. *Craig v. Parkis*, 40 N. Y. 181; *Claffin v. Ostrom*, 54 N. Y. 581; *Cady v. Sheldon*, 38 Barb. (N. Y.) 103.

In *Pennsylvania* it was held that where one guaranteed the payment of a mortgage and the mortgage was afterwards assigned to the administrators of the guarantor, and by them assigned to another person "with all the rights, remedies, incidents, etc., thereunto belonging," the guaranty was extinguished. *Fluck v. Hager*, 51 Pa. St. 459.

In *Jackson v. Foote*, 12 Fed. Rep. 37, a guaranty in the hands of a *bona fide* holder was held valid and not affected by any of the equities between the original parties.

In *Briggs v. Latham*, 36 Kan. 205, L., without any consideration therefor, wrote upon a mortgage which secured certain negotiable promissory notes, the following: "I hereby guarantee the payment of the within mortgage. L." L. was entire stranger to the notes

liable is a question upon which the authorities differ. In some cases such a guaranty is treated as negotiable in the absence of words implying a restriction to the first taker.¹ Story considers that a guaranty on the face of a bill of exchange, not limited to any particular person, but to the payee or his order, or to bearer, is a complete guaranty to every successive person who shall become the holder of the bill.²

7. CONTINUING AND NON-CONTINUING GUARANTIES.—When by the terms of the guaranty it appears that the parties look to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty, but when no time is fixed upon and nothing in the agreement indicates a continuance of the undertaking, the presumption is in favor of a limited liability as to time.³

and mortgage. *Held*, that the guaranty was not a negotiable contract, and even if the notes were subsequently transferred to a *bona fide* purchaser, L might nevertheless set up the want of consideration for the guaranty.

1. *Partridge v. Davis*, 20 Vt. 499; *Jones v. Berryhill*, 25 Iowa 289; *Nevins v. Bank of Lansingburg*, 10 Mich. 547. In *Everson v. Gore*, 40 Hun. (N. Y.) 248, a guaranty of a note was held assignable with the note, before its maturity, nothing in the guaranty implying a contrary intent. See *Toppan v. Cleveland, Columbus, etc. R. R. Co.* 1 Flap. (U. S.) 74.

2. Story on Bills, § 458.

3. **Examples of Continuing Guaranty.**—A defendant wrote "The bearer is going to start a peddling route to sell cigars and tobacco. He wishes to buy goods of your firm. We, the undersigned, will be his security to the amount of \$1000." *Held* to be continuing guaranty. 44 How. (N. Y.) 91.

An agreement to be responsible for the payment of all future bills or indebtedness of a third person to an amount not exceeding \$500, is a continuing guarantee. 38 Leg. Intel. (Pa.) 94.

Where A was largely engaged in mercantile business, and his wife assigned a certificate of stock to the M bank "as security for the payment of any demands the M bank may, from time to time, have or hold against H." *Held*, that this was a continuing security for all demands then existing against H, and for all renewals thereof, and for all that might afterwards be created in conducting his business with the bank in the ordinary manner of banking business. *Merchants' Bank*

v. Hall, 18 Hun. (N. Y.) 176. For other examples of continuing guaranty see *Morrow v. Brady*, 12 R. I. 130; *Rice v. Loomis*, 139 Mass. 302; *Tootle v. Elgutter*, 14 Neb. 158; *Pratt v. Matthews*, 24 Hun. (N. Y.) 386.

Laurie v. Scholefield R. & Co., L. R. 4 C. P. 622; *Heffield v. Meadows, L. R. 4 C. P. 595*; *Coles v. Pack, L. R. 5 C. P. 65*; *Burgess v. Eve*, 13 Eq. 450; *Wood v. Priestner, L. R. 2 Exch. 66*; *Mason v. Pritchard*, 12 East. 227; *Dunlap v. Gordon*, 10 La. Ann. 243; *Placer County v. Dickerson*, 45 Cal. 12; *U. S. v. Truesdell*, 2 Biss. (U. S.) 78; *Merle v. Wells*, 2 Camp. 413; *Mason v. Pritchard*, 12 East. 227; *Bastow v. Bennett*, 3 Camp. 220; *Simpson v. Manley*, 2 Tyr. 86; *Hargrave v. Smee*, 3 M. & P. 573; *Mayer v. Isaac*, 6 M. & W. 605; *Martin v. Wright*, 6 Q. B. 917; *Hitchcock v. Humphrey*, 7 Jur. 423; *Tanner v. Moore*, 9 Q. B. 1; *Williams v. Rawlinson*, 3 Bing. 71; *Allan v. Kenning*, 2 M. & Scott 769; *Wood v. Priestner*, 36 L. J. Exch. 124; *Heffield v. Meadows*, 4 L. R. C. P. 596; *Nottingham Hide, Skin and Fat Market Co. v. Bottrell*, 42 L. J. C. P. 256.

Examples of Non-Continuing Guaranty.—A wrote to B that C wanted to place a stock of groceries in his store, and that to enable C to do this A was willing to be responsible to B "for the amount of groceries he may order of you." C selected a stock of groceries which with A's aid were paid for. *Held*, that A incurred no further liability—that the guaranty was not a continuing one. *Knowlton v. Hessey*, 76 Me. 345.

A sent to B an order for goods, and asking credit, to which B replied: "As we have no personal knowledge of you, we would in the outset be compelled to

8. NOTICE OF ACCEPTANCE OF GUARANTY.—Where the guaranty is of a debt which is to be subsequently created, and the guarantor can not know beforehand whether he will be liable or not, or to what extent, notice of acceptance of the guaranty must be given to the guarantor within a reasonable time. This rule applies only where the instrument creating the guaranty is merely an offer or proposal, and an acceptance is necessary to that mutual assent without which there can be no contract.¹ Where, however, there is

require of you security . . . and if you can do so by such men as H, . . . we are perfectly willing to fill your order." Thereupon H wrote to B: "You will now fill said bill . . . and ship by first boat to T. Let me say to you, I indorse A and hope that he may become one of your best customers." Held, that this did not constitute a continuing guaranty, but one extending only to the first bill ordered. *Perryman v. McCall*, 66 Ala. 402.

A guaranty of payment for goods to be sold "from time to time" to an amount not exceeding a specified sum, is continuous until the sums remaining unpaid reach the designated limit, even though the aggregate of purchases far exceeds it. *Crittenden v. Fiske*, 46 Mich. 70.

A guarantor wrote: "Please deliver to A, goods as he may want from time to time, not exceeding \$300, and if not paid for by him within thirty days, I will be responsible for the same." Held not to be a continuing guaranty, but to be exhausted by the first purchase and payment to the amount of \$300. *Sartwell v. Humphrey*, 136 Mass. 337.

The following guaranty was held non-continuing: "Messrs. A, B & Co.—The bearer, Mr. C D, is visiting your city, buying a few goods in your line, and anything you may be able to sell him will be paid promptly as agreed on, which I herewith guarantee. E. F." *Morgan v. Boyer*, 39 Ohio St. 324.

The following writing, "You will send P full line of samples at lowest figures, and I will guaranty payment of goods you may sell him," was held not a continuing guaranty, but only for sale of goods ordered from samples suitable for ensuing spring and summer. *Schwartz v. Hyman*, 107 N. Y. 562.

Other samples of non-continuing guaranties may be found in *Frost v. Weathersbee*, 23 S. C. 354; *Columbus Sewer Pipe Co. v. Ganser*, 58 Mich. 385; *Hayden v. Crane*, 1 Lans. (N. Y.) 181; *Nicholson v. Paget*, 1 C. & M. 48;

Taylor v. Wildin, L. R. 3 Ex. 303; *Chalmers v. Victors*, 16 W. R. 1046; *Allnut v. Ashenden*, 5 M. & G. 392; *Lord Arlington v. Merricke*, 2 Wms. Saund. 813; *Kingston Mut. Ins. Co. v. Clark*, 33 Barb. (N. Y.) 196; *Welsh v. Seymour*, 28 Conn. 387; *Hollman v. Langdon*, 7 Jones (N. Car.) 49; *Bovill Turner*, 2 Chit. 205; *Melville v. Hayden*, 3 B. & A. 593; *Kirby v. Marlborough*, 2 M. & S. 18; *Kay v. Graves*, 6 Bing. 276; *Nicholson v. Paget*, 1 C. & M. 48; *Morrell v. Cowan*, 26 W. R. 90.

1. An agreement in writing between a manufacturing company and its agent for a certain district, by which it agreed to sell him its goods at certain prices, and he agreed to sell the goods and pay it those prices, was signed by the agent. A guaranty of his future performance of his agreement was signed by another person on the same day, and delivered by the guarantor to the agent. The agreement and guaranty were delivered by the agent to an attorney of the company, who two days afterwards wrote under the guaranty his certificate of the sufficiency of the guarantor, and forwarded the agreement and guaranty to the company, which thereupon signed the agreement, but gave no notice to the guarantor of its signature of the agreement or acceptance of the guaranty. It was held by the supreme court of the United States that the contract of guaranty was not complete, and the guarantor was not liable for the price of goods sold by the corporation to the agent and not paid for by him. *Davis Sewing Machine Company v. Richards*, 115 U. S. 524. See, also, *Davis v. Wells*, 104 U. S. 159; *Woodstock Bank v. Downer*, 27 Vt. 539; *Walker v. Forbes*, 25 Ala. 139; *Bell v. Keller*, 13 B. Mon. (Ky.) 381; *Lawton v. Mauer*, 9 Rich. (S. Car.) 335; *Parkman v. Brewster*, 15 Gray (Mass.) 271.

If A sends word to B that A will guarantee B's contracts for a year with C, A is entitled to notice of accept-

an express consideration stated in the instrument as paid by the guarantee to the guarantor, the guaranty is binding on delivery without notice of acceptance.¹

9. NOTICE TO THE GUARANTOR OF DEFAULT.—Whether notice of the default of the principal is necessary to fix the liability of the guarantor is a question which has given rise to numerous conflicting opinions. In general where the liability of the guarantor is collateral and not absolute and is dependent upon the fault of another, notice of such default must be given within a reasonable time.² But where the guaranty absolutely and unconditionally provides that the principal shall pay a given sum at a stated time,

ance. *Newman v. Streator Coal Co.*, 19 Ill. App. 594. See, also, *Duncan v. Heller*, 13 S. Car. 94.

In *Milroy v. Quinn*, 69 Ind. 406, the court held that in case of a collateral guaranty of a debt to be created, of an amount uncertain, variable and unascertainable at the time, the guarantor is not liable without notice of acceptance within a reasonable time, nor without notice of the principal's default. See in general on the subject of notice of acceptance *Thompson v. Glover*, 78 Ky. 193; *Taylor v. Shouse*, 73 Mo. 361; *Platter v. Green*, 26 Kan. 252; *Wells v. Ross*, 77 Ind. 1; *Davis Sewing Machine Co. v. Mills*, 55 Iowa 543; *Singer Manuf. Co. v. Littler*, 56 Iowa 601; *Wilcox v. Draper*, 12 Neb. 138; *Crittenden v. Fiske*, 46 Mich. 70; *Russell v. Clarke*, 7 Cranch (U. S.) 69; *Edmondston v. Drake*, 5 Pet. (U. S.) 624; *Douglass v. Reynolds*, 7 Pet. (U. S.) 113; *Lee v. Dick*, 10 Pet. (U. S.) 482; *Adams v. Jones*, 12 Pet. (U. S.) 207; *Louisville Manuf. Co. v. Welsh*, 10 How. (U. S.) 461; *Weldes v. Savage*, 1 Story (U. S.) 22; *Bay v. Thompson*, 1 Pears. (Pa.) 551; *M'Iver v. Richardson*, 1 M. & S. 557; *Sorby v. Gordon*, 30 L. T. N. S. 528; *Henderson v. Reilly*, 1 McArthur (D. C.) 25; *Wise v. Miller*, 11 West. Rep. 645 (Ohio); *Snyder v. Click*, 112 Ind. 293.

In *Newbury Bank v. Sinclair*, 60 N. H. 100, it was held that under a written guaranty to be responsible for indebtedness incurred before a certain day, notice of acceptance and of default is unnecessary. See, also, *Bright v. McKnight*, 1 Sneed 158; *Yancey v. Brown*, 3 Sneed (Tenn.) 80.

1. In *Davis v. Wells*, 104 U. S. 159, it was held that a guaranty, if expressed to be in consideration of one dollar paid to the guarantor by the guarantee, the receipt of which is therein acknowledged, is not an unaccepted proposal,

but is without notice of acceptance, binding on delivery.

2. In *Oxford Bank v. Haynes*, 8 Pick. (Mass.) 423, the holder of a promissory note neglected to give notice to the guarantor for nine months after its dishonor; the maker was solvent when the note became due, but afterwards became insolvent; it was held, that the guarantor was discharged. The court, *PARKER, C. J.*, said: "It is clearly conformable to the general principles of right and justice that the creditor who knows of the delinquency of his debtor, and withholds information of it from the guarantee by reason of which the debt is actually lost when it might have been saved by either, should not throw the loss upon the guarantee."

In the following guarantee's notice to the guarantor was held to be necessary:

"I guaranty the payment of the within note to A for value received." *Cox v. Brown*, 6 Jones Law (N. C.) 100.

"I have this day sold to A a note on B for \$412 which I guaranty to said A, waiving all exceptions of my not assigning said claim, and holding myself bound for the same for value. *Kannon v. Neely*, 10 Hump. (Tenn.) 288.

In *Lewis v. Bradley*, 2 Ired. (N. C.) 303, it was held in a suit brought on an agreement to make good all sums which could not be collected on certain notes assigned on payment of a debt, as soon as they should be returned by any constable chosen by the assignee as incapable of collection, there could be no recovery without an averment and proof, that notice of the failure of the officer in whose hands they were placed to obtain payment upon them had been given to the defendant. See, also, *Sylvester v. Downing*, 18 Vt. 32.

A and B were joint owners of land. A transferred his interest to B and

no notice of default is necessary before suing the guarantor.¹ If, however, the principal is insolvent when the debt becomes due or default is made, no notice is required, because the guarantor could derive no benefit from the receipt of notice.²

Where the contract is a continuing one and the guarantor becomes liable for an amount varying at different times, he is entitled to notice of the amount of his liability within a reasonable time after the close of the transactions between the principals.³

10. DISCHARGE OF THE GUARANTOR.—As a general rule if the person to whom the guaranty is made does any act which injures

guaranteed that if the title proved defective the grantor of the two would recompense B for the loss of the title. *Held*, that notice of the grantor's default was necessary before bringing suit against A. *Morris v. Wadsworth*, 17 Wend. (N. Y.) 103.

See, also, *Beebe v. Dudley*, 6 Foster (N. H.) 249; *McDougal v. Calef*, 34 N. H. 534; *McCollum v. Cushing*, 22 Ark. 540; *Patterson v. Reed*, 7 W. & S. (Pa.) 144; *Greene v. Dodge*, 2 Ohio 231; *Ward v. Wilson*, 100 Ind. 52; *Milroy v. Quinn*, 69 Ind. 406; *Kline v. Raymond*, 70 Ind. 271; *Gaff v. Sims*, 45 Ind. 262; *McMillan v. Bull's Head Bank*, 32 Ind. 11; *Brackett v. Rich*, 23 Minn. 485; *Mayberry v. Bainton*, 2 Harr. (Del.) 24; *Stanley v. Stanley*, 11 West Rep. 129; *Furst & Bradley Manuf. Co. v. Black*, 111 Ind. 308; *Weiler v. Henarie*, 15 Oregon 28.

1. In *Lent v. Padelford*, 10 Mass. 230 the court held that he who guarantees the acts of another, is bound to see that the latter fulfills the engagement made in his behalf and may be held responsible without any previous notice of the default. Thus, where a written agreement set forth that A assigned to B a judgment bearing a specified rate of interest, and that C guaranteed payment at a certain time, and if not paid at that time guaranteed three per cent. additional interest, it was *held* that B in his complaint need not allege notice to C of the non-payment of the judgment. *Frash v. Polk*, 67 Ind. 55. And where A guaranteed a written agreement by B "to return" a certain sum of money to C at a certain time, it was held that a notice of default was not necessary. *Cordier v. Thompson*, 8 Daly (N. Y.) 172; the pages of a note indorsed it: "For value received we guaranty the payment of the within note at maturity." *Held*, that no notice of default was necessary. *Gage v. Mechanics' National Bank*, 79 Ill. 62;

see, also, *Woodstock Bank v. Downer*, 27 Vt. 539; *Peck v. Frink*, 10 Iowa 193; see, also, *Dearborn v. Sawyer*, 59 N. H. 95; *Newbury Bank v. Sinclair*, 60 N. H. 100; *Claffin v. Reese*, 54 Iowa 544; *Wells v. Davis*, 2 Utah 411; *Mann v. Eckford*, 15 Wend. (N. Y.) 502; *Dougllass v. Howland*, 24 Wend. (N. Y.); *Whitney v. Groot*, 24 Wend. (N. Y.) 82; *Barhydt v. Ellis*, 45 N. Y. 107; *Clay v. Edgerton*, 19 Ohio 549; *Bashford v. Shaw*, 4 Ohio 266; *Allen v. Kightmere*, 20 John. (N. Y.) 365; *Breed v. Hillhouse*, 7 Conn. 533; *Heaton v. Hulbert*, 3 Scam. (Ill.) 489; *Gage v. Lewis*, 68 Ill. 604; *Dickerson v. Derrickson*, 39 Ill. 574; *Gage v. Mechanics' Nat. Bank*, 79 Ill. 62; *Voltz v. Harris*, 40 Ill. 155; *Gammell v. Parramore*, 58 Ga. 54; *Bowman v. Curd*, 2 Bush. (Ky.) 565; *Barker v. Scudder*, 56 Mo. 272; *McDougall v. Calef*, 34 N. H. 534; *Tancey v. Brown*, 3 Sneed. (Tenn.) 89; *Woodstock Bank v. Downer*, 1 Williams (Vt.) 482; *Powers v. Bumcratz*, 12 Ohio St. 273; *Brown v. Curtis*, 2 N. Y. 225; *Matthews v. Christman*, 12 S. & M. (Miss.) 595; *Peck v. Barney*, 13 Vt. 93; *March v. Putney*, 56 N. H. 34; *Bank v. Hammond*, 1 Rich. Law. (S. Car.) 281; *Forest v. Stewart*, 14 Ohio St. 246; *Williams v. Granger*, 4 Day (Conn.) 444; *Mallory v. Lyman*, 3 Pin. (Wis.) 452; *Train v. Jones*, 11 Vt. 444; *Ten Eyck v. Brown*, 3 Pin. (Wis.) 452; *Clark v. Merriam*, 25 Ct. 576; *Levi v. Mendell*, 1 Duv. (Ky.) 77.

2. *Walker v. Forbes*, 25 Ala. 139; *Beebe v. Dudley*, 6 Fost. (N. H.) 249; *Salem Manufacturing Co. v. Brown*, 4 Jones (N. Car.) 429; *Montgomery v. Kellogg*, 43 Miss. 486; *Wildes v. Savage*, 1 Story (U. S.) 22; *Brackett v. Rich*, 23 Minn. 485; *Dearborn v. Sawyer*, 59 N. H. 95.

3. *Davis Sewing Machine Co. v. Mills*, 55 Iowa 543; *Singer Manuf. Co. v. Littler*, 56 Iowa 601.

the guarantor, or is inconsistent with his rights, or if he fails to do an act which his duty enjoins upon him and such omission injures the guarantor, the latter is discharged.

More specifically the guarantor is discharged,

1. By fraud or duress on the part of the guarantee at the inception of the contract.¹
2. By material alteration in the written instrument in which the contract is contained.²
3. By a failure of the consideration on which the contract is founded.³

1. Where there has been any material misrepresentation or concealment made by the principal to the guarantor, which if disclosed, might have prevented the guarantor from entering into the contract, the contract will be invalid and the guarantor discharged. *Graves v. Lebanon National Bank*, 10 Bush. (Ky.) 23; The fraud must be one to which the person benefited by the contract is a party, or at least of which he had notice; *Coleman v. Beam*, 3 Keyes (N. Y.) 94; *Casoni v. Jerome*, 58 N. Y. 315; *McWilliams v. Mason*, 31 N. Y. 294; Thus where the maker of a note, without the knowledge or participation of the payee, by fraudulent representations induced a third person to sign it as surety, the surety will be liable notwithstanding the fraud. *Anderson v. Warne*, 71 Ill. 20; *Burks v. Wonerline*, 6 Bush. (Ky.) 20; Unless fraud is clearly shown, the liability of a guarantor is not affected by the invalidity of the original obligation. *Purdy v. Peters*, 35 Barb. (N. Y.) 239; *Sterns v. Marks*, 35 Barb. (N. Y.) 565.

See, also, *Graves v. Tucker*, 10 Sm. & M. (Miss.) 9; *Franklin Bank v. Cooper*, 36 Me. 179; *Evans v. Kneeland*, 9 Ala. 42; *Upton v. Vail*, 6 John. (N. Y.) 181; *Bean v. Bean*, 12 Mass. 20.

The defence of duress is available to the guarantor who has joined in the contract as well as to the principal therein. *Baylies on Sureties and Guarantors* 218; *Osborn v. Robins*, 36 N. Y. 365; *Putnam v. Schuyler*, 4 Hun. (N. Y.) 166; *Strong v. Grannis*, 26 Barb. (N. Y.) 122; *Thompson v. Lockwood*, 15 John. (N. Y.) 256.

2. In *Davidson v. Cooper*, 11 Rep. 27a, it was averred that after the guaranty was made, and while it was in the hands of the plaintiff, it was altered by affixing two seals near the signatures of the defendants. It was held that the guaranty became void in law, and that the plaintiff could not recover.

In *Wilde v. Armsby*, 6 Cush. (Mass.) 314, it appeared on the face of a written guaranty of C. & Co. that the words "and company" had been interlined in a different handwriting from the rest of the instrument, and in different ink, and it was held that the burden was on the plaintiff to show that the interlineation was made before the instrument was executed.

See, also, *Fulmer v. Seitz*, 68 Pa. St. 237; *Neff v. Hornor*, 63 Pa. St. 327; *State v. Pepper*, 31 Ind. 76; *Hard v. Clouser*, 30 Ind. 210; *Voiles v. Green*, 43 Ind. 374; *Britton v. Dierker*, 46 Mo. 591; *Bank of Com. v. McChord*, 4 Dana (Ky.) 191; *Miller v. Gilleland*, 19 Pa. St. 119; *Kountz v. Hart*, 17 Ind. 329; *Hart v. Clouser*, 30 Ind. 210; *Glover v. Robbins*, 49 Ala. 219; *Locknane v. Emmerson*, 11 Bush. (Ky.) 69; *Dewey v. Reed*, 40 Barb. (N. Y.) 16; *Marsh v. Griffin*, 42 Iowa 403; *Boatt v. Brown*, 13 Ohio St. 364; *Huff v. Cole*, 45 Ind. 300; *Pahlman v. Taylor*, 75 Ill. 629.

3. In *Cooper v. Joel*, 1 De. G. F. & J. 240, it appeared that upon the eve of a sale by the sheriff, a guarantor gave a written guaranty for payment of the judgment debts in consideration of the judgment creditors consenting to postpone the sale under the execution. It turned out that the consent of another person was necessary in order to prevent the sale, and in consequence, the sale took place. The guarantor gave notice that the consideration having failed, the guaranty was at an end, and it was held that he was discharged.

Case v. Boughton, 11 Wend. (N. Y.) 106; *Hall v. Robins*, 4 Lans. (N. Y.) 463; *Solomon v. Kimmel*, 5 Binn. (Pa.) 232; *Swift v. Hawkins*, 1 Dall. (Pa.) 17; *Coyle v. Fowler*, 3 J. J. Marsh (Ky.) 473; *Kimball v. Walker*, 30 Ill. 511; *En parte Agra Bank*, L. R. 9 Eq. 725; *Harney v. Laurie*, 13 Ill. App. 400.

4. By a notice of revocation of the guaranty given by the guarantor to the creditor.¹

5. By the fulfillment of the contract.²

6. By the laches of the creditor.³

7. By the loss, through the fault of the creditor, of securities received by the creditor from the principal debtor.⁴

1. A promise of guaranty is revocable at the pleasure of the guarantor by sufficient notice, unless it be made to cover some specific transaction which is not yet exhausted, or unless it be founded upon a continuing consideration, the benefit of which the guarantor cannot or does not renounce. If the promise be to guarantee the payment of goods sold up to a certain amount, and after a part has been delivered, the guaranty is revoked, it would seem that the revocation is good, unless it be founded upon a consideration which has been paid to the guarantor for the whole amount; or unless the seller has in reliance on the guaranty, not only delivered a part to the buyer, but bound himself by a contract enforceable at law to deliver the residue. 2 Parsons on Contracts 30; Allen v. Kenning, 9 Bing. 618; Offord v. Davies, 12 C. B. N. S. 748.

In *Hassell v. Long*, 2 M. & S. 363, Lord Ellenborough expressed the opinion that under no circumstances could a guaranty under seal be revoked. But in *Burgess v. Eve*, L. R. 13 Eq. 450, this extreme view was modified. See *Meuer v. Graham*, 24 Pa. St. 491; *Hunt v. Roberts*, 45 N. Y. 691; *Pleasanton's Appeal* 75 Pa. St. 344; *Michigan State Bank v. Est. of Leavenworth*, 28 Vt. 209.

Where a guarantor requested revocation and surrender of his continuing guaranty four months before the alleged liability began to accrue, he was held not liable. *Tischler v. Hofheimer*, 4 S. E. Rep. (Va.) 370.

2. The guarantor is discharged if payment be made to the principal, and if it be only paid in part he will be discharged *pro tanto*. *Hunt v. Knox*, 34 Miss. 555; *Obendorf v. Union Bank of Baltimore*, 31 Md. 126; A lawful tender of the amount of the debt by the principal to the creditor will relieve the guarantor. *Brown v. Dysinger*, 1 Rawle (Pa.) 407; *Joslyn v. Eastman*, 46 Vt. 258; *Curriac v. Packard*, 29 Cal. 194; but see *Clark v. Sickler*, 64 N. Y. 231. The guarantor may also be discharged by a set-off existing between the principal and the creditor. *Maguire*

v. Howard, 40 Pa. St. 391; *Lyman v. Newman*, 29 Barb. (N. Y.) 162; *Walker v. McKay*, 3 Met. (Ky.) 530; *Sterling v. Stewart*, 74 Pa. St. 445. If the debt is once paid it cannot be revived against the surety. *Gibson v. Rix*, 32 Vt. 824; *Woodman v. Mooring*, 3 Dev. (N. Car.) 237; *Eastman v. Plumer*, 32 N. H. 238; *Hopkins v. Farwell*, 32 N. H. 425; *Ruble v. Norman*, 7 Bush. (Ky.) 582. Nor can funds which have been appropriated by the principal for the payment of the debt be diverted from that purpose without consent of the guarantor. *Donally v. Wilson*, 5 Leigh (Va.) 329; *Mellendy v. Austin*, 69 Ill. 15; *Hidden v. Bishop*, 5 R. I. 29.

3. In *Watts v. Shuttleworth*, 7 H. & N. 353, it was stipulated in the agreement between the plaintiff and the principal that the plaintiff should insure from risk by fire, the work which the principal debtor was doing for him. The defendant when he became surety for the due performance of the work, was informed of this stipulation. It was held that he was discharged by the plaintiff's omission to insure.

In *Fetrow v. Wiseman*, 40 Ind. 148, it was held that a creditor's neglect to prove his claim against the estate of the principal would not defeat his right of action against the surety.

An unexplained delay of six years in suing a debtor will ordinarily discharge a guarantor. 30 Hun. (N. Y.) 266.

Failure to use diligence to collect of debtor constitutes a good defence to guarantor of collection. *Durand v. Bowen*, 35 N. W. Rep. 644.

Where the principal debtor is a corporation the creditor is not bound, before proceeding against the guarantor, to attempt the enforcement of the individual liability of stockholders. *National Loan & Building Ass'n v. Lichtenwalner*, 100 Pa. St. 100.

Mere indulgence shown to the principal will not discharge the guarantor or surety. *Thompson v. Hall*, 45 Barb. (N. Y.) 212; *Pollock v. Hoag*, 4 E. D. Smith (N. Y.) 473.

4. A guarantor may be discharged if the guarantor negligently loses the bene-

8. By a subsequent material variation on the part of the creditor of the contract with the principal.¹
9. By discharge of principal.²
10. By release of co-surety.³
11. By the giving of time.⁴

fit of collateral security. Thus where the assignee of a note as collateral security was notified of the impending insolvency of the maker and warned that if he did not sue or surrender the note, he must take the risk. He neglected to sue and the debt being lost, the assignee was held responsible for the loss. *Bonta v. Curry*, 3 Bush. (Ky.) 678; see *Shippen's Adm'r v. Clapp*, 36 Pa. St. 89; *Sellers v. Jones*, 22 Pa. St. 423; *Kemmerer v. Wilson*, 31 Pa. St. 110; *Jennison v. Parker*, 7 Mich. 355; *Lochrane v. Solomon*, 38 Ga. 286; *Lamberton v. Windom*, 18 Minn.; *Sherraden v. Parker*, 24 Iowa 28; *City Bank v. Young*, 43 N. H. 457; *Lee v. Baldwin*, 10 Ga. 208; *Beach v. Bates*, 12 Vt. 68. Where the creditor neglects to record mortgage for security of the debt the guarantor may be discharged. *Burr v. Boyer*, 2 Neb. 265; *Capel v. Butler*, 2 Simons & S. 457.

A bank holding a guaranteed note secured by an assignment of patent rights which were being litigated, received an offer for them of more than enough to pay the note, which the guarantor urged it to accept, but the bank refused, honestly believing that more could be realized. Subsequently the rights became valueless by a decision of the supreme court. *Held*, that the guarantor was not discharged. *Kaufman v. Loomis*, 110 Ill. 617.

1. *Grant v. Smith*, 46 N. Y. 93; *Hanson v. Crawley*, 41 Ga. 303; *Hanson v. Crawley*, 41 Ga. 303; *United States v. Corwine*, 1 Bond. (U. S.) 339. In *Watress v. Pierce*, 32 N. H. 560, the court said: "The current of authorities seems to run very decidedly one way, and is to the effect that any variation between the principal and the creditor, of the terms of the original understanding for the performance of which the surety became responsible, will discharge the surety if done without his assent, however the change may affect his interest." See, also, *Curtis v. Hubbard*, 6 Met. (Mass.) 186; *Clogett v. Salmon*, 5 Gill and & J. (Md.) 314; *Ryan v. Shawneetown*, 14 Ill. 20; *Atlantic National Bank v. Douglass*, 51 Ga. 205; *Goldner v. Finn*, (Mich.) 11 West Rep. 177.

2. As a general rule the discharge of the principal releases the guarantor. *Trotter v. Strong*, 63 Ill. 272. But if the creditor at the time he releases the principal reserves his remedies against the surety, the release does not discharge the surety. *Bateson v. Gosling*, L. R. 7 C. P. 9.

An agreement by the lessor to release one of two joint lessees, discharges the sureties on the lease. *Prior v. Kiso*, 81 Mo. 241.

3. When the obligation of the guarantors is joint and several the discharge of one does not necessarily release the others. *Kilngensmith v. Klingensmith*, 31 Pa. St. 460; *Alford v. Baxter*, 36 Vt. 158.

In *Potter v. Gronbeck*, 17 Ill. App. 251, it was held that where one of several guarantors had revoked and withdrawn with the assent of the parties, there was no joint liability of subsequent guarantors who signed without knowledge of such revocation.

4. In order that the guarantor may be discharged by an extension of time, there must be a binding agreement between the creditor and principal, entered into without the knowledge or consent of the surety, founded upon a valuable consideration for an extension of time for a definite period, whereby the creditor's hands are tied so that he cannot proceed to collect from the principal until the expiration of the time granted by him. *Baylies on Sureties and Guarantors*, 241; *Zane v. Kennedy*, 73 Pa. St. 182. *Lawrance v. Johnson*, 64 Ill. 351; *Brown v. Prophit*, 53 Miss. 649; *Rice v. Isham*, 4 Abb. (N. Y.) App. 37; *Remsen v. Graves*, 41 N. Y. 471; *Treat v. Smith*, 54 Me. 112; *Adams v. Way*, 32 Conn. 160; *Wright v. Storrs*, 32 N. Y. 691; *La Farge v. Horter*, 11 Barb. (N. Y.) 159; *Berry v. Pullen*, 69 Me. 101; *Deal v. Cochran*, 66 N. Car. 269; *Freeland v. Complins*, 30 Miss. 424; *Clark Co. v. Covington*, 26 Miss. 470; *Thornton v. Dabney*, 23 Miss. 559; *Wynne v. Colorado Springs Co.*, 3 Colo. 155; *McKenzie v. Ward*, 58 N. Y. 541; *Rucker v. Robinson*, 39 Mo. 154; *McCune v. Belt*, 38 Mo. 281; *State v. Manning*, 55 Mo. 142; *Myers v. First National Bank*,

12. By neglect to sue after request.¹
13. By failure to terminate contract after default.²
14. By change of the duties of the principal.³
15. By act of God.⁴
11. AUTHORITIES ON GUARANTY.⁵

78 Ill. 257; *Wright v. Watt*, 52 Miss. 634; *Briggs v. Morris*, (Mich.) 11 West. Rep. 475.

In *Dixon v. Spencer*, 59 Md. 246, it was held that it was a defence to an action at law against a guarantor, that the creditor granted an extension to the principal debtor, although the contract was under seal, if it showed on its face that defendant was merely a guarantor.

Where an agent, acting with the scope of his apparent authority, extends the time of payment upon a note due to his principal, the principal will be bound and the guarantor released. *Hurd v. Marple*, 10 Ill. App. 418.

A contract for extension of time may be implied by law. Thus, where a debtor has accepted interest in advance, there will be an implied extension of time for the interval covered by such interest. *Jarvis v. Hyatt*, 43 Ind. 163; *Hamilton v. Winterrowd*, 43 Ind. 401; but see *Hayes v. Wells*, 34 Md. 515.

Mere delay of a creditor in enforcing payment will not discharge the guarantor. *Pittsburg, Fort Wayne & Chicago R. Co. v. Shaeffer*, 59 Pa. St. 350; *Price v. Kirkham*, 3 Hurlst. & C. 437.

1. In some States a neglect or refusal to sue after request will discharge the guarantor. This is the rule in *New York*. *Colgrove v. Tallman*, 67 N. Y. 95; *Remsen v. Beekman*, 25 N. Y. 552; but not in *New Jersey*. *Penlard v. Davis*, 1 N. J. 632; Nor in *Illinois*. *Taylor v. Beck*, 13 Ill. 376; nor in *Wisconsin*. *Hames v. Newell*, 42 Wis. 687. In *Iowa* and some of the *western* and *southern States*, the right of a guarantor or surety to compel a creditor to commence an action is regulated by statute.

2. *Charlotte, Columbia & Augusta R. Co. v. Gow*, 59 Ga. 685; *Phillips v. Foxall*, L. R., 7 Q. B. 666.

3. *Phybus v. Gibbs*, 6 El. & Bl. 903; *Gausson v. United States*, 97 U. S. 584; *People v. Pennock*, 60 N. Y. 421.

4. The death of the guarantor is ordinarily a revocation of the guaranty; but a continuing guaranty is not so revoked until notice. *Bradbury v. Mor-*

gan, 1 Hurlst., etc., 249; but see *Harris v. Fawcett*, L. R. 15 Eq. 311. In *Fielden v. Lahens*, 6 Blatch. (U. S.) 524, where the guaranty was on a joint obligation and the guarantor died, it was held that the remedy at law was gone, as respected the legal representatives of the guarantor. See, also, *Getty v. Binsse*, 49 N. Y. 385; *Pickersgill v. Lahens*, 15 Wall. (U. S.) 141.

5. *Brandt on Suretyship and Guaranty*, (1878); *DeColyar on Guarantees and Principal, and Surety*, (N. Y. 1875); (Phila., 1887); *Fell on Guaranty*, Reed on the Statute of Frauds, Philadelphia, 1884; *Baylies on Surety and Guarantors*, New York, 1881; *Putman on Suretyship*; *Burge on Suretyship*; *Theobald on Principal and Surety*; *Browne on the Statute of Frauds*; *Addison, Chitty, Parsons and Story on Contracts*; *Smith's Leading Cases*; a note by O. W. Holmes, Jr., in 3 Kent; *Bouvier's Law Dictionary*, tit. Guaranty.

The following articles are collected in the Index to *Legal Periodicals*: 25 *Law Mag.* 56, 381; 47 *Law Times* 256; *Acceptance of Guaranty*, 27 *Am. Jurist* 336; *Admissibility of Evidence to Explain*, 35 *Leg. Obs.* 203; *Guaranty and Suretyship*, Wm. Archer Cocke, 21 *Cent. L. J.* 6; *Guaranty and Suretyship distinguished*, annotated case, C. W. Reed, 18 *Am. Law Register* (N. S.) 751; *Rights of Principal and Creditor*, 3 *Bench and Bar* 287; *Construction of the Contract of Guaranty*, 2 *Bench and Bar* 1 and 107; *Discharge of the Guarantor*, 3 *Bench and Bar* 121; *Guaranty distinguished from Suretyship*, annotated case, W. W. Wiltbank, 10 *Am. Law Register* (N. S.) 431; *Form and Effect of Guaranty*, 34 *Leg. Obs.* 433; *Law of Guaranty*, 11 *Irish Law Times* 28; *Guaranty of an Account*, 1 *Am. L. J.* (O.) 240; *Guaranty of Promissory Notes*, 15 *L. Rep.* 541, 661; 1 *Am. L. J.* (O.) 146; *Statute of Frauds as Effecting Guaranty*, George Harris, 8 *Co. Ct. Chr.* 76; 16 *Am. L. Reg.* (N. S.) 471; *What is a sufficient Expression of Consideration Under the Statute of Frauds?* annotated case; H. Campbell Black; 22 *Cent. L. J.* 63.

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I. GUARDIAN.—1. Definition.—A guardian, at common law, is one who legally has the care and management of the person or property, or both, of a child during its minority.¹

Guardians are sometimes appointed also over the persons and estates of adults, when they are idiots, lunatics, drunkards, spend-thrifts or otherwise in need of such authority over them, but such appointments are generally the result of statute law.

A ward is any person under guardianship.

II. DIFFERENT KINDS OF.—*a. Natural Guardian.*—At common law, guardians are of three kinds; by nature, by nurture, and in socage. The two former represent the natural right of parents to the custody of their children. In England, guardianship by nature applies only to the heir-apparent and continues during minority; guardianship by nurture applies to the other children and ceases when they reach fourteen years. In the United States, where all children are heirs-apparent, the two kinds are merged in one, guardianship by nature and nurture; or natural guardianship.² Natural guardians have no control of the property, but only of the person of the ward.³ The father, and after his death, the mother, are alone entitled to such guardianship,⁴ though the preference of the father over the

1. Reeve's Dom. Rel. (3rd ed.) 311.

One having control of the property and not of the person of a minor is known in the civil law and in some of the States as a *curator*. 2 Kent. Com. 224; Mo. Rev. Stat. § 2561; Duncan v. Crook, 49 Mo. 116.

2. 2 Kent Com. 221; Reeve's Dom. Rel. 315; Schouler Dom. Rel., § 290.

This guardianship exists in most of the States. Schouler Dom. Rel. (3rd ed.), § 290.

It yields to every other kind which is derived from special appointment either by will or by a court. Schouler Dom. Rel. (3rd ed.), § 285; Macready v. Wilcox, 33 Conn. 321.

3. Kendall v. Miller, 9 Cal. 591; Perry v. Carmichael, 95 Ill. 519; Hyde v. Stone, 7 Wend. (N. Y.) 354; Fonda v. Van Horne, 15 Wend. (N. Y.) 631; Kline v. Beebe, 6 Conn. 494; Porter v. Tudor, 9 Conn. 416; Perkins v. Dyer, 6 Ga. 401; Alston v. Alston, 34 Ala. 15; Nelson v. Goree's Admr., 34 Ala. 565; Haynie v. Hall's Admr., 5 Humph. (Tenn.) 290; Otto v. Schlapkahl, 57 Iowa 226; 1 Bl. Com. 461 & Harg. Notes; 2 Kent Com. 220, 221; King v. Thorp, 5 Mod. 221. See, however, Cain v. Devitt, 8 Iowa 116; Taylor v. Bemiss, 110 U. S. 42.

A minor is not bound by any contract made for him by his parent as natural guardian without formal guardianship having been granted. Jones v. Jones, 46 Iowa 466.

A guardian by nature has no authority to lease the land of an infant. Anderson v. Darby, 1 N. & McC. (S. Car.) 369; Magruder v. Peter, 4 Gill & J. (Md.) 323; Ross v. Cobb, 9 Yerg. (Tenn.) 463.

The father as natural guardian has no right to receive the rents and profits of his child's land. Jackson v. Combs, 7 Cowen (N. Y.) 36.

He cannot receive legacies belonging to his child. Genet v. Tallmadge, 1 Johns. Ch. (N. Y.) 3; Miles v. Boyden, 3 Pick. (Mass.) 213; Miles v. Kaigler, 10 Yerg. (Tenn.) 10.

A compromise made by a natural guardian in behalf of his ward has no effect, and cannot change the rights of the minor. Houston, etc., R. R. Co. v. Bradley, 45 Tex. 171.

Yet adverse possession of a chattel by the natural guardian claiming to hold it for the ward, will operate to give the infant title, as a similar possession by a regular guardian would do. Williams v. Walton, 8 Yerg. (Tenn.) 387.

4. Co. Litt. 88b; 1 Bl. Com. 461; 2 Kent. Com. 220; Jarrett v. State, 5 Gill & J. (Md.) 27; Eldridge v. Lippincott, Cox v. (N. J.) 397; Fields v. Law, 2 Root (Conn.) 320; Ramsey v. Ramsey, 20 Wis. 507; Bowles v. Dixon, 92 Ark. 72; Lefever v. Lefever, 6 Md. 472; Rust v. Vanvacter, 9 W. Va. 600.

If a father by will appoints a guardian for his children other than the

mother is not recognized in case of illegitimate children.¹

b. Socage Guardian.—Guardianship in socage pertains to both the ward's person and estate and arises whenever an infant under fourteen years acquires title by descent to real property.² It belongs to such next of kin as cannot possibly inherit the property³ and may cease when the ward reaches fourteen years, if he elects to appoint another as his guardian.⁴ The socage guardian acquires to a limited extent a legal interest in the property of his ward.⁵ This nearly obsolete kind of guardianship has existed in this country only for a time in New York.

mother, the latter, if she is a competent person, is entitled to their custody as against the testamentary guardian. *Lord v. Hough*, 37 Cal. 657; *contra*, *Re. VanHouten*, 2 Green. Ch. (N. J.) 211.

Though a father may appoint a testamentary guardian, he cannot by contract with a third person bargain away the rights of the mother to the child after his death. *Moore v. Christian*, 56 Miss. 408, 412.

A widowed mother is entitled to the services of her minor child, if he has no other guardian, in the same manner that a father, if alive, would be. *Hammond v. Corbett*, 50 N. H. 501.

When a female infant marries, the husband succeeds to the guardianship of her person. *Kettletas v. Gardner*, 1 Paige (N. Y.) 488.

1. The mother of an illegitimate child is the proper person to have its care and custody, and not the putative father. *Wright v. Wright*, 2 Mass. 109; *Hudson v. Hills*, 8 N. H. 417; *People v. Kling*, 6 Barb. (N. Y.) 366; *People v. Mitchell*, 44 Barb. (N. Y.) 245; *Dalton v. State*, 6 Blackf. (Ind.) 357; *Commonwealth v. Fee*, 6 S. & R. (Pa.) 255; *Nine v. Starr*, 8 Oregon 49.

Though the common law regarded such children as without a natural guardian. *MacPhers. Inf.* 67; *Schouler Dom. Rel.* (3rd ed.), § 278.

Therefore the county court has no authority to apprentice an illegitimate child without the consent of the mother, unless she is unable to support it or there is some other legal reason to deprive her of its custody. *Alfred v. McKay*, 36 Ga. 444.

In Texas the putative father may be guardian on the death of the mother. *Barela v. Roberts*, 34 Tex. 554.

The father of a bastard is entitled to custody as against all but the mother. He is therefore a proper person to petition for appointment of guardian. *Potes' Appeal*, 106 Pa. St. 574.

2. See upon the subject generally 1 Bl. Com. 461, & Harg. notes; 2 Kent Com. 220 *et seq.*; *Macphers. Inf.* 19 *et seq.*; Co. Litt. 87, 89.

The socage guardian has no control over equitable or personal estate of the ward or real estate not obtained by inheritance. His duty is to receive the rents and profits of the ward's real estate coming into his hands, to preserve it and to bring up the ward properly. *Schouler Dom. Rel.* (3rd ed.), § 286.

A guardian in socage has custody of an infant's lands as well as his person. *Quadrang v. Downs*, 2 Mod. 176.

3. This guardianship has existed in the United States only in a form modified from the English, as the fact that half-bloods inherit here as well as whole bloods would make it difficult to find a next of kin, who might not inherit the ward's estate. 2 Kent Com. 222, 223; *Reeve Dom. Rel.* (3rd ed.) 315, 316. In New York by statute the father or mother might be such guardian. *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631.

A father who holds lands for life with remainder to his children cannot be their guardian in socage. *Graham v. Houghtalin*, 1 Vroom. (N. J.) 552.

4. His authority lasts till the infant reaches fourteen years but may continue till his majority if no other guardian is appointed. *Jackson v. Combs*, 7 Cowen (N. Y.) 36; *Byrne v. Van Hoesen*, 5 Johns. (N. Y.) 66; *Snook v. Sutton*, 5 Halst. (N. J.) 133.

5. A guardian in socage, and not his ward, is liable for injuries or damages incurred by others by reason of his failure to keep the real estate of his ward in repair. *Rex v. Rutton*, 3 Ad. & El. 597, and 5 Nev. & M. 353.

A guardian in socage has such an interest in the land of his ward as will enable him by actual residence upon it to gain a settlement under English law. *Rex v. Oakley*, 10 East. 491.

A widow who enters into possession

c. Testamentary Guardians.—Testamentary guardianship exists by virtue of a statute, 12 Car II. c. 24, which has been adopted in substance in most States of the United States,¹ and which gives the father² power to appoint by deed or will³ a guardian for his own child,⁴ born or unborn, such guardian having custody of the child

of land left by her husband is supposed to enter as guardian in socage for the minor heirs at law and may grant to third persons permission to occupy and use. *DeWalt v. Jackson*, 7 Johns. (N. Y.) 157; *Byrne v. VanHoesen*, 5 Johns. (N. Y.) 66.

She has authority to employ counsel to bring ejectment, and to contract with him for his compensation. *Re Hynes*, 105 N. Y. 560.

A guardian in socage may receive the rents and profits of the land for the benefit of the heirs and has such an interest as will enable him to maintain trespass and ejectment. *Byrne v. VanHoesen*, 5 Johns. (N. Y.) 66; *Holmes v. Seeley*, 17 Wend. (N. Y.) 75; *Beecher v. Crouse*, 19 Wend. (N. Y.) 306; *Torry v. Black*, 58 N. Y. 185.

A guardian in socage may lease lands of his ward for as long a term as he continues guardian or for any number of years within the minority of the ward. The lease is, however, subject to being defeated by the appointment of a statutory guardian and his election to avoid it. *Emerson v. Spicer*, 46 N. Y. 594.

1. 1 Bl. Com. 462; *Schouler Dom. Rel.* (3d ed.), § 287, 290; *Copp v. Copp*, 20 N. H. 284; *Thomas v. Williams*, 9 Fla. 289.

2. By the statute of Charles II the father, although a minor, could appoint, but now in England, and generally in this country by statute only persons capable of making a will can appoint. *Schouler Dom. Rel.* (3d ed.), § 290. A mother cannot appoint nor a putative father, nor a person *in loco parentis*. 1 Bl. Com. 462; *Vaugh. 180*; *In re Hunt*, 2 Con. & L. 373; *ex parte Edwards*, 3 Atk. 519; *Matter of Pierce*, 12 How. Pr. (N. Y.) 532; *ex parte Bell*, 2 Tenn. Ch. 327; *Re Turner*, 4 C. E. Green (N. J.) 433, 536.

In New York, however, the consent of the mother is necessary to appointment by the father. *Sackett's Est.*, 1 Tuck. (N. Y.) 84.

In Illinois, Texas and California, the mother, if not remarried, may appoint in case the deceased father has failed to do so. Ill. Rev. Stat. ch. 64, § 5; *McKinney v. Noble*, 37 Tex. 731; *Lord*

v. Hough, 37 Cal. 657; see *Bush v. Bush*, 2 Duv. (Ky.) 269.

Where divorce has been granted and a mother given custody of the child, she can appoint under the statutes in the lifetime of the father. *Wilkinson v. Duning*, 80 Ill. 342; *contra*, *McKinney v. Noble*, 37 Tex. 731.

A decree granting divorce and giving custody of the child to the father has no effect in taking away the right of the father to appoint a testamentary guardian, but this right could be exercised only in subordination to the power of the courts to supervise and direct who should have the custody of such children. *Hill v. Hill*, 59 Md. 450.

3. If the appointment is made by deed, the instrument must be of a testamentary character. *Ex parte Earl of Ilchester*, 7 Ver. 367; *Earl of Shaftesbury v. Lady Hannan*, Finch 323; see, however, *Lecone v. Sheires*, 1 Vern. 442.

But statutes in many States omit the word "deed." In Massachusetts the father cannot appoint a guardian for his child except by a will duly executed and valid in law. *Wardwell v. Wardwell*, 9 Allen (Mass.) 518.

4. A testator cannot appoint a testamentary guardian except to his own children. 2 Kent Com. 225; *Brigham v. Wheeler*, 8 Met. (Mass.) 127; *Camp v. Pittman*, 90 N. Car. 615.

And a grandfather has no right to appoint a guardian to his grandchild. *Fullerton v. Jackson*, 5 Johns. Ch. (N. Y.) 278; *Hoyt v. Hilton*, 2 Edw. Ch. (N. Y.) 202; *Vanartsdalen v. Vanartsdalen*, 14 Pa. St. 384; *Williamson v. Jordon*, 1 Busb. Eq. (N. Car.) 46.

After a devise of land to two children, the testator expresses a wish that their father shall manage the property for them and act as their guardian until they become of age: *Held*, that the direction for him to act as guardian does not constitute him a testamentary guardian, but the father has the right to take possession of and manage the estate, as trustee, without being required to qualify as guardian and give bond as prescribed by statute. *Camp v. Pittman*, 90 N. Car. 615; see *Brigham v. Wheeler*, 8 Met. (Mass.) 127.

and control of all his estate¹ during his minority unless appointed for a shorter time.²

A testamentary guardian need not be expressly designated as such in the instrument appointing him, but in order to constitute him such by implication, powers essential to the office must be conferred.³

It is a personal trust, not assignable,⁴ and deriving its authority directly from the will. Letters of guardianship from a court generally give the guardian no additional power, but are void.⁵

The father could probably appoint for an adopted child. *Schouler Dom. Rel.* (3d ed.), § 290. But see *Re Upton*, 16 La. Ann. 175. He cannot appoint for an illegitimate child. *Sleeman v. Wilson*, 13 L. R. Eq. 36.

1. The Florida statute gives the testamentary guardian control over the person only of the ward; control over his estate can be obtained only by appointment of the court. *Thomas v. Williams*, 9 Fla. 289.

2. Where a testator appoints his widow a guardian so long as she remains unmarried, an appointment by the court is necessary on her remarriage. *Corrigan v. Kiernan*, 1 Bradf. (N. Y.) 208; *Holmes v. Field*, 12 Ill. 424.

3. *Miller v. Harris*, 14 Sim. 540; *Mendes v. Mendes*, 1 Ves. 89; *Johnston v. Beattie*, 10 Cl. & Fin. 42; *Martin v. Tully*, 72 Ala. 23.

A testator directed his sons to maintain their infant brother in the same manner as fathers or guardians, the infant to render them due subjection as a child by labor and obedience, *held* that they were thus appointed testamentary guardians. *Balch v. Smith*, 12 N. H. 437.

A testator directed his wife to have the care and custody of his children till they became of age or till she remarried, and directed her to educate them under the directions of the executors: *held*, that she was appointed guardian. *Corrigan v. Kiernan*, 1 Bradf. (N. Y.) 208; *Macknet v. Macknet*, 9 C. E. Green (N. J.) 447; see, however, *Massingale v. Tate*, 4 Hayw. (Tenn.) 30.

A bequest by a testator for the benefit of his infant son, the proceeds or dividends to be expended for his education under the direction of his executors, does not make the executors testamentary guardians. *Kevan v. Waller*, Leigh (Va.) 414; *Gainey v. Spann*, 2 Brock. (U. S.) 81; *Peyton v. Smith*, 2 Dev. & B. Eq. (N. Car.) 325.

An instrument executed by a father of two minor children, reciting that he had "found kind friends to take charge of and raise" his children, and requesting the managers of an asylum, in whose custody the children then were, to place them "in custody of" a party therein named, shows that it was not the father's intention for such party to have the care, protection and nurture of such children; and such instrument cannot, therefore, be construed as a testamentary appointment of such party as guardian of said children. *Desribes v. Willmer*, 69 Ala. 25.

A testator provided that the executors should hold his estate in trust until the youngest child should become of age, and further declared: "I will that my executors pay out of my estate annually a sum sufficient to clothe, educate and support my minor children until they become of lawful age." *Held*, that the executors were made trustees of the estate, and, in effect, testamentary guardians of the minors, and that the court had no rightful power or authority to require the executors to pay over any moneys to the statutory guardian of such minors for their support and education. *Capps v. Hickman*, 97 Ill. 429.

4. *Goods of Parnell*, L. R. 2 P. & D. 379; *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 121; *Matter of Reynolds*, 11 Hun. (N. Y.) 41; *Balch v. Smith*, 12 N. H. 437.

5. *Robinson v. Zollinger*, 9 Watts (Pa.) 169; *Morris v. Harris*, 15 Cal. 226; *Holmes v. Field*, 12 Ill. 424; *Copp v. Copp*, 20 N. H. 284.

But in some States statutes require such guardian to obtain letters from the court and otherwise to qualify. *In re Taylor*, 3 Redf. (N. Y.), 259; *Stone v. Dorsett*, 18 Tex. 700; *McAlister v. Olmstead*, 1 Humph. (Tenn.) 210; *Wadsworth v. Connell*, 104 Ill. 369; *Aldrich v. Willis*, 55 Cal. 81.

A testamentary guardian will be

d. Judicial Guardians.—(1) *of Infants.*—By far the most numerous class of guardians both in England and the United States are those appointed by the court. They derive authority from the court of chancery in England and from chancery, probate, orphans', ordinary's or surrogate's courts in the United States.¹ Their duties in the absence of statute are regulated by the general law of guardian and ward.

(2) *Of Lunatics, Spendthrifts, Etc.*—The court of chancery in England claims power of appointment not only for infants but for insane persons, and the courts of this country possess the same jurisdiction, usually, however, by virtue of an express statute. Under statute, also, courts appoint special guardians for spendthrifts, drunkards, infirm persons and the like.²

(3) *Guardians ad litem.*—Finally the court will appoint a guardian *ad litem* for an infant or other incompetent, to represent him in legal proceedings where he is a party defendant.³

III. APPOINTMENT OF.—*a. Who May Appoint, Right of Nomination.*—Guardians are appointed by the parents of the infant (testamentary guardians) or by a court of competent jurisdiction. Guardianship by the sole appointment of the infant, permitted to wards in socage over fourteen years, is now practically obsolete, but

compelled to enter security whenever circumstances justify the interposition of the court. Stanton's Est., 13 Phila. (Pa.) 213.

1. Schouler Dom. Rel. (3d. ed.), §§ 287, 291.

Guardians are appointed in New England and most of the western States by the probate court; in New York by the surrogate; in New Jersey by the orphans' court, or the ordinary; in Pennsylvania and Maryland and most southern States by the orphans' court; in Ohio by the court of common pleas with chancery powers; in California by the district court possessing similar powers; in Virginia, North and South Carolina the chancery and county courts exercise a concurrent jurisdiction. The supreme courts in many States possess full chancery powers over the estates of infants.

In Tennessee the county courts possess a statutory jurisdiction of infants and their estates, while the court of chancery exercises a common law jurisdiction over the same; but the general statutory guardian, who is required to give a personal bond with good security, is always to be preferred, and whenever appointed is entitled to demand and receive the property of the ward from the appointee of the chancery court. Lake v. McDavitt, 13 Lea (Tenn.) 26.

The circuit courts of Wisconsin have jurisdiction to appoint and remove guardians of infants, the power of county courts in this respect is concurrent. Glasscott v. Warner, 20 Wis. 654.

Chancery courts in many States retain a general jurisdiction to remove or otherwise control guardians, whether appointed by themselves or by a probate or other court. Wilcox v. Wilcox, 14 N. Y. 575; Cowles v. Cowles, 3 Gilm. (Ill.) 435; Durrett v. Davis, 24 Gratt. (Va.) 302; Bowles v. Dixon, 32 Ark. 92; Lord v. Hough, 37 Cal. 657; Disbrow v. Henshaw, 8 Cow. (N. Y.) 349.

Letters of guardianship can be granted only at a regular term of the court of ordinary. Where the proceedings showed on their face that the letters were granted by the ordinary at chambers, the appointment was made without jurisdiction, and was void. Bell v. Love, 72 Ga. 125.

In Indiana, there being no statute authorizing the court of common pleas to appoint a guardian for unknown heirs, it cannot do so without such authority, as it possesses no chancery powers upon the subject. State v. McLaughlin, 77 Ind. 335.

2. See INSANE PERSONS, SPENDTHRIFTS, ETC.

3. See Part V.

infants over fourteen years still have the right of nominating a guardian in court.¹

b. Who May Be Appointed, Etc.—Guardians are appointed by the court on petition and after a hearing of which all parties interested should have notice.² The father, if alive, is generally entitled to the guardianship;³

1. In England the practice is for the court to approve such nomination without the customary reference to a master; *Ex parte Salter*, 3 Bro. 499; *Ex parte Edwards*, 3 Atk. 519; *Ex parte Bond*, 11 Jur. 114; *Macphers' Inf.* 78, 109. See, however, *Ex parte Watkins*, 2 Ves 470; *Curtis v. Rippon*, 4 Madd. 462; *Coham v. Coham*, 13 Sim. 639.

The court has no discretion, but must accept the choice of the minor if it is a proper one, even though a guardian already appointed by the court is itself superseded. *Adam's Appeal*, 38 Conn. 304; *Arthur's Appeal*, 1 Grant (Pa.) 55; *Montgomery v. Smith*, 3 Dana (Ky.) 568, 599; *Sessions v. Kell*, 30 Miss. 458; *Kelly v. Smith*, 15 Ala. 687; *Estate of Lewry*, 12 Phila. (Pa.) 120; *Pitts v. Cherry*, 14 Ga. 594; *Bryce v. Wynn*, 50 Ga. 332; *Lunt v. Aubens*, 39 Me. 392; *Coltman v. Hall*, 31 Me. 196.

But it is held *contra* in some States that a minor on reaching fourteen years cannot arbitrarily nominate a guardian to succeed one previously appointed by the court. *Ham v. Ham*, 15 Gratt. (Va.) 74; *Dibble v. Dibble*, 8 Ind. 307; *Manro v. Ritchie*, 3 Cranch (C. C.) 147; *Gray's Appeal*, 96 Pa. St. 243.

But a minor will not be permitted to change his guardian after reaching fourteen years when such change would probably be to his prejudice. *Estate of Berryman*, 17 Phila. (Pa.) 463.

A testamentary or chancery guardian cannot be superseded by the infant's nomination. *Matter of Nicholl*, 1 John. Ch. (N. Y.) 25; *Matter of Dyer*, 5 Paige (N. Y.) 534; *Matter of Reynolds*, 11 Hun. (N. Y.) 41; *Sessions v. Kell* 30 Miss. 458.

It is not obligatory upon the ordinary to supersede the mother as natural guardian of her daughter and to appoint as guardian the person elected by the latter. *Beard v. Dean*, 64 Ga. 258.

Having once nominated the ward is bound by the order of the court and cannot nominate again at pleasure. *Lee's Appeal*, 27 Pa. St. 229.

2. *Redman v. Chance*, 32 Md. 42; *In re Winkleman*, 9 Nev. 303; *Seavers v. Gerke*, 3 Sawyer (U. S.) 353.

Failure to notify parties in interest is good ground for setting aside an appointment. *Underhill v. Dennis*, 9 Paige (N. Y.) 202.

The appointment of a maternal grandmother will be revoked when made without notice to a paternal grandfather. *Matter of Feeley*, 4 Redf. (N. Y.) 306.

And where the statute requires notice to be given only to those whom the surrogate may designate, if he makes an appointment without ordering any notice to interested parties, the appointment will be set aside. *White v. Pomerooy*, 7 Barb. (N. Y.) 640.

But although an order of the orphans' court, granting letters of guardianship of an infant under fourteen, ought to have been set aside because no notice of the appointment had been given to the ward's mother and only surviving parent, yet if the application is afterwards fully heard in the presence of all the parties interested, such order will not be reversed. *Luppie v. Winans*, 37 N. J. Eq. 245.

Though the right of one, who is not otherwise disqualified, to letters of guardianship, is prior to that of the person holding letters already given, still, where such an one requests a person to receive the appointment, and consent to the same, he cannot be heard to ask the removal of such guardian in order to be appointed in his stead. *Kahn v. Israelson*, 62 Tex. 221.

3. In England a guardian other than the father cannot be appointed during his lifetime except in very peculiar circumstances and then rather as curator than as guardian. *Barry v. Barry*, 1 Moll. 210; *Fynn's Case*, 12 Jur. 713; *Ball v. Ball*, 2 Sim. 35; cf. *Spence's Case*, 2 Phillips 247.

In the United States the father is not usually bound by proceedings for guardianship of his child to which he is not a party. *Bowles v. Dixon*, 32 Ark. 92; *Tong v. Marvin*, 26 Mich. 35; *Senseman's Appeal*, 21 Pa. St. 331; see *Watson v. Warnock*, 31 Ga. 716.

But in some States the statutes permit the appointment, in the lifetime of

after his death, the mother,¹ and after her, the next of kin.²

If the mother is a *feme covert*, this fact constitutes no objection to her appointment in most of the States.³

But the interest and welfare of the child should be the leading consideration for the court, and may prevent the selection of even the parents themselves.⁴

the father, of guardians whose powers being limited to the ward's estate, do not conflict with the parental right of custody. *Mass. Gen. St. C.* 109, § 4; *Matthews v. Wade*, 2 W. Va. 464; *Waldron v. Woodman*, 58 N. H. 15; *Re Heather*, 50 Mich. 261.

In other States the probate court can only grant guardianship to fatherless children. *Hall v. Lay*, 2 Ala. 529; *Stewart v. Morrison*, 38 Miss. 417; *Poston v. Young*, 7 J. J. Marsh. (Ky.) 501; (unless the ward has property in the State. *Burnett v. Burnett*, 12 B. Mon. (Ky.) 324.)

By statute in Michigan, only the parents alone have the right to demand guardianship of their children. *Taff v. Hosmer*, 14 Mich. 249.

1. *Eldridge v. Lippincott, Cox*. (N. J.) 397; *Albert v. Perry*, 1 McCart. (N. J.) 540; *Read v. Drake*, 1 Green Ch. (N. J.) 78; *Allen v. Peete*, 25 Miss. 29; *People v. Wilcox*, 22 Barb. (N. Y.) 178; *Good v. Good*, 52 Tex. 1; *Leavel v. Bettis*, 3 Bush (Ky.) 74; *Moorehouse v. Cooke, Hopk. Ch.* (N. Y.) 226.

The mother, on death of the father, is not bound by proceedings for the guardianship of her child to which she does not consent, and can have such proceedings revoked. *Ramsay v. Ramsay*, 20 Wis. 507.

Where a mother was appointed guardian of her child, but failed to give the bond within the time limited by the court, and the court, without notice, appointed a stranger in her stead: *Held*, that the appointment of the latter was not warranted. *Weldon v. Keen*, 37 N. J. Eq. 251.

Where the mother has made a written agreement to surrender the custody and control of her child to a third person, the court will still, with her consent, appoint a guardian for the child notwithstanding the objection of the third person. *Gloucester v. Page*, 105 Mass. 231; *Cook v. Bybee*, 24 Tex. 278.

Where a widow being entitled to the guardianship, marries again and her husband takes out letters as guardian and afterward resigns, the next of kin of children under fourteen years will be entitled to the guardianship, the

resignation of the husband being regarded as a relinquishment of the right on the part of the wife. *Spaun v. Collins*, 10 Sm. & M. (Miss.) 624.

In England the mother's right is not so highly regarded as in the United States, *Cooke's Case*, 6 Eng. L. & Eq. 47, but the court will not take the custody of children residing with her away from the mother by appointing a guardian until she has indicated her wishes. *Lockwood v. Fenton*, 17 Eng. L. & Eq. 90; *In re Thomas*, 21 Eng. L. & Eq. 524.

2. The next of kin, if otherwise suitable for the office, should receive the appointment in preference to a stranger and the latter, if appointed, may be removed on petition of such next of kin. *Johnson v. Kelley*, 44 Ga. 485; *Allen v. Peete*, 25 Miss. 290; *Moorehouse v. Cooke, Hopk. Ch.* (N. Y.) 226; *Sullivan's Case*, 1 Moll. 226; *Lady Teynham v. Lennard* cited 2 Atk. 315.

3. *Farrar v. Clark*, 20 Miss. 195; *Beard v. Dean*, 64 Ga. 258.

The bond of a married woman with sureties as guardian will be accepted and held valid although she is by law personally incompetent to execute it. *Jarrett v. State*, 5 Gill & J (Md.) 27; *Palmer v. Oakley*, 2 Doug. (Mich.) 433.

In New York the appointment of a married woman has been held to be against the policy of the law. *Holly v. Chamberlain*, 1 Redf. (N. Y.) 333, but a recent statute empowers her to act as such. *Matter of Hermance*, 2 Dem. (N. Y.) 1.

A married woman in England may be co-guardian with a man but her sole appointment is improper. *In re Kaye*, L. R. 1 Ch. 387; and her marriage is good ground for appointment of another guardian. *Anon.* 8 Sim. 346; *Gornall's Case*, 8 Beav. 347.

A married woman will not be appointed unless her husband is also a suitable person to act as guardian, it being presumed that she will be under his influence. *En parte Maxwell*, 19 Ind. 88; *Kettletas v. Gardner*, 1 Paige (N. Y.) 488.

4. *Badenhoof v. Johnson*, 11 Nev. 87; *Janes v. Cleghorn*, 63 Ga. 335; *Comp-*

The expressed wishes of the parents are, however, often controlling, especially when they are in the nature of dying requests.¹

It is not for the interest of an infant that a non-resident guardian be appointed, since he cannot be made answerable to the court appointing him.²

ton v. Compton, 2 Gill (Md.) 241; Cozine v. Horn, 1 Bradf. (N. Y.) 143; Holley v. Chamberlain, 1 Redf. (N. Y.) 333; Luppie v. Winans, 37 N. J. Eq. 245; Griffin v. Sarsfield, 2 Dem. (N. Y.) 4; Smith v. Smith, 2 Dem. (N. Y.) 43; Hine v. Nixon, 6 Port. (Ala.) 77.

When a father by neglect or abuse shows himself devoid of paternal affection a court of chancery may remove his children from his control and place them in the custody of a proper person to act as guardian. Cowls v. Cowls, 8 Ill. 435.

Where the mother's manner of life would be likely to exercise an unfavorable influence upon the child, she will not be appointed. Albert v. Perry, 1 McCart. (N. J.) 540; Burmester v. Orth, 5 Redf. (N. Y.) 259; Succession of Le Blanc, 37 La. Ann. 546.

Where it appeared that a father neglected to provide medical treatment for his wife and three children, all of whom died: *Held*, that the court properly appointed a guardian for the two remaining minor children. Heineman's Appeal, 96 Pa. St. 112.

Generally if it appears that the father is unfit to perform the duties of a natural guardian he will not be appointed by the court. Page v. Hodgdon, 63 N. H. 53.

The statutes in Missouri provide that one having the same religious faith as the parents or as the surviving parent should be preferred as guardian. Voultaire v. Voultaire, 45 Mo. 602; *In re* Doyle, 16 Mo. App. 159. For similar English rule see Macphers. Inf. 113; Lady Teynham v. Lennard, *cited* 2 Atk. 315.

The fact that the infant inherited his property through one line of the family is no reason against the appointment of relatives in the other line. Underhill v. Dennis, 9 Paige (N. Y.) 202; Albert v. Perry, 1 McCart. (N. J.) 540.

If the appointment of a certain person would subject the ward's estate to unusual expense, that fact should weigh against him. Bennett v. Byrne, 2 Barb. Ch. (N. Y.) 216.

1. The requests of the parent of the infant on his death-bed as to the guard-

ianship of the person and property of the child will influence the court, and, other things being equal, determine its appointment. Watson v. Warnock, 31 Ga. 716; Bennett v. Byrne, 2 Barb. Ch. (N. Y.) 216; Cozine v. Horn, 1 Bradf. (N. Y.) 143; Underhill v. Dennis, 9 Paige (N. Y.) 202; *In re* Turner, 4 C. E. Green (N. J.) 433; Badenhoof v. Johnson, 11 Nev. 87; Knott v. Cottee, 2 Phillips 192; Kaye's Case, L. R. 1 Ch. 387; Matter of Marcellin, 31 N. Y. Supr. 207 and 4 Redf. (N. Y.) 299; Smith v. Smith, 2 Dem. (N. Y.) 43.

The court should take into account the wishes of a deceased mother, indicated in an attempted testamentary appointment, though the latter be void. Griffin v. Sarsfield, 2 Dem. (N. Y.) 4; Hall v. Storer, 1 Y. & C. 556.

A child was left for a number of years with its grandparents, according to a promise made by the father at the death-bed of the mother; *held*, that the grandfather should have the guardianship rather than an uncle whom the father had designated during his last illness. Foster v. Mott, 3 Bradf. (N. Y.) 409; see, also, Albert v. Perry, 1 McCart. (N. J.) 540.

If a father agreed for another to have the custody of his infant child for an indefinite period, and thereupon the latter took and cared for it during the lifetime of the father and afterwards, such person, if a suitable and proper person to have the custody of the child, would be entitled thereto until it was fourteen years of age, in preference to its next of kin. Cleghorn v. Janes, 68 Ga. 87.

2. Logan v. Fairlee, Jacobs 193; Stephens v. James, 1 M. & K. 627; Leethem v. Hall, 7 Sim. 141; Finney v. State, 9 Mo. 227. For exceptions to this rule in special cases, see Daniel v. Newton, 8 Beav. 485; *In re* Thomas, 21 Eng. L. & Eq. 524.

Statutes in Missouri, New York and elsewhere forbid the appointment of non-residents, *In re* Taylor, 3 Redf. (N. Y.) 259, but there is no such prohibition in Maine, Berry v. Johnson, 53 Me. 401.

And the executor or administrator of an estate in which an infant is interested is not a suitable appointee.¹

A firm cannot be guardian,² nor a corporation, except by express statute.³

The court, however, has liberal discretion and its appointment will not be disturbed on appeal unless strong reasons showing abuse of authority are adduced.⁴

c. Jurisdiction.—The residence of the infant rather than the situs of his property determines what court has jurisdiction to make the appointment.⁵ But if the infant has no residence in the State the court of the county where he holds property is generally authorized to appoint a guardian to care for such property.⁶

d. Effect of Appointment.—Letters of guardianship obtained in the wrong jurisdiction are void and may be impeached in any

The removal of the guardian from the State will be sufficient reason for superseding him by another. *Speight v. Knight*, 11 Ala. 461.

The non-residence of a guardian renders his appointment voidable, not void; it cannot be set up to avoid his liability or that of his sureties. *Martin v. Tully*, 72 Ala. 23.

1. *Crutchfield's Case*, 3 Yerg. (Tenn.) 336; *Isaacs v. Taylor*, 3 Dana (Ky.) 600; *Massingale v. Tate*, 4 Hayw. (Tenn.) 30; *Griffin v. Sarsfield*, 2 Dem. (N. Y.) 4.

In some States such appointment is forbidden by statute. *Scobey v. Gano*, 35 Ohio St. 550; *Sawyer v. Knowles*, 33 Me. 208; *Dull's Appeal*, 108 Pa. St. 604; *Senseman's Appeal*, 21 Pa. St. 331.

But one already a trustee for the infant, might well be appointed guardian. *Bennett v. Byrne*, 2 Barb. Ch. (N. Y.) 216.

2. *Macphers Inf.* 109; *De Mazar v. Pybus*, 4 Ves. 644.

3. *Rice's Case*, 42 Mich. 528; *Re Cordova*, 4 Redf. (N. Y.) 66; *Ledwith v. Ledwith*, 1 Dem. (N. Y.) 154.

4. *Kaye's Case*, L. R. 1 Ch. 387; *Nelson v. Green*, 22 Ark. 367; *Battle v. Vick*, 4 Dev. (N. Car.) 294; *White v. Pomeroy*, 7 Barb. (N. Y.) 640; *State v. Houston*, 32 La. Ann. 1305; *Weeks' Appeal*, 39 Conn. 363.

A foreign court will be presumed to have acted correctly in appointing a guardian. *Taylor v. Kilgore*, 33 Ala. 214.

5. *Ware v. Coleman*, 6 J. J. Marsh (Ky.) 198; *Montgomery v. Smith*, 3 Dana (Ky.) 368, 399; *Dorman v. Ogbourne*, 16 Ala. 759; *Munson v. Munson*, 9 Tex. 109; *Lacy v. Williams*, 27 Mo. 280; *Lewis v. Costello*, 17 Mo.

App. 593; *Herring v. Goodson*, 43 Miss. 392; *Duke v. State*, 57 Miss. 229; *Maxsom v. Sawyer*, 12 Ohio St. 195; *Darden v. Wyatt*, 15 Ga. 414. The law on this subject is regulated by statute in nearly all the States. See preceding cases.

The residence of the infant at the time the guardian is to be appointed is meant. Hence the county court that appointed the first guardian, may not appoint his successor. *Harding v. Weld*, 128 Mass. 587; *Brown v. Lynch*, 2 Bradf. (N. Y.) 214; *Moses v. Faber*, 81 Ala. 445; *Ex parte Bartlett*, 4 Bradf. (N. Y.) 221.

A mere domicile is not sufficient. The infant must have an actual residence and place of abode, where he could be served with notice of proceedings. *Sears v. Terrey*, 26 Conn. 273.

But *contra*, the probate court of the county where an infant has his domicile has jurisdiction to appoint a guardian for him, though he be not at the time a resident of such county. *Jenkins v. Clark*, 71 Iowa 552.

If no appointment has been made in the county of the minor's residence, the probate court of the county where his property lies may, on application, appoint a guardian. *Judge of Probate v. Hinds*, 4 N. H. 464.

6. *Clarke v. Cordis*, 4 Allen (Mass.) 466; *Maxwell v. Campbell*, 41 Ind. 360; *Seavers v. Gerke*, 3 Sawyer, (U. S.) 353; *Re Hubbard*, 82 N. Y. 90; *Grier v. McLendon*, 7 Ga. 362; see *Hope v. Hope*, 27 Eng. L. & Eq. 249; *Rice's Case*, 42 Mich. 528; *Re Horsford*, 2 Redf. (N. Y.) 168; *Davis v. Hudson*, 29 Minn. 27; *Barnsback v. Dewey*, 13 Ill. App. 581; *Neal v. Bartleson*, 65 Tex. 478.

collateral proceeding;¹ but they can be attacked collaterally on no other ground. The decree of a court of competent jurisdiction can be modified or set aside only by direct proceedings to that end in the same court.²

IV. TERM OF OFFICE.—*a. How Limited.*—Unless a special limit is fixed, guardianship is terminated by the ward becoming of age;³ by the marriage of a female ward,⁴ (her husband, if of age, then succeeding to the guardian's rights)⁵

Where an infant has neither residence nor property in the jurisdiction, there can be no appointment by the court. *Re Hubbard*, 82 N. Y. 90; *Boyd v. Glass*, 34 Ga. 253.

1. See cases cited under preceding paragraph; also *Palmer v. Oakley*, 2 Doug. (Mich.) 433; *Shroyer v. Richmond*, 16 Ohio St. 455.

But the guardian himself, who has accepted the appointment and by virtue thereof has become possessed of the infant's estate, is estopped to deny the jurisdiction of the court or the legality of his own appointment. *Hines v. Mullins*, 25 Ga. 696; *Fox v. Minor*, 32 Cal. 111; *State v. Lewis*, 93 N. Car. 138; *Harbin v. Bell*, 54 Ala. 389; *Martin v. Tully*, 72 Ala. 23.

2. *Warner v. Wilson*, 4 Cal. 310; *Speight v. Knight*, 11 Ala. 461; *Hines v. Mullins*, 25 Ga. 696; *Warner v. Wilson*, 4 Cal. 310; *Fox v. Minor*, 32 Cal. 111; *Thurston v. Holbrook's Est.*, 31 Vt. 354; *Farrar v. Olmstead*, 24 Vt. 123; *Pannell v. Calloway*, 78 Va. 387; *Sears v. Terry*, 26 Conn. 273; *People v. Wilcox*, 22 Barb. (N. Y.) 178; *Simpson v. Gonzales*, 15 Fla. 9; *Walker v. Goldsmith*, 14 Oregon 125.

A decree of appointment is *prima facie* evidence of the ward's disability. *White v. Palmer*, 4 Mass. 147.

3. 2 Kent Com. 221, 227; *Stroup v. State*, 70 Ind. 495; *Bourne v. Maybin*, 3 Woods. (C. C.) 724; *Overton v. Beavers*, 19 Ark. 623; *Tate v. Stevenson*, 55 Mich. 320; *People v. Brooks*, 22 Ill. App. 594; *Ross v. Gill*, 4 Call (Va.) 250.

The ward may terminate the relationship sooner by nominating a successor on reaching fourteen years in those States where his right of nomination is absolute. See *supra*, under "APPOINTMENT OF GUARDIANS."

In Ohio, probate guardianship wholly ceases when the ward, if female, reaches twelve years, and if male, fourteen years. A new appointment is then necessary. *Perry v. Brainard*, 11 Ohio 442.

4. *Jones v. Ward*, 10 Yerg. (Tenn.) 160; *Nicholson v. Wilborn*, 13 Ga. 467; *Anon*, 8 Sim. 346; *Armstrong v. Walkup*, 12 Gratt. (Va.) 608; *Price v. Peterson*, 38 Ark. 494; *Barnet v. Commonwealth*, 4 J. J. Marsh. (Ky.) 389. See, however, *Whitaker's Case*, 4 Johns. Ch. (N. Y.) 378.

Where a female ward has married an adult, statutory provisions sometimes declare that the guardianship shall cease. *Bourne v. Maybin*, 3 Woods (C. C.) 724; *Kidwell v. State*, 45 Ind. 27; *Ex parte Post*, 47 Ind. 142; *State v. Joest*, 44 Ind. 235; *Wise v. Morton*, 48 Ala. 214; *Vaughn v. Bibb*, 46 Ala. 153.

The marriage of a male ward does not terminate his guardianship, at least so far as his property is concerned. 2 Kent Com. 226; *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103; *Mendes v. Mendes*, 3 Atk. 619 and 1 Ves. 85; *Jones v. Ward*, 10 Yerg. (Tenn.) 160; *Brick's Estate*, 15 Abb. Pr. (N. Y.) 12; *Shutt v. Carlross*, 1 Ired. Eq. (N. Car.) 232.

5. From the time of her marriage the guardianship devolves upon her husband. He can enter upon her property and permit others to enter upon it; he can also make leases voidable by her upon his death, or by his heirs at her death. *Porch v. Fries*, 3 C. E. Green (N. Y.) 204.

The concurrence and assent of the husband to a sale of standing timber by his infant wife gives the purchaser the right to fell and carry away such timber without being liable for trespass. *Bartlett v. Cowles*, 15 Gray (Mass.) 445.

The husband may receive and receipt for his wife's property from the guardian, and such receipt discharges the guardian. *Mobley v. Leopahrt*, 47 Ala. 257.

The guardian of an infant married woman cannot be held responsible to her for her money paid to her husband who was of full age, in good faith, without any notice or presumption of her non-concurrence. *Beazley v. Harris*, 1 Bush (Ky.) 533.

by the resignation¹ or by the removal of the guardian. The death of either party, of course, terminates the relation.²

b. Removal of Guardian, Manner and Causes Of.—The court appointing a guardian may upon petition remove him after due notice to him of the petition and the hearing thereon and after good cause shown at such hearing.³

The ward's remedies for misappropriation of her estate by her husband guardian are the same as in case of other wards. *Story v. Walker*, 64 Ga. 614.

In New York, since the Married Women's Act of 1848, the husband of a female infant does not acquire control of her property, nor it seems, as to her property, is an existing guardianship terminated by marriage. 16 Abb. N. S. (N. Y.) 214.

Where the husband is a minor, the property which his wife, whether a minor or not, brings to the marriage goes to the guardian of the husband and he is clothed with power to reduce it to possession. *Ware v. Ware*, 28 Gratt. (Va.) 670.

In some States the husband must be of full age in order to supersede the guardian. Thus, there can be no recovery by an infant wife against her guardian on his bond for failure to account and pay over money in his hands as such, without proof that her husband was of full age when the suit was brought. *Burkam v. State*, 88 Ind. 200.

1. No resignation was allowable at common law except for strong reasons showing that the best interest of the ward demanded it. *Schouler Dom. Rel.* (3rd ed.), § 315; *Spencer v. Earl of Chesterfield*, Ambl. 146; *Ex parte Crumb*, 2 Johns. Ch. (N. Y.) 439.

But statutes now generally permit a guardian to resign.

Where the probate court has power to remove a guardian for good and sufficient reasons, if the court, upon a guardian tendering his resignation, deems this a sufficient ground for revoking his letters, the decision will not be disturbed on appeal. *Young v. Lorain*, 11 Ill. 624; *Brown v. Huntsman*, 32 Minn. 466.

A decree permitting a guardian's resignation is not a judgment that a full accounting has been made by him. *King v. Hughes*, 52 Ga. 600.

A testamentary guardian may renounce the guardianship or refuse or neglect to act, in which case the court will appoint a successor. *McAlister v. Olmstead*, 1 Humph. (Tenn.) 210; *Ex*

parte *Champney*, 1 Dick. 350; *O'Keefe v. Casey*, 1 Sch. & Lef. 106.

Where the statute permits the widow, by qualifying and giving bond, to become guardian not only of the person but the estate of her child, but she neglects within a reasonable time to take advantage of its provisions, she will forfeit her privilege and the court may appoint another as guardian. *Lefever v. Lefever*, 6 Md. 472.

2. *Re Colvin*, 3 Md. Ch. 278; *Norton v. Strong*, 1 Conn. 65; *Armstrong v. Walkup*, 12 Gratt. (Va.) 608; *Ordway v. Phelps*, 45 Iowa 279; *Bean v. Bumpos*, 22 Me. 549; the guardian is sometimes charged with the administration of his deceased ward's estate. *Beavers v. Brewster*, 62 Ga. 574.

It is the duty of the executor or administrator of a deceased guardian to close up his guardianship accounts and hand the balance to the successor. *Co. Litt.* 89; *Bac. Abr. Guardian (E)*, *Connolly v. Weatherly*, 33 Ark. 658; see, also, *Hutton v. Williams*, 60 Ala. 133; and see *infra*, under GUARDIAN'S ACCOUNT.

The license of a guardian to enter and do acts upon his ward's land likewise determines at the death of the guardian. *Johnson v. Carter*, 16 Mass. 443.

3. Without such notice the removal will not be valid. *Gwin v. Vanzant*, 7 Yerg. (Tenn.) 143; *Lee v. Ice*, 22 Ind. 384; *Croft v. Terrell*, 15 Ala. 652; *Montgomery v. Smith*, *Dana* (Ky.) 368, 599; *Copp v. Copp*, 20 N. H. 284; *Brodribb v. Tibbits*, 63 Cal. 80; *Hart v. Gray*, 3 Sumn. (C. C.) 339; *Manro v. Ritchie*, 3 Cranch (C. C.) 147; *Myers v. Pearsall*, 17 Ind. 405; see, *Hovey v. Harmon*, 49 Me. 269.

It is no excuse for failure to serve such notice that the guardian was at the time insane. *Damarell v. Walker*, 2 Redf. (N. Y.) 198.

But a guardian may be removed without notice to him where it appears that he has removed from the State and is beyond its jurisdiction. *State v. Engelke*, 6 Mo. App. 356; *Succession of Bookter* 18 La. Ann. 157.

Unfitness for the office,¹ misconduct therein,² irregularity in

And where it appears that a guardian has removed from the jurisdiction and taken the property of his ward with him, his removal will be ordered without notice. *Cooke v. Beale*, 11 Ired. (N. Car.) 36.

Where the authority of the mother as a guardian is extinguished by her marriage, the probate court may appoint a new guardian without notice to her. *Farrar v. Olmstead*, 24 Vt. 123.

1. Gross and confirmed habits of intoxication are sufficient to render the removal of a guardian necessary, and the wife of such person is not suitable for the guardianship, as she is supposed to be under his authority. *Kettletas v. Gardner*, Paige Ch. (N. Y.) 488.

The conviction of the guardian of conspiracy to defraud others is sufficient reason for his removal from the office of guardian. *Est. of Soley*, 13 Phila. (Pa.) 402.

Where the life of the guardian is such as to corrupt the morals of the ward or otherwise to exercise a baneful influence he will be removed. *Ruohs v. Backer*, 6 Heisk. (Tenn.) 395.

A guardian of several wards having an estate in common must keep separate accounts with each, and if he fails in this because he is too ignorant, he should be removed. *Wood v. Black*, 84 Ind. 279.

Ignorance of duty whereby the guardian causes loss to his ward or injury to his interests will justify removal. *Nicholson's Appeal*, 20 Pa. St. 50.

Where circumstances conspiring subsequent to the appointment cause the guardian to make personal claims upon the ward's estate hostile in the latter's interest he should be removed. *Windor v. McAtee*, 2 Met. (Ky.) 430.

If a guardian becomes *non compos mentis* without having settled his accounts, his own guardian will be required to make the settlement. *Modawell v. Holmes*, 40 Ala. 391; *Damarell v. Walker*, 2 Redf. (N. Y.) 198.

Difference in religious belief are no sufficient ground for removal, if no harsh or unfair means are used by the guardian to erase impressions left upon the child by its parents. *Nicholson's Appeal*, 20 Pa. St. 50.

Mere insolvency of the guardian is not ground for removal. *Chew's Est.*, 4 Md. Ch. 60; *contra*, *Baldbridge v. State*, 69 Ind. 166; the insolvency of the guardian and one of his sureties

would be. *Cooper's Case*, 2 Paige (N. Y.) 34; see *Lord Thurlow in Smith v. Bate*, 2 Dick. 631.

2. A father who, as guardian of his children, is in receipt of a large income from their property and who refuses to provide for their support and education is not suitable to manage their estate and should be removed from the guardianship. *Re Swift*, 47 Cal. 629.

The orphans' court has jurisdiction to remove a guardian for failure to account and for waste. *Dickerson v. Dickerson*, 31 N. J. Eq. 652.

The statute in Indiana is imperative, that a guardian who fails to file an inventory within three months after appointment shall be removed, and this, in case of resignation, applies to the successor. *Barnes v. Powers*, 12 Ind. 341; *Kimmel v. Kimmel*, 48 Ind. 203; see, however, *Johnson v. Metzger*, 95 Ind. 307.

The failure of a guardian to give a bond sufficient to secure to his ward the amount of a pension coming to him from the government is sufficient cause for his removal. *West v. Forsythe*, 34 Ind. 418.

The conversion of real estate into personal estate by the guardian without authority of the court is a sufficient cause for his removal. *Ex parte Crutchfield*, 3 Yerg. (Tenn.) 336.

Where the guardian entered into a speculation with the husband of his ward, who was also an infant in relation to her estate and obtained a mortgage from both, the court ordered his removal. *Cooper's Case*, 2 Paige (N. Y.) 34.

When the guardian has misappropriated the ward's funds, employing them in his own business or for speculation, he will be removed. *O'Neil's Case*, 1 Tucker 34; *Savely v. Harkrader*, 29 Gratt. (Va.) 112; *Wood v. Black*, 84 Ind. 279.

But where the guardian uses the funds expecting and agreeing to pay interest, is himself solvent and has given ample security, his use of the funds is not a cause for removal. *Sweet v. Sweet*, *Speer's Eq.* (S. Car.) 309.

Such conduct as tends to alienate the ward's affections from the mother who is a woman of good character will justify removal at her request. *Perkins v. Finegan*, 105 Mass. 501.

Intermeddling with ward's estate before qualifying as guardian, if done in

the appointment¹ and, generally, removal from the jurisdiction,² are sufficient reasons for displacing a guardian; but in passing upon the circumstances of each case the court may exercise a liberal discretion which will not be questioned on appeal.³

The marriage of a female guardian is not generally in this country a cause for her removal.⁴

Testamentary guardians, not being appointed by any court, are not in England removable judicially, though the court of chancery may control their acts so as practically to supersede them by others.⁵ In this country statutes generally empower the courts to remove such guardians on the same grounds which

good faith and on advice of counsel is not cause for removal. *Stone v. Dorrett*, 18 Tex. 700.

Where it is not shown that guardian has wasted the estate or has become insolvent so that nothing could be recovered from him on final settlement but is only negligent in filing accounts, there is no ground for removing him. *Sanderson v. Sanderson*, 79 N. Car. 360.

Failure to account when cited to do so, if the neglect is not injurious to the estate, is not necessarily a cause of forfeiture. *Gott v. Culp*, 45 Mich. 265.

And mere neglect to file inventory and accounts is not sufficient ground for removal if he has not been first ordered to file such papers and has disobeyed. *Ledwith v. Union Trust Co.*, 2 Dem. (N. Y.) 439.

Under the Maryland statute, improper conduct by the guardian towards the ward's person or estate must be shown in order to secure removal. *Slattery v. Smiley*, 25 Md. 389.

1. For the effect of failure to notify parties in interest before the appointment, see *supra*, under APPOINTMENT.

Obtaining letters of guardianship by fraud will justify removal. *Clement's Appeal*, 25 N. J. Eq. 508.

Where a guardian removed from office in one county obtains an appointment by fraud in another county, the second appointment is void at *ab initio*. *Pease v. Roberts*, 16 Ill. App. 634.

2. *Removal from the State* is made by statute in Indiana, Alabama, and elsewhere, a ground for displacing the guardian. *Nettleton v. State*, 13 Ind. 159; *Cockrell v. Cockrell*, 36 Ala. 673; *State v. Engelke*, 6 Mo. App. 356; *Speight v. Knight*, 11 Ala. 461; *Eiland v. Chandler*, 8 Ala. 781; *Succession of Booker*, 18 La. Ann. 157; *Cooke v. Beale*, 11 Ired. (N. Car.) 36.

3. *Isaacs v. Taylor*, 3 Dana (Ky.)

600; *Young v. Young*, 5 Ind. 513; *Nicholson's Appeal*, 20 Pa. St. 50; *Johnson v. Metzger*, 95 Ind. 307.

But where the statute enumerates the grounds for removal the court has no authority to remove for any other cause. *Kahn v. Israelson*, 62 Tex. 221.

4. *Leavel v. Bettis*, 3 Bush (Ky.) 74; *Cotton v. Wolf*, 14 Bush (Ky.) 238; *Elgin's Case*, 1 Tucker (N. Y. Surr.) 97; *contra*, *Swartwout v. Swartwout*, 2 Redf. (N. Y.) 52; *Carr v. Spannagel*, 4 Mo. App. 285; *Field v. Torrey*, 7 Vt. 372; *Farrar v. Olmstead*, 24 Vt. 123; see *supra*, under appointment of married women and statutory provisions of each State.

The marriage of a woman who is guardian of her children by a former husband has in some States the effect of joining her husband with her in the guardianship. *Martin v. Foster*, 38 Ala. 688; *Wood v. Stafford*, 50 Miss 370.

In Louisiana the mother must obtain the consent of her family before her remarriage in order to retain guardianship of her children. *Gaudet v. Gaudet*, 14 La. Ann. 112; *Keene v. Guier*, 27 La. Ann. 232.

In England marriage will not affect the power of a female testamentary guardian, if the will does not expressly provide that her authority shall be terminated then; the directions of the will must be exactly followed. *Macphers. Inf.* 129; *Morgan v. Dillon*, 9 Mod. 135; *Dillon v. Lady MountCashell*, 4 Bro. P. C. 306; see *Corbet v. Tottenham*, 1 Ball & B. 59.

5. *Roach v. Garvan*, 1 Ves. 160; *O'Keefe v. Casey*, 1 Sch. & Lef. 106; *Foster v. Denny*, 2 Ch. Cas. 237; *Smith v. Bate*, 2 Dick. 631; *Ingraham v. Bickerdike*, 6 Madd. 275; *Spencer v. Earl of Chesterfield*, Ambl. 146; in *Re McCulloch*, 1 Dru. 276; *Duke of Beaufort v. Berty*, 1 P. Wms. 705.

would warrant the removal of a judicial guardian.¹

In general, except in case of natural guardians, there must be an actual decree of removal before a new appointment can take effect.²

V. RIGHTS AND DUTIES OF THE GUARDIAN.—1. As to the Ward's Person.—a. Custody.—Guardianship generally carries with it the custody of the ward's person. If the ward's parents are both dead, this rule always applies, even if the express wishes of a deceased parent are thereby violated;³ but in case one or both are alive the natural parental right of custody is usually superior to the guardian's right.⁴

1. *McPhillips v. McPhillips*, 9 R. I. 536; *Copp v. Copp*, 20 N. H. 284; *Damarell v. Walker*, 2 Redf. (N. Y.) 198; *Re King*, 42 Hun. (N. Y.) 607; *Lord v. Hough*, 37 Cal. 657; *Massingale v. Tate*, 4 Hayw. (Tenn.) 30.

The power of a chancery court to remove a testamentary guardian even in the absence of a special statute has been asserted. *Cowls v. Cowls*, 3 Gilm. (Ill.) 435.

2. *Bledsoe v. Britt*, 6 Yerg. (Tenn.) 458; *Grant v. Whitaker*, 1 Murph. (N. C.) 231; *Robinson v. Zollinger*, 9 Watts (Pa.) 169; *Fay v. Hurd*, 8 Pick. 528; *Thomas v. Burrus*, 23 Miss. 550; *Foster v. Denny*, 2 Ch. Cas. 237; *Morgan v. Dillon*, 9 Mod. 141; *Copp v. Copp*, 20 N. H. 284; *Pitts v. Cherry*, 14 Ga. 594.

The filing of a bond with proper security is held sometimes to be a condition precedent to a probate appointment taking effect. In such cases where no bond is given a removal is not necessary. *Clark v. Darnall*, 8 Gill & J. (Md.) 111; *Barns v. Branch*, 3 McCord L. (S. Car.) 19; *contra*, *Russell v. Coffin*, 8 Pick. (Mass.) 143; *Fant v. McGowan*, 57 Miss. 779.

A mere stranger cannot apply to have a guardian removed, it must be a party in interest. *Colton v. Goodson*, 1 How. (Miss.) 295.

If the court remove a guardian and appoint another in his place who gives the necessary bond, the powers of the person removed at once cease even though he may appeal from the decree removing him. An appeal in such case does not vacate the decree appealed from, but the custody and control of the ward and his estate belongs to the new guardian till the appeal is decided against him. *State v. McKown*, 21 Vt. 503.

A receiver appointed to take charge of the ward's estate when the guardian

is removed, is not invested with the powers of a guardian, but acts under the control of the court until another guardian is appointed. *Temple v. Williams*, 91 N. Car. 82.

3. *Coltman v. Hall*, 31 Me. 196; *Bonnell v. Berryhill*, 2 Cart. (Ind.) 613; *Johns v. Emmert*, 62 Ind. 533; *Brown v. Yaryan*, 74 Ind. 305; *Ex parte Ralston*, 1 R. M. Charlt. (Ga.) 119; *Jenkins v. Clark*, 72 Iowa 552; *Burger v. Frakes*, 67 Iowa 460.

The judgment of a probate court appointing a guardian for minor children is conclusive as to the right of such guardian to their custody. *Fitts v. Fitts*, 21 Tex. 511.

The best interest of the ward, being the paramount consideration, may modify this rule; where a child is in feeble health and requires the care of a grandmother with whom it has lived for some time, the guardian cannot obtain custody of it from her. *Ward v. Roper*, 7 Humph. (Tenn.) 111.

The guardian of an infant ward living in his family can charge her for board and clothing, though she be his niece, and the fact that another member of the family would have boarded her for nothing makes no difference, if the guardian, in the exercise of his best judgment for the ward's own good, has decided that she had better live in his family. *Moyer v. Fletcher*, 56 Mich. 508.

4. *Wood v. Wood*, 5 Paige (N. Y.) 596; *People v. Wilcox*, 22 Barb. (N. Y.) 178; *Lord v. Hough*, 37 Cal. 657; *Ramsay v. Ramsay*, 20 Wis. 507. For statutes to same effect see Mass. Gen. Stat., chap. 109, § 4; *Matthews v. Wade*, 2 W. Va. 464; *McDowell v. Bonner*, 62 Miss. 278; *contra*, *Macready v. Wilcox*, 33 Conn. 321.

The parental right of the mother against the guardian is not strongly upheld in England. *Macphers. Inf.*

The custody of the guardian, however, can never be regarded as illegal and his refusal to surrender the child to the parent is not a ground for alleging unlawful imprisonment or restraint of the child.¹

b. Change of Domicile.—As an incident of the right of custody, the guardian may change the ward's domicile from one county or municipality to another in the same State,² but whether from one State or country to another is doubtful.³

c. Support and Education.—It is the duty of the father, whether he is the guardian or not, to support and educate his child out of his own resources.⁴ If, however, the father's means are small, an

119, 121; *Wright v. Naylor*, 5 Madd. 77; *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103; *In re North*, 11 Jur. 7; *Earl of Ilchester's Case*, 7 Ves. 380.

In some cases chancery will give relatives right of access to the infant while awarding custody to the guardian. *Ord v. Blackett*, 9 Mod. 116; *Ex parte Ralston*, 1 R. M. Charlt. (Ga.) 119; *Hill v. Hill*, 49 Md. 450.

1. *People v. Wilcox*, 22 Barb. N. Y. 178; *Townsend v. Kendall*, 4 Minn. 315; *In re Andrews*, L. R. 8 Q. B. 153.

On the other hand where a parent forcibly removed a child from the custody of the guardian and it appeared that the inclination of the child was toward the parent so that no restraint was exercised upon him by the latter, the court would not restore the child to the guardian. *Foster v. Alston*, 6 How. (Miss.) 406. That the inclination or wishes of the ward, if he is of sufficient age, will have weight in determining the custody, see, also, *Bonnell v. Berryhill*, 2 Cart. (Ind.) 613; *Rex v. Greenhill*, 4 Ad. & El. 642.

2. *Holyoke v. Haskins*, 5 Pick. (Mass.) 20; *Cutts v. Haskins*, 9 Mass. 543; *Ex parte Bartlett* 4 Bradf. (N. Y.) 221; *Kirkland v. Whitely*, 4 Allen (Mass.) 462; *Anderson v. Anderson*, 42 Vt. 350; *contra*, *School Directors v. James*, 2 W. & S. (Pa.) 568; *Marheineke v. Grotthaus*, 72 Mo. 204.

3. 2 Kent Com. 227 n. (c); *Story on Conflict of Laws*, § 506; see *Jacobs on Domicile*, ch. 11, for a full discussion of the question. If a guardian is also the parent, he may so change the ward's domicile. *Pottinger v. Wightman*, 3 Mer. 67; *Pedan v. Robb*, 8 Ohio 227; *Wheeler v. Hollie*, 19 Tex. 522; *contra*, *Mears v. Sinclair*, 1 W. Va. 185.

The right of the guardian to change the domicile of his ward from one State to another if done in good faith is

broadly asserted in some cases. *Wood v. Wood*, 5 Paige (N. Y.) 596; *Pedan v. Robb*, 8 Ohio 556; *Re Afficks Est.*, 3 MacAr. (D. C.) 95; see *White v. Howard*, 52 Barb. (N. Y.) 294.

The guardian may change the residence of his ward from one State to another, when such change would be for the benefit of the ward. *Townsend v. Kendall*, 8 Minn. 315.

But where such change of domicile would affect the ward's testamentary capacity, the guardian can not make it. *Daniel v. Hill*, 52 Ala. 430.

Infants, who on the death of their parents, take up their residence with their grandparent in another State will be considered to have acquired her domicile. *Lamar v. Micon*, 114 U.S. 218.

4. *State v. Roche*, 91 Ind. 406; s. c., 94 Ind. 372; *Re Besondy*, 32 Minn. 385; *Re Wilson*, 38 N. J. Eq. 205; *Smith v. Gummere*, 39 N. J. Eq. 27; *Burke v. Twiner*, 85 N. Car. 500.

A father was guardian of his child, and had in his hand funds of his ward, the interest whereof the court authorized him to apply to the ward's maintenance and education; but he was able to maintain and educate his child out of his own means, and there is nothing to show that he, for that purpose, used the ward's funds; no allowance will be made for such maintenance and education after the guardianship has terminated. *Stigler v. Stigler*, 77 Va. 163; *Griffith v. Bird*, 22 Gratt. (Va.) 73; *Humphrey v. Humphrey*, 79 N. Car. 396; *Walker v. Crowder*, 2 Ired. Eq. (N. Car.) 478; *Buckley v. Howard*, 35 Tex. 565.

In Mississippi the chancery court cannot ratify a guardian's expenditures for the maintenance of his ward who has parents, but a precedent order is necessary. *Darter v. Speirs*, 61 Miss. 148; *Ex parte George*, 63 Miss. 143.

allowance out of the ward's estate will be made to him for that purpose.¹

Persons other than the father, standing *in loco parentis* to the child, may acquire a father's liability for its support and education. Thus, a guardian may expressly agree not to charge anything for the support of his ward.²

And where a guardian, step-father, or other person takes a child without any agreement as to support, and treats it as his own, having the benefit of its services meanwhile and not receiving payment for its support at the time, he will be considered as a parent and will not be permitted to charge the ward's estate for its support.³

1. *Newport v. Cook*, 2 Ashm. (Pa.) 332; *Clark v. Montgomery*, 23 Barb. (N. Y.) 464; *Beasley v. Watson*, 41 Ala. 234; *Welch v. Burris*, 29 Iowa 186; *Chapline v. Moore*, 7 T. B. Mon. (Ky.) 150; *Myers v. Wade*, 6 Rand. (Va.) 444; *Walker v. Crowder*, 2 Ired. Eq. (N. Car.) 478; *Voessing v. Voessing*, 4 Redf. (N. Y.) 360; *Latham v. Myers*, 57 Iowa 519; *Kinsey v. State*, 71 Ind. 32; *Waldron v. Waldron*, 76 Ala. 245; *Morris v. Morris*, 2 McCart. (N. J.) 239; *State v. Martin*, 18 Mo. App. 468; *Patton's Admr. v. Patton*, 3 B. Monr. (Ky.) 161.

A guardian is not entitled to credit for sums expended in the education and maintenance of his ward, unless the ward had no parents able to provide therefor, or unless such parents were unwilling to do so. *State v. Roche*, 94 Ind. 372.

An answer that the wards being of tender years and unable to earn support, the guardian, who was their father, being destitute of means to support and educate his children and wards, was compelled to apply thereto the proceeds of said real estate, and now refuses to make claim against them on account thereof, is sufficient. *Corbaley v. State*, 81 Ind. 62.

2. *Manning v. Baker*, 8 Md. 44; *Hooper v. Royster*, 1 Munf. (Va.) 119; *Bradford v. Bodfish*, 39 Iowa 681; *McDowell v. Caldwell*, 2 McCord's Ch. (S. Car.) 43.

There may be circumstances, however, under which a guardian's promise not to charge a ward for support may be void for want of consideration. *Keith v. Miles*, 39 Miss. 442.

A gratuitous remark by the guardian that he would not charge his ward for board is not obligatory upon him. *Cunningham v. Pool*, 9 Ala. 615; *Allsop v. Barbee*, 14 T. B. Mon. (Ky.) 526.

3. *Folger v. Heidel*, 60 Mo. 285; *Chapline v. Moore*, 7 T. B. Mon. (Ky.) 163; *Webster v. Wadsworth*, 44 Ind. 283; *Snover v. Prall*, 38 N. J. Eq. 207; *Whipple v. Doe*, 2 Mass. 418; *Evans v. Pearce*, 15 Gratt. (Va.) 513; *Crosby v. Crosby*, 1 S. Car. 337; *Douglas's Appeal*, 82 Pa. St. 169; *Mulhern v. McDavitt*, 16 Gray (Mass.) 404.

Where a stepfather, though not bound to support his step-children, or they to render him service, maintains them and accepts such service, they will be regarded as having dealt with each other as parent and child, and in the absence of express agreement, the stepfather can claim no compensation for their support. *Hussey v. Roundtree*, Busb. (N. Car.) 110; *Brown's Appeal*, 112 Pa. St. 18; *Barnes v. Ward*, Busb. (N. Car.) 93.

But, *contra*, where there is no evidence of any agreement, a guardian can charge for the board of a ward even though she be his niece, and even though another member of the family would have boarded her for nothing; if the guardian deemed it best for her to live with his family. *Moyer v. Fletcher*, 56 Mich. 508.

If a child sues the administrator of its mother for money received by her as guardian, the administrator cannot set up a claim for maintenance when there is no evidence that the mother intended to charge therefor. *Guion v. Guion*, 16 Mo. 48; *Edwards v. Durgen*, 19 Grant's Ch. (Pa.) 101; *Martin v. Foster*, 38 Ala. 688; *Presley v. Davis*, 7 Rich. Eq. (S. Car.) 105; *Cummings v. Cummings*, 8 Watts (Pa.) 366.

A ward was the niece of the wife of her guardian and lived with him as one of his family, worked therein, and was boarded, clothed and schooled as one of his own children. The guardian frequently declared to the ward and others

But if the father is dead or unable to support his child and no other person has assumed the liability, it is the duty of the guardian to provide for its support, and he will be entitled to reimbursement out of the ward's estate;¹ but no allowance will be made for expenditure by the guardian beyond the income of the estate, unless they have been previously sanctioned by the court² or

that he regarded her as one of his children, and would do by her as his own. He never applied to the court for an allowance for her support, nor did it appear that he made any charge in his books for her maintenance: *Held*, that the guardian had placed himself *in loco parentis* to his ward, and was not entitled to a credit in his final account for her maintenance. *Horton's Appeal*, 94 Pa. St. 62; *Bondie v. Bourassa*, 46 Mich. 321; *Pratt v. Baker*, 56 Vt. 70; *Marquess v. La Bow*, 82 Ind. 550; *Heyden v. Stone*, 1 Duv. (Ky.) 396; *State v. Slevin*, 93 Mo. 253; *State v. Pretorious*, 11 Mo. App. 593. See *Pratt v. Baker*, 56 Vt. 70.

If a father, who is also guardian for his son, makes no charge for tuition or support, his surety in a suit on the guardianship bond can make none. *Pratt v. McJunkin*, 4 Rich. (S. Car.) 5; *Myers v. Appleton*, 45 Ind. 160.

1. The guardian must exercise proper discretion; if he furnishes the ward means for an extravagant life, the court will not reimburse him for such expenditures. *In re Mills*, 64 Iowa, 391.

But where the compensation for support is not excessive, the guardian will be entitled to reimbursement. *Jetter's Estate*, 14 Phila. (Pa.) 319; and for necessities furnished before the guardianship began as well as after. *Re Miller*, 34 Hun. (N. Y.) 267.

A guardian who has paid over the proceeds of the ward's estate to a suitable person to aid such person in supporting the ward, cannot maintain an action at law against him to recover back the amount so paid after it has been reasonably expended for that purpose. *Chubb v. Bradley*, 58 Mich. 267.

The guardian should apply lunatic's personality to her support, so far as necessary, and having maintained her out of his own means, has a claim against her estate for his reimbursement, which claim he has no right to release, and thus put a burden on the sureties on his bond. *Hauser v. King*, 76 Va. 731.

But a conservator has no lien on the property of the ward for disbursements made in his lifetime for his support, so as to entitle the former to retain possession against the executor of the latter. *Norton v. Strong*, 1 Conn. 65.

2. *Patton v. Thompson*, 2 Jones Eq. (N. Car.) 285; *In re Bostwick*, 4 Johns. Ch. (N. Y.) 100; *Myers v. Wade*, 6 Rand. (Va.) 444; *Anderson v. Thompson*, 11 Leigh (Va.) 439; *Foreman v. Murray*, 7 Leigh (Va.) 412; *Whitledge's Heirs v. Callis*, 2 J. J. Marsh. (Ky.) 403; *Irvine v. McDowell*, 4 Dana (Ky.) 631; *Villard v. Chevin*, 2 Strobb. Eq. (S. Car.) 40; *State v. Clark*, 16 Ind. 97; *Beeler v. Dunn*, 3 Head (Tenn.) 87; *McDowell v. Caldwell*, 2 McC. Ch. (S. Car.) 43; *Royston v. Royston*, 29 Ga. 82; *Davis v. Harkness*, 2 Gilm. (Ill.) 173; *Davis v. Roberts*, 1 S. & M. Ch. (Miss.) 543; *Wiggle v. Owen*, 45 Miss. 691; *Foteaux v. Lepage*, 6 Iowa 123; *Cummins v. Cummins*, 29 Ill. 452; *Gilbert v. McEachen*, 38 Miss. 466; *Phillips v. Davis*, 2 Sneed. (Tenn.) 520; *Cohen v. Shryer*, 1 Tenn. Ch. 192; *Preble v. Longfellow*, 48 Me. 279; *Dowling v. Feeley*, 72 Ga. 557; *Boyd v. Hawkins*, 60 Miss. 277; *Poullain v. Poullain*, 76 Ga. 420; *Hart v. Czapski*, 11 Lea (Tenn.) 151; *Hobbs v. Harlan*, 10 Lea (Tenn.) 268; *Brown v. Grant*, 29 W. Va. 117; *Owens v. Walker*, 2 Strobb. Eq. (S. Car.) 289; *Jones v. Parker*, 67 Tex. 76; *Johnston v. Haynes*, 68 N. Car. 514; *Caffey v. McMichael*, 64 N. Car. 507; *Re Oakley*, 3 Dem. (N. Y.) 140; see, also, *Paine v. Scott*, 14 La. Ann. 760; *Webre's Succession*, 36 La. Ann. 312.

A guardian is not at liberty to consider debts contracted by a former guardian even for necessities, beyond the income of the estate, as payable out of the principal. *State v. Cook*, 12 Ired. (N. Car.) 67.

The guardian may sometimes anticipate the income of one year to meet the casual deficiencies of another. *Carmichael v. Wilson*, 3 Moll. 87; *Bybee v. Tharp*, 4 B. Mon. (Ky.) 313; *Speer v. Tinsley*, 55 Ga. 89.

He should not exceed the income, without adequate reason, though if cir-

would have been had application first been made to it.¹

Expenditures beyond the income will be authorized when the principal is small and the income insufficient,² or where special necessity is shown.³

The liability of the guardian in any event is limited to the extent of the ward's estate,⁴ unless he has personally agreed to

cumstances justify it he may look at future and probable resources as well as at the present and actual income. *Gott v. Culp*, 45 Mich. 265.

He may treat an increase in value of the ward's estate as income. *Long v. Norcom*, 2 Ired. Eq. (N. Car.) 354.

So long as the principal is intact he will be allowed a large discretion in using the interest. *Speer v. Tinsley*, 55 Ga. 89; *Brown v. Mullins*, 24 Miss. 204.

He is not limited to the income of the estate actually in his hands, but wherever situated. *Foreman v. Murray*, 7 Leigh (Va.) 412; *Maclin v. Smith*, 2 Ired. Eq. (N. Car.) 371.

A third person of whom the guardian purchases is not bound to see that payment is made from the ward's income. *Broadus v. Rosson*, 3 Leigh (Va.) 12; *Hutchinson v. Hutchinson*, 19 Vt. 437.

1. A guardian, to be entitled to an allowance of expenditure greater than the income of his ward, must show such a state of facts as that a court would have awarded such expenditure had application been made for such purpose. *Owens v. Pierce*, 10 Lea (Tenn.) 45; *Barton v. Bowen*, 27 Gratt. (Va.) 849; *Calhoun v. Calhoun*, 41 Ala. 369; *Jarret v. Andrews*, 7 Bush (Ky.) 312.

Allowance will be made the guardian for extraordinary expenses concerning the whole estate, if it is shown that they were necessary. *Hooper v. Royster*, 1 Munf. (Va.) 119.

In a case where the ward's estate was small so that she was gratuitously cared for by a friend, it was held that the guardian was justified in advancing to her the whole estate in small sums for her spending money. *Karney v. Vale*, 56 Ind. 542.

But where an administrator, failing to wind up the estate, sought to act as guardian for minor children without an appointment, and had not made returns or shown vouchers for the money, he cannot relieve himself from liability for the estate by claiming to have used not only the income but the corpus for

the support and education of the minors. *Dowling v. Feeley*, 72 Ga. 557.

The guardian cannot apply for support of the ward the proceeds of real estate sold by decree of the court for investment. *Strong v. Moe*, 8 Allen (Mass.) 125; *Rinker v. Streib*, 33 Gratt. (Va.) 663.

The order of expenditure should be: first, the income; second, if that is insufficient, the principal of the personal property; lastly, if both are inadequate, the real estate. *Schouler Dom. Rel.* (3d ed.), § 338.

2. *Newport v. Cook*, 2 Ashm. (Pa.) 332; *Roseborough v. Roseborough*, 3 Baxt. (Tenn.) 314; *Farrance v. Viley*, 9 E. L. & Eq. 219; *In re Clark*, 17 Eng. L. & Eq. 599; *Withers v. Hickman*, 6 B. Mon. (Ky.) 294.

3. The principal of the funds of the ward, or such part as is necessary, may be used by the guardian when the ward is of such tender years or infirm health that he cannot be apprenticed, or no suitable person will take him as such for nurture and education. *Campbell v. Golden*, 79 Ky. 544; *Johnson v. Coleman*, 3 Jones Eq. (N. Car.) 290; *Long v. Norcom*, 2 Ired. Eq. (N. Car.) 354; *In re Clark*, 17 Eng. L. & Eq. 599.

Wherever the expenditure is shown to be necessary and reasonable, the court has authority to permit the use of the whole principal. *Browne v. Bedford*, 4 Dem. (N. Y.) 304.

4. *Overton v. Beaver*, 19 Ark. 623; *McDaniel v. Mann*, 25 Tex. 101; *Barnum v. Frost*, 17 Gratt. (Va.) 398.

A guardian, against whom an allowance has been made, cannot be compelled to pay it unless he has money of the ward with which the same may be paid. *Stumph v. Goepper*, 76 Ind. 323.

Where a guardian has given notice to a town that he should demand support for his ward as a pauper, he may claim reimbursement from the town for necessary expenses incurred after the ward's property has been exhausted. *Fisher v. Lincoln*, 19 Pick. (Mass.) 473.

But if a guardian neglects to take proper measures to sell the property

assume a greater liability.¹

In general, in order to charge the guardian with any liability for necessities supplied to the ward, his own order or consent must be shown.²

d. Services of the Ward.—The guardian as such, not having a parent's personal liability to support the ward, cannot claim a parent's right to the services of the ward and if such services are performed the ward is entitled to credit therefor.³

He stands, however, in *loco parentis* so far as to be able to bind his ward out as an apprentice,⁴ and to sue and recover damages for maintenance, and consequently it appears that on the final settlement, a sum is due him for the ward's support, he cannot recover such sum by suit against the ward, for it was his own negligence in not reimbursing himself from the property. *Preble v. Longfellow*, 48 Me. 279.

1. Where the guardian has personally undertaken to pay for his ward, but for no definite period, he may terminate his liability at any moment by notice thereof to the party with whom he has contracted. *Spring v. Woodworth*, 4 Allen (Mass.) 326.

It is held in Vermont if the guardian does not in terms limit his liability to the estate of the ward in his hands in dealing with third parties, they may hold him responsible for ordering necessities for his ward beyond the extent of the ward's estate. *Hutchinson v. Hutchinson*, 19 Vt. 437.

2. *Gwaltney v. Cannon*, 31 Ind. 227; *Bredin v. Dwen*, 2 Watts (Pa.) 95; *Tucker v. McKee*, 1 Bailey (S. Car.) 344; *State v. Cooke*, 12 Ired. (N. C.) 68; *May v. Webb*, Kirby (Conn.) 287; *Penfield v. Savage*, 2 Conn. 387; see, *Rossiter v. Marsh*, 4 Conn. 196, 203; *Barnum v. Frost*, 17 Gratt. (Va.) 398.

Such order may be implied, *e. g.* when a ward is allowed to reside with its mother, she is considered to have authority from the guardian to employ medical aid for the child and the law will imply a promise by the guardian to pay therefor. *Walker v. Brown*, 3 Bush (Ky.) 686.

To maintain an action against a guardian for articles sold the ward without his order, it must appear that the articles were necessary and suitable to the minor's condition of life. *Hastings v. Bachelor*, 27 Tex. 259. It must appear further that the guardian has failed to provide sufficient support for his ward. *Gwaltney v. Cannon*, 31 Ind. 227; *Nicholson v. Spencer*, 11 Ga. 607.

But the guardian's judgment as to what is necessary for his ward should generally be controlling or accorded as much weight as a parent's would be. *Nicholson v. Spencer*, 11 Ga. 607; *Kraker v. Byrum*, 13 Rich. (S. Car.) 163; *McKanna v. Merry*, 61 Ill. 177.

A contract made by the ward may be ratified by the guardian by his suing upon it for the ward. *Hargrove v. Webb*, 27 Ga. 172.

3. *Foteaux v. Lepage*, 6 Iowa 123; *Bass v. Cook*, 4 Port. (Ala.) 390; *Denison v. Cornwell*, 17 S. & R. (Pa.) 377; *Calhoun v. Calhoun*, 41 Ala. 369; *Re Clark*, 36 Hun. (N. Y.) 301; *Hayden v. Stone*, 1 Duv. (Ky.) 400; *Meyer v. Temme*, 72 Ill. 574.

But an infant ward living in the family of her guardian and cared for as a member of it, is not entitled to pay for household services. *Moyer v. Fletcher*, 56 Mich. 508.

If a guardian commits the custody of a female ward to one who compels personal services from her, while her education is neglected, he will not be allowed credit for her board within the value of her services. *Starling v. Balkum*, 47 Ala. 314.

In an action by a ward, on a bond given to procure the sale of the ward's real estate, the defendants could jointly plead, as a set-off, money paid out by their guardian for the necessary support and education of the ward, and also the value of his services as such guardian. A reply, by way of set-off to such answer, seeking to charge the defendants for the value of services rendered by the ward for the guardian, was insufficient on demurrer, unless it also alleged that the general bond given by the guardian on his appointment had been duly exhausted. *Kinsey v. State*, 71 Ind. 32.

4. It is the duty of the guardian when the fortune of his wards is limited and they are able to earn their support, to keep them so employed rather than to

for her seduction;¹ and may expel from the ward's premises objectionable persons whose influence over the ward is unfavorable.²

2. As to the Ward's Estate.—a. General Principles; Fraud.—The guardian's office is one of trust and obligation. He is bound to act for the interest of the ward and not for his own interest.³ Whatever profit or advantage arises from his management accrues to the ward's estate, and not to his own benefit;⁴ and whenever he seeks to gain a personal advantage at the expense of the ward, such act is fraudulent and will be annulled by the court.⁵

allow them to remain in idleness or expend their limited patrimony. *Brown v. Yaryan*, 74 Ind. 305; *State v. Clark*, 16 Ind. 97; *Foteaux v. Lepage*, 6 Iowa 123.

But he is not liable for the ward's breach of the contract as a parent would be. *Velde v. Levering*, 2 Rawle (Pa.) 269; *Chapman v. Crane*, 20 Me. 172.

1. *Fernslee v. Moyer*, 3 W. & R. (Pa.) 416. See *Certwell v. Hoyt*, 6 Hun. (N. Y.) 575; *Ball v. Bruce*, 21 Ill. 161.

It would seem, however, that he could not bring such suit, if the father is still living. *Blanchard v. Ilsley*, 120 Mass. 487.

2. *Wood v. Gale*, 10 N. H. 247.

He may enter the ward's premises against his consent in the exercise of his official duties. *State v. Hyde*, 29 Conn. 564.

3. A guardian therefore cannot avoid a beneficial contract made by his ward. *Oliver v. Handlet*, 13 Mass. 237.

He cannot waive a benefit to which the ward is entitled by decree. *Hite v. Hite*, 2 Rand. (Va.) 409; *Forbes' Heirs v. Brents*, 1 J. J. Marsh. (Ky.) 440; nor release security for a debt due the ward before payment. *Water Valley Mfg. Co. v. Seaman*, 53 Miss. 655.

The tutor of an infant cannot confess judgment or revive a debt which is proscribed. *Clement v. Sigur*, 29 La Ann. 798; *Metcalfe v. Alter*, 31 La Ann. 389.

A guardian cannot sue his ward during the existence of the relationship even for the necessities furnished and when the guardian has no property of the ward in his hands. *McLane v. Curran*, 133 Mass. 531; see *Smith v. Dudley*, 1 Dev. Eq. (N. Car.) 354.

4. 2 Kent Com. 229; *White v. Parker*, 8 Barb. (N. Y.) 48; *Bond v. Lockwood*, 33 Ill. 212; *Sparhawk v. Allen*, 1 Foster (N. H.) 9; *State v. Peebles*, 70 N. Car. 10; *Moore v. Shields*, 69 N. Car. 50; *Rankin v. Miller*, 43 Iowa 11; *Eberts v. Eberts*, 55 Pa. St. 110.

The purchase of an adverse claim against the estate of the ward by his guardian will be considered to be a purchase for the ward. He can charge the estate no more than he paid for the claim. *Fox v. Lee*, 6 Dana (Ky.) 176; *Hanna v. Spott's Heirs*, 5 B. Mon. (Ky.) 368.

But where a guardian, as such, lawfully contracts a debt for the maintenance and education of his ward, and such debt has been personally released to him by the creditor, without his having paid the same, he and his sureties are entitled to credit for the amount thereof, with interest, in an action by the ward on his bond. *Kinsey v. State*, 71 Ind. 32.

5. *Hunter v. Lawrence*, 11 Gratt. (Va.) 111; *Burwell v. Burwell*, 78 Va. 574; *Wohlscheid v. Bergrath*, 46 Mich. 46.

A guardian cannot transfer property of the ward as collateral security for a debt due by himself. *Villalonga v. Hicks*, 13 S. Car. 163.

He cannot pledge his ward's notes and a successor may maintain a suit in equity against the pledgee to recover them. *Hardy v. Citizens' Bank*, 61 N. H. 34.

He cannot improve the property of his ward's without authority of the court, cause the land to be sold to pay for such improvements, and become through third persons a purchaser at the sale. *Lane v. Taylor*, 40 Ind. 495.

A special guardian, after his appointment, cannot so use an invalid claim held by him against the real estate as to put a purchaser from him of such claim in possession, rendering an action of ejectment necessary by the one lawfully entitled, and the guardian is liable for damages and expenses of such suit. *Spelman v. Terry*, 74 N. Y. 448.

If the guardian has a life interest in the land of which his ward is seized in fee, he cannot charge the whole cost of

Similarly when the guardian accepts his own notes in payment of a claim due his ward, this is not payment to the ward, and the court will hold the guardian and his sureties liable for the amount of the claim.¹

b. Purchase of Estate by the Guardian.—Purchases by the guardian personally at sale of the ward's property will be set aside, if the interests of the ward have been sacrificed,² but if the sale appears beneficial to him and no fraud can be discovered, it will be upheld in equity subject to the ward's right to disaffirm it at his majority.³

c. Negligence.—The guardian is also bound to use ordinary prudence and care in his management. For losses to the estate occurring through his negligence or laches he will be liable,⁴ but

removing an incumbrance thereon to the ward. *Bourne v. Maybin*, 3 Woods (C. C.) 724.

Where a guardian receives money belonging to his wards, and afterwards, when making report to the proper court, under oath, as to the condition of his wards' estate in his hands, fails to charge himself with such money, or to make any disclosure of the fact of his having received it, such failure to charge himself and such concealment of the fact of its reception amount to a conversion of the money so received by him. *Asher v. State*, 88 Ind. 215.

If the guardian becomes insolvent and gives the greater part of his property to one of his wards and little to others, equity will set this aside and treat the property as belonging to the wards in their proper shares. *Case of Hampton*, 17 S. & R. (Pa.) 144.

1. Where a person purchases from the guardian real estate of his ward, and in payment of the price surrenders a note he holds against the guardian, and transfers notes held by him upon others, the guardian is liable on his bond for the price of the land. *Heflin v. Bevis*, 82 Ind. 388; *Wallace v. Brown*, 41 Ind. 436; *State v. Womack*, 72 N. Car. 397.

A guardian has no right to credit his personal indebtedness to a third party upon a note or other debt due by the third party to the ward. He and his sureties will be liable for the full amount of the original debt to the ward. *Baughn v. Shackelford*, 48 Miss. 255; *Pfeiffer v. Knapp*, 17 Fla. 144.

2. *Ex parte* Lacy, 6 Ves. 625; *Lefer v. Laraway*, 22 Barb. (N. Y.) 168; *Chorpenning's Appeal*, 32 Pa. St. 315; *Hoskins v. Wilson*, 4 Dev. & B.

(N. Car.) 243; *Lee v. Howell*, 69 N. Car. 200; *Doe v. Hassel*, 68 N. Car. 213; *Blackmore v. Shelby*, 8 Humph. (Tenn.) 439; *Wyman v. Hooper*, 2 Gray (Mass.) 141; *Patton v. Thompson*, 2 Jones Eq. (N. Car.) 285; *Bostwick v. Atkins*, 3 N. Y. 53; *Beal v. Harmon*, 38 Mo. 435; *Redd v. Jones*, 30 Gratt. (Va.) 123; *Brockett v. Richardson*, 61 Miss. 766; (where a guardian jointly with another person having full knowledge of the relationship, purchased the ward's property and neither acquired title as against the ward, regardless of the *bona fides* of the purchase); see *Small v. Small*, 74 N. Car. 16.

There is no disability to prevent the husband of a guardian purchasing at such sale. *Gregory v. Lenning*, 54 Md. 51.

If a guardian bids in at a public auction the estate of his ward at a price lower than the value placed upon the land by the commissioners, he should be required to show that the price paid is reasonable before the sale can stand. *Ex parte* Crump, 16 Lea (Tenn.) 732.

A purchase by a guardian of his wards' land at a sale is subject to a constructive trust in favor of the wards. *Downs v. Richards*, 4 Del. Ch. 416.

If a guardian sells his own property to his ward the latter can ignore the sale and recover the price and interest regardless of whether the sale was made in good faith or not. *Hendel v. Cleveland*, 54 Vt. 142.

3. *Mann v. MacDonald*, 10 Humph. (Tenn.) 275.

4. 2 Kent Com. 230; *Glover v. Glover*, 1 McMull. (S. Car.) 153; *Royer's Appeal*, 11 Pa. St. 36; *Horton v. Horton*, 4 Ired. Eq. (N. Car.) 54; *Harris v. Harrison*, 78 N. Car. 202; *Wynn v. Benbury*, 4 Jones

generally where he acts prudently and in good faith he will not be held responsible.¹

Thus, if he receives notes among the assets of the ward's estate he will not be responsible for losses upon them if he has used ordinary care and good faith.²

d. Liability for Unauthorized Acts.—Generally, unauthorized acts, even if done in good faith, are undertaken at the risk of the guardian; if they prove beneficial to the ward, the court will adopt them; if detrimental, he is personally liable for the loss.³

Eq. (N. Car.) 395; Willis' Appeal, 22 Pa. St. 325; Boaz's Admr. v. Milliken, 83 Ky. 634; Sanders v. State 49 Ind. 228; Potter v. Hiscox, 30 Conn. 508; Taylor v. Hite, 61 Mo. 142; Long v. Cason, 4 Rich. Eq. (S. Car.) 60; Scott v. Carruth, 9 Yerg. (Tenn.) 418; Seigler v. Seigler, 7 S. Car. 317.

For negligence in investing the estate and liability for interest, see *Infra*, under PERSONAL ESTATE, CARE OF, etc.

Where a guardian takes a mortgage on property estimated to be worth \$3,500 and permits it to be sold at \$540, he is guilty of such negligence as will make him responsible for the loss. McLean v. Hosea, 14 Ala. 104.

A guardian is liable to his ward for the loss to the ward of the value of his real estate sold, for the non-payment of a tax assessed thereon, more than two years before the ward became of age, the guardian having the means to pay the tax, derived from the rent of the real estate; but the guardian is not so liable to a ward who became of age before the sale. Shurtleff v. Rile, 140 Mass. 213.

To surcharge a guardian with a certain fund on the ground that in not collecting it he was guilty of negligence, it must be shown not only that he had the legal right, but was subject to the legal duty to collect it in his official capacity. Leonard's Appeal, 95 Pa. St. 196.

A guardian failed to insure a frame house of the ward lying outside of the village, held not to be such gross negligence as to make him liable for the loss by fire. Means v. Earls, 15 Ill. App. 273;

Ignorance of duty may be equivalent to negligence and render the guardian liable. Nicholson's Appeal, 20 Pa. St. 50.

And where a guardian through lack of ordinary judgment sold the ward's property at a grossly inadequate price, the sale was set aside at the instance of the ward. Leonard v. Barnum, 34 Wis. 105.

1. State v. Morrison, 68 N. Car. 162;

State v. Robinson, 64 N. Car. 608; Walker v. Walker, 42 Ga. 135; McElheney v. Musick, 63 Ill. 328; Worrell's Estate, 14 Phila. (Pa.) 311; see, however, Hemphill v. Lewis, 7 Bush (Ky.) 215;

A guardian employed a reputable claim agent to collect a claim of the ward's against the United States. The agent collected it and kept the money. Held, that the guardian should not be liable for the loss. Holeman v. Blue, 10 Ill. App. 130.

Where the guardian has been robbed of the ward's funds, through no fault of his, he is not liable for negligence. Furman v. Coe, 1 Caines Cas. (N. Y.) 96; Atkinson v. Whitehead, 66 N. Car. 296.

Nor will a guardian be liable for slaves held by him as guardian which were lost not by his fault but through the results of the civil war. Pannill v. Calloway, 78 Va. 387.

2. Konigsmacher Appeal, 1 Pa. 207; Stein's Appeal, 5 Whart. (Pa.) 472; Waring v. Darnall, 10 Gill & J. (Md.) 127; Love v. Logan, 69 N. Car. 70; State v. Foy, 65 N. Car. 265; Covington v. Leak, 67 N. Car. 363.

Otherwise if laches is shown. Freeman v. Wilson, 74 N. Car. 308.

In an action on his bond the guardian will not be held liable where the evidence showed that the assets consisted of certain promissory notes executed to the guardian by the surety of the ward's former guardian, in settlement of the ward's estate in his hands on settlement of his trust, one of which notes had not yet become due, whilst the others had been duly collected. Hiper v. State, 69 Ind. 403.

A guardian will be relieved from the charge of the notes of his predecessor which turn out not to have been intended as notes, but informal receipts of the assets of the ward. Hammond v. Beasley, 15 Lea (Tenn.) 618.

3. Milner v. Lord Harewood, 18 Ves. 259; Capehart v. Huey, 1 Hill Ch. (S. Car.) 405; May v. Duke, 61 Ala. 53;

e. Collection of Assets.—The guardian's first duty is to obtain possession of the ward's estate of every kind and nature,¹ including

McDuffie v. McIntyre, 11 S. Car. 551; Jackson v. Sears, 10 Johns. (N. Y.) 435; Smith v. Dibrell, 31 Tex. 239.

Where a guardian sanctioned a contract made by the ward with his father by which the latter gave him his time and paid the father for said time according to the contract, it was held that such payment would not be allowed the guardian on settlement of his accounts unless he could show affirmatively that his ward was at least no worse off than if he had his money with interest on reaching his majority. Bannister v. Bannister, 44 Vt. 624.

Guardians have authority to lease the lands, loan the money, and manage the interests of their wards under the direction of the court, but the direction must precede the act, and without such direction the guardian would have no authority to do such acts and would be answerable therefor. Bates v. Dunham, 58 Iowa 308.

It is the duty of a guardian of an insane person rather to protect and preserve the business affairs of the ward than to wind them up. To that end the statute has invested the probate court with large discretionary powers, but in their exercise the court should not for any considerable length of time continue a hazardous manufacturing or mercantile business. It is, however, within the power of the court to direct and order the continuance of a business of the ward and in many cases it would be its plain and obvious duty to do so. State v. Jones, 89 Mo. 470; overruling Michael v. Locke, 80 Mo. 548; and earlier cases. Compare Corcoran v. Allen, 11 R. I. 567.

But when the guardian carries on the business and the ward after the end of the guardianship accepts the benefits, he may be estopped from objecting. Hoyt v. Sprague, 103 U. S. 613.

The guardian, without any orders of the court, advanced to his ward sums of money to start him in several business enterprises, which proved to be failures. Held, that upon final settlement the probate court properly refused to give him credit for the money advanced to the ward for such purposes. *In re Mells*, 64 Iowa 391; Eichelberger's Appeal, 4 Watts (Pa.) 84; Shaw v. Coble, 63 N. Car. 377.

A guardian cannot stock and main-

tain a plantation on the account of his ward, without being personally liable for losses incurred in the undertaking. Alexander v. Alexander, 8 Ala. 796.

But *contra*, it has been held that a guardian should be reimbursed for money advanced a ward's husband to set him up in business. Peale's Admr. v. Thurman, 77 Va. 753.

Where the guardian of an insane ward carried on the ward's business advantageously so that its increase required the erection of a new building, it was held that the guardian could not charge the cost of such building to the estate, being himself liable for it, but he might charge the estate a reasonable rent therefor. Murphy v. Walker, 131 Mass. 341.

1. Schouler Dom. Rel. (3rd ed.), § 342; Bond v. Lockwood, 33 Ill. 212; White v. Parker, 8 Barb. (N. Y.) 48; Crenshaw v. Crenshaw, 4 Rich. Eq. (S. Car.) 14; Genet v. Tallmadge, 1 Johns. Ch. (N. Y.) 3; Dolhonde v. Lemoine, 32 La. Ann. 251; see Leonard's Appeal, 95 Pa St. 196; Pierce v. Prescott, 128 Mass. 140.

He may follow the ward's property wherever he can find it, whether in the hands of the former guardian or his transferee. Fox v. Kerper, 51 Ind. 148.

He cannot safely permit the administration of the ward's father to hold the ward's estate but should call him to an account. Will's Appeal, 22 Pa. St. 325; Clark v. Tompkins, 1 S. Car. 119; Covington v. Leak, 65 N. Car. 594.

An infant's distributive share must be paid to the guardian if he has given security therefor. *Re Moody*, 2 Dem. (N. Y.) 624.

The guardian is entitled to possession of a note payable to a third party for the benefit of his ward. Carrillo v. McPhillips, 55 Cal. 130.

He is entitled to possession as against the trustee of land devised to the trustee in trust for the ward. Bacon v. Taylor, Kirby (Conn.) 369.

But where the will commits to trustees the whole estate devised to the minor, the guardian cannot compel it to be paid to them through him. Estate of Young, 17 Phila. (Pa.) 511.

Where a guardian claims credit for assets not reduced to possession, the *onus* is on him to show due diligence to collect, or that it is uncollectable by due

legacies, shares in estates of deceased persons and property settled upon the ward by gift or purchase. And he should collect all debts and other claims of the ward against others;¹ only money can be safely accepted in payment of such claims.²

f. Suits By and Against the Guardian.—The guardian is authorized in collecting such claims to institute suits under proper legal advice,³ and to submit controversies regarding the estate to

diligence. *Stuart v. McMurray*, 82 Ala. 269.

1. The guardian of a soldier's heir should ascertain his pension and bounty rights, and pursue claims accordingly. *Clodfelter v. Bost*, 70 N. Car. 733; *Boaz's Admr. v. Milliken*, 83 Ky. 634.

But a guardian should not be compelled to account for the amount of an uncollected pension, which his successor may still collect for the ward. *Mattox v. Patterson*, 60 Iowa 434.

A guardian may maintain an action against a person who sold a lunatic stock known by him to be worthless, although he did not know of the insanity of the ward. *Johnson v. Stone*, 35 Hun. (N. Y.) 380.

A guardian of an insane person may maintain a bill in equity, to compel a reconveyance of land conveyed by his ward to indemnify the grantee against loss upon a bond, executed by him as part of the same transaction, and conditioned for the payment of debts and legacies given by the will of the ward, in case the estate of the latter is not sufficient to pay them at the time of his decease, the deed, though absolute in form, having been intended by the parties only as a mortgage, the land being necessary for the ward's support, and a surrender of the bond and a release of the obligor's liability upon it being offered. *Warfield v. Fisk*, 136 Mass. 219.

The fact that the property is to be found in another State is no ground for failure of the guardian to recover it. *Potter v. Hiscock*, 30 Conn. 508.

Proof that the infant ward requested the guardian to abstain from recovering a demand against a debtor is no defence to an action for the omission to make the collection. *Johnston v. Miller*, 5 T. B. Monr. (Ky.) 205.

A guardian cannot maintain an action against the purchaser of land as for money due to an incompetent ward where the ward had no interest in the land, but the purchaser had retained in his hands to be paid to a

proper person the amount of a debt due the incompetent from the vendor and which the vendor had agreed to pay the ward out of the proceeds of a sale. *Hidden v. Chappel*, 48 Mich. 527.

2. *Brenham v. Davidson*, 51 Cal. 352; *Lane v. Mickle*, 46 Ala. 600; *State v. Womack*, 72 N. Car. 397; as to Confederate money, see *Venable v. Howard*, 68 Ga. 167; *Byne v. Anderson*, 67 Ga. 466; *Wilson v. Braddy*, 16 S. Car. 517.

That guardian is not chargeable for loss by receiving Confederate money, see *Ferguson v. Lowry*, 54 Ala. 510; *Anderson v. Wynne*, 62 Ala. 329; *Lewis v. Allred*, 57 Ala. 628; *Stewart v. McMurray*, 82 Ala. 269; *Longmire v. Herndon*, 72 N. Car. 629.

A guardian is authorized to accept property, real or personal, in settlement of the debt or claim held by him as guardian if he acts prudently and in good faith. *Mason v. Buchanan*, 62 Ala. 110.

He takes notes of third persons in payment at his own risk, but if he afterwards receives the money upon such notes, and appropriates it as guardian, the payment is sufficient. *Jones v. Jones*, 20 Iowa 388.

A guardian is liable for notes received by him for the hire of slaves before the war, where the obligors were solvent and the guardian forebore to bring suit. *McNeill v. Hodges*, 83 N. Car. 504.

A guardian has no right to accept as part of his ward's estate a promissory note payable to his predecessor in the trust in his individual capacity, and if he does accept such note, and it proves to be uncollectable, he is liable to the ward on his bond. *State v. Greensdale*, 106 Ind. 364.

3. *Smith v. Bean*, 8 N. H. 15; *Shepherd v. Evans*, 9 Ind. 260; *Southwestern R. Co. v. Chapman*, 46 Ga. 557.

This right extends to property fraudulently obtained from the ward before the guardian's appointment. *Somes v. Skinner*, 16 Mass. 348.

arbitration¹ and to compromise suits by or against the estate,² and he will be reimbursed for reasonable expenses incurred in such suits.³

But in most jurisdictions, suit by the guardian should not be begun in his own name, but in the name of the ward.⁴

1. *Weed v. Ellis*, 3 Caines. (N. Y.) 253; *Weston v. Stuart*, 11 Me. 326; *Hutchins v. Johnson*, 12 Conn. 376; *Goleman v. Turner*, 14 S. & M. (Miss.) 118; *Strong v. Beroujon*, 18 Ala. 168.

2. *King v. King*, 15 Ill. 187; *Lippiat v. Holley*, 1 Beav. 423; *Schee v. McQuilken*, 59 Ind. 269, 276; *Graham v. Hester*, 15 La. Ann. 148; *Hagy v. Avery*, 69 Iowa 434; *Luton v. Wilcox*, 83 N. Car. 20.

Such a compromise will be upheld although it charges the ward's estate with new liabilities. *Smith v. Angell*, 14 R. I. 192.

But the ward will not be bound by a compromise of a baseless or unjust claim even if made in good faith by the guardian. *Underwood v. Brockman*, 4 Dana (Ky.) 309; nor by a fraudulent compromise. *Lunday v. Thomas*, 26 Ga. 537.

On the same principle of compromise a guardian may release a debt due the ward or a cause of action for damages. *Torry v. Black*, 58 N. Y. 185; *Blue v. Marshall*, 3 P. Wms. 381.

But where a guardian holding a note belonging to the estate of his wards consented in 1872 to take judgment against the makers of the note, then perfectly solvent, for one-third of the amount due, because of an agreement then prevailing among the lawyers at that bar, induced by the rulings of their presiding judge, although the supreme court had twice decided that such debts were collectible: *Held*, that the guardian was liable to account to his wards for the full amount of the note. *Darby v. Stribling*, 22 S. Car. 243.

The guardian should resist and contest improper claims against the estate of his ward. *Ex parte Guernsey*, 21 Ill. 443, and is entitled to reimbursement out of the estate for expenses thereby incurred. *Mathes v. Bennett*, 1 Foster (N. H.) 204.

3. *Alexander v. Alexander*, 5 Ala. 517; *Re Flinn*, 31 N. J. Eq. 640; *Bickstaff v. Marlin*, 60 Miss. 509.

But if he brings suits where no cause of action exists he is personally chargeable with the costs, although he may have acted under the advice of counsel.

Savage v. Dickson, 16 Ala. 257; *Brown v. Brown*, 5 Eng. L. & Eq. 567.

Where he becomes involved in suits about his accounts through his own fault he cannot charge the expense upon the estate. *Blake v. Pegram*, 109 Mass. 541.

But when the heirs of a ward appeal from the decision of the probate court, the guardian is entitled to his *reasonable expenses in accounting*; and the county court have the power to, and *should allow* them. *Shaw v. Bates*, 53 Vt. 360.

4. *Hoare v. Harris*, 11 Ill. 24; *Fox v. Minor*, 32 Cal. 111; *Riggs v. Zaleski*, 44 Conn. 121; *Hutchins v. Johnson*, 12 Conn. 383; *Anderson v. Watson*, 3 Met. (Ky.) 509; *Barnett v. Commonwealth*, 4 J. J. Marsh. (Ky.) 389; *McChord v. Fisher's Heirs*, 13 B. Mon. (Ky.) 194; *Hutchins v. Dresser*, 26 Me. 76; *McCrillis v. Bartlett*, 8 N. H. 569; *Vincent v. Starks*, 45 Wis. 458; *McKinney v. Jones*, 55 Wis. 39; *Sillings v. Bumgardner*, 9 Gratt. (Va.) 273; *Longstreet v. Tilton, Coxe* (N. J.) 38; *Bradley v. Amidon*, 10 Paige (N. Y.) 235; see *Buermann v. Buermann*, 7 Abb. (N. Y.) N. C. 391; *Leman v. Hansbarger*, 6 Gratt. (Va.) 301; *contra*, *Roberts v. Sacra*, 38 Tex. 580.

So the guardian cannot sue in his own name on an award made in favor of the ward's estate, although he had submitted to arbitration. *Hutchins v. Johnson*, 12 Conn. 376.

And a promise to the "guardian of the minor children of A B" is a promise to the minors and should be sued in their name. *Carskadden v. McGhee*, 7 W. & S. (Pa.) 140.

A guardian cannot subscribe his own name as guardian to a libel for divorce instituted by his ward. *Winslow v. Winslow*, 7 Mass. 96.

He cannot sue in his own name on an account for the labor of his ward. *Newton v. Nutt*, 58 N. H. 599. Nor under the West Virginia code to recover the ward's distributive share in an ancestor's estate. *Burdett v. Cain*, 8 W. Va. 282. In New York, *contra*, *Hauenstein v. Kull*, 59 How. Pr. (N. Y.) 24.

In Georgia the guardian must be a party in an action to recover a legacy

But it is sometimes said that where the suit has reference to an injury to the guardian's right to actual possession of the ward's property, then he should sue in his own name, but otherwise when the matter lies in action.¹ Where, however, the debt or contract sued upon is one which is a result of the guardian's own management of the estate, he should sue upon it in his own name.²

bequeathed to his deceased ward.
Beavers v. Brewster, 62 Ga. 574.

An action for assault and battery committed upon an infant must be brought in the name of the infant by his guardian and not in the name of the guardian. *Stewart v. Crabbin*, 6 Munf. (Va.) 280.

Statutes in some States, however, authorize the guardian to sue in his own name for the use of the ward. *Longmire v. Pilkington*, 37 Ala. 296; *Harris v. Mebane*, 66 N. Car. 334.

A guardian may, by the statute, sue in his own name for the benefit of his ward; but it is better that the suit be in the name of the ward by his guardian. *Turner v. Alexander*, 41 Ark. 254.

1. *Sutherland v. Goff*, 5 Port. (Ala.) 508; *Field v. Lucas*, 21 Ga. 447.

The guardian should sue personally for trespass upon the lands of his wards. *Truss v. Old*, 6 Rand. (Va.) 556; *Bacon v. Taylor, Kirby* (Conn.) 368.

For intermeddling with the issues and profits of an infant's estate action will not lie in their own names, but must be brought by their general guardian or a guardian in socage. *Beecher v. Bunce*, 19 Wend. (N. Y.) 306.

In Illinois, under statute, the guardian may sue in his own name for personal property due the ward, but cannot bring ejectment or any action regarding real estate except in the name of the ward. *Muller v. Benner*, 69 Ill. 108.

A guardian in Indiana cannot maintain for his ward an action for waste or trespass, for injury to the inheritance, but it must be brought by the ward in his own name, by next friend, as provided by statute. *Wilson v. Galey*, 103 Ind. 257.

A guardian by appointment is not authorized, in Michigan, to bring ejectment in his own name for lands owned by the ward; but where the ward's title is fully set forth in the declaration, and the guardian is only a nominal party, the objection to the pleading should be taken by demurrer, and it is within the discretion of the court to permit an amendment. *Kenny v. Harrett*, 46 Mich. 87.

2. While in general an action concerning the estate of a minor must be brought by or against the minor (who, under the statute, must be represented by his guardian *ad litem*), yet where the action is upon an express contract made by the guardian for the benefit of the ward, it may be by or against the guardian personally. *McKinney v. Jones*, 55 Wis. 39.

Where the guardian leased the ward's premises as guardian he should sue on the lease for non-payment of rent in his own name. *Pond v. Curtiss*, 7 Wend. (N. Y.) 45; see, also, *Coakley v. Maher*, 36 Hun. (N. Y.) 157.

He should sue in his own name on notes payable to himself as guardian, though accepted by him for a debt due his ward. *Jolliffe v. Higgins*, 6 Munf. (Va.) 3; *Baker v. Ormsby*, 4 Scam. (Ill.) 325; *Thacker v. Dinsmore*, 5 Mass. 299; *Bingham v. Calvert*, 13 Ark. 399; *Gentry v. Owen*, 14 Ark. 396; *Nickerson v. Gilliam*, 29 Mo. 456; *Shepherd v. Evans*, 9 Ind. 260; *Hightower v. Maull*, 50 Ala. 495; see, also, *Fountain v. Anderson*, 33 Ga. 372.

Where an action is prosecuted by A, guardian of B, on an instrument payable to "A, guardian of B," the fact that the ward becomes of age pending the suit affords no ground to abate it. *Gard v. Neff*, 39 Ohio St. 607.

After the termination of the guardianship, the former guardian has still a *prima facie* right to sue on a note payable to him as guardian, unless the defendant can show that it has been transferred to his successor, or otherwise disprove title. *Chambless v. Vick*, 34 Miss. 109; *Zachary v. Gregory*, 32 Tex. 452.

And the right of action on a note payable to the guardian for money of the ward, will pass on the death of the former to his personal representatives. *Chitwood v. Cromwell*, 12 Heisk. (Tenn.) 658; and similarly of foreclosing a mortgage given to secure such note. *King v. Seals*, 45 Ala. 415.

But a bond made payable to a guardian is in equity the property of the ward, and suit may be brought upon it by the ward when the same was

So, also, for debts or claims existing against the ward's estate at the time the guardianship begins or which the ward afterwards contracts, suit should be made against the ward and not against the guardian;¹ but on all contracts made by the guardian with reference to the estate, he should be sued personally.²

g. Contracts of the Guardian.—The above distinctions are founded upon the general rule that a guardian cannot bind the estate of his ward by his contracts even when made in his capacity as guardian.³ He is personally liable and must look to the court to allow him reimbursement out of the ward's estate.

turned over in the guardian's settlement, notwithstanding the legal title may have been transferred by the guardian's endorsement to another. *Usry v. Suit*, 91 N. Car. 406.

The guardian should sue personally on a contract made by him with another in reference to the ward's estate, although he was understood to act as guardian in the matter. *Thomas v. Bennett*, 56 Barb. (N. Y.) 197.

A guardian may sue his attorney for money collected for him as guardian by agreement, though after such collection the ward becomes of age. *Huntsman v. Fish*, 36 Minn. 148.

1. *Brown v. Chase*, 4 Mass. 436; *Willard v. Fairbanks*, 8 R. I. 1; *Raymond v. Sawyer*, 37 Me. 406; *Coombs v. Janvier*, 31 N. J. L. 240; *Bently v. Torbert*, 68 Iowa 122; see *Robinson v. Hersey*, 60 Me. 225.

A guardian is not liable in *assumpsit* for necessities which have been furnished his ward. If a guardian refuses to pay debts contracted by the ward, the remedy is by suit on the guardian's bond. *Cole v. Eaton*, 8 Cush. (Mass.) 587.

Where judgment is to bind the ward's property, the suit should be against the ward; judgment against the guardian would bind only his personal estate. *Tobin v. Addison*, 2 Strobb. (S. Car.) 3; *Clark v. Casler*, 1 Smith (Ind.) 150; *Morrison v. Garrison*, 27 Pa. St. 226; *McDaniel v. Mann*, 25 Tex. 101; *Nugent v. Epperson*, 57 Miss. 45.

And in a suit against A, B, the words, "As he is guardian," etc., may be rejected as surplusage. *Rollins v. Marsh*, 128 Mass. 116.

A guardian and insane ward cannot be sued jointly on a debt incurred by the ward previous to the guardianship. *Allen v. Hopkin*, 9 R. I. 258.

Similarly an action will not lie against the guardian for the tort of his ward, but the latter should be sued alone. *Garrigus v. Ellis*, 95 Ind. 598.

2. *Stevenson v. Bruce*, 10 Ind. 397; *Ray v. McGinnis*, 81 Ind. 451; *Lindsay v. Stevens*, 5 Dana (Ky.) 105.

An infant is not even personally liable for necessities when they are furnished with the permission of the guardian and charged to him. *Simms v. Norris*, 5 Ala. 42.

Judgment in such case should be against the guardian personally. *Clark v. Casler*, 1 Ind. 243.

But money loaned to a guardian who is authorized by the court to borrow the same for the purpose of removing liens from the land of his ward, and who uses it for such purpose, constitutes a claim against such ward's estate, and the person who loans it may recover it from such estate. *Ray v. McGinnis*, 81 Ind. 451.

Judgment against the guardian on a personal promise to pay for the support and education of the ward does not conclude or estop the ward and neither she nor her husband can appeal from such decision. *Morris v. Garrison*, 27 Pa. St. 226.

An action cannot be maintained against a lunatic after the guardianship has ended and he has received his property on an implied promise to pay debt of the guardian contracted in his behalf during the guardianship even though the guardian has not kept back out of the property enough to pay the debt. *Westmoreland v. Davis*, 1 Ala. 299.

The promise of a guardian to pay the debt of a ward is not collateral within the meaning of the statute of frauds and need not be in writing. *Roche v. Chaplin*, 1 Bailey L. (S. Car.) 419.

3. *Jones v. Brewer*, 1 Pick. (Mass.) 317; *Rollins v. Marsh*, 128 Mass. 116; *Phelps v. Worcester*, 11 N. H. 51; *Tenney v. Evans*, 14 N. H. 343; *Adams v. Jones*, 8 Mo. App. 602; *Dalton v. Jones*, 51 Miss. 585; *McGavock v.*

h. Power to Convert the Estate.—A guardian is not authorized to change real estate of the ward into personal estate or, *vice versa*, without previously obtaining the sanction of the court.¹

Whitfield, 45 Miss. 452; Reading v. Wilson, 38 N. J. Eq. 446; St. Joseph's Academy v. Augustini, 55 Ala. 493.

See Salem Female Academy v. Phillips, 68 N. Car. 491; and cases cited under "SUITS BY AND AGAINST GUARDIANS," *ante*.

So if a guardian takes premises on a lease for the ward, though mentioned as guardian in the lease, he will be personally liable to pay rent. Hannen v. Ewalt, 18 Pa. St. 9; Snook v. Sutton, 5 Halst. (N. J.) 133.

And a stipulation by a guardian in a lease to pay for improvements will not bind the ward. Barrett v. Cooke, 12 Heisk. (Tenn.) 566.

Where a guardian contracts debts beyond the limit of the ward's estate, being personally liable to the creditors he must bear the loss, unless in his contract he has expressly limited his liability to the extent of the assets in his hands. Sperry v. Fanning, 80 Ill. 371.

A person, in anticipation of being appointed guardian of an insane person, promised to pay the treasurer of an asylum for the board and supplies furnished the insane person. He was soon after appointed guardian and as guardian agreed to pay the debt out of the ward's estate and in part paid it. He afterwards resigned, and a new guardian was appointed. *Held*, that his liability under the contract was not ended by the appointment of the new guardian, being himself personally liable thereon. Mass. Gen. Hosp. v. Fairbanks, 132 Mass. 414.

If a guardian purchases for his ward a house and lot subject to a mortgage, he will be liable for the mortgage although he had been authorized by the court to make the purchase, but he is entitled to relief from the ward's estate. Woodward's Appeal, 38 Pa. St. 322; Low v. Purdy, 2 Lans. (N. Y.) 422.

And a guardian cannot, on selling the land of his ward, bind the ward's estate for the removal of incumbrances on such lands. Person v. Merrick, 5 Wis. 231.

But it is held that the guardian has power by making a new promise to take a debt owed by the estate of the ward, out of the statute of limitations and to make the ward's estate respon-

sible therefor. Manson v. Felton, 13 Pick. (Mass.) 206; see, also, Prescott v. Cass, 9 N. H. 93.

Where a guardian brings an action of replevin in favor of his ward and signs the replevin bond individually, he will be liable in his individual capacity. Oliver v. Townsend, 16 Iowa 430.

Similarly a note signed by a person as guardian for the payment of board and tuition for his ward is only a personal obligation of the guardian, and the sureties on his bond as guardian are not liable for its non-payment. McKinnon v. McKinnon, 81 N. Car. 201.

No agreement made by the guardian of a minor concerning the partition of an estate in which he is interested, can, unless ordered or sanctioned by the court having jurisdiction, operate as an estoppel on the minor. Rainey v. Chambers, 56 Tex 17.

1. 2 Kent Com. 228, 230 and note; *Ex parte* Phillips, 19 Ves. 122; Ware v. Polhill, 11 Ves. 278; Shelton v. Ordinary, 32 Ga. 266; Collins v. Dixon, 72 Ga. 475; White v. Parker, 8 Barb. (N. Y.) 48; *Ex parte* Crutchfield, 3 Yerg. (Tenn.) 336; Wood v. Boots, 60 Mo. 546; West v. West's Admr., 75 Mo. 204; Holbrook v. Brooks, 33 Conn. 347; Robinson v. Pebworth, 71 Ala. 240; Royer's Appeal, 11 Pa. St. 36; Dorr, Petitioner, Walk. Eq. (Mich.) 145; Boisseau v. Boisseau, 79 Va. 73; McReynolds v. Anderson, 69 Iowa 208; Moore v. Moore, 12 B. Mon. (Ky.) 651, 662; Attridge v. Billings, 57 Ill. 489. See Rockwell v. Morgan, 2 Beasl. (N. J.) 384; Davis's Appeal, 60 Pa. St. 118.

But a guardian may purchase for his ward, if it be for his interest, such portion of an estate in which the ward is interested, as the other heirs would not take on partition and the court ordered to be sold. Bowman's Appeal, 3 Watts (Pa.) 369.

And he may, upon breach of a mortgage to his ward, enter and sell the estate in accordance with its terms. Taylor v. Hite, 61 Mo. 142; Walter v. Walter, 10 Neb. 123.

If the court orders the sale, the guardian will not be liable in case the conversion proves detrimental to the

But he may use the personal estate to pay interest on mortgages or other incumbrances of the realty or to remove such¹ if it be for the interest of the ward and to redeem the estate from foreclosure.²

i. Liability to Account.—For all property of the ward's received by him or known to him the guardian is liable to account;³ and not only for what he receives but what he ought to have received.⁴

ward. *Bonsall's Case*, 1 Rawle (Pa.) 266. See *Harding v. Larned*, 4 Allen (Mass.) 426; *Hoyt v. Sprague*, 103 U. S. 613.

Where guardian properly invests wards' funds in real estate, and mistakenly, through no bad faith of his, conveyance thereof is made to the wards' mother, and on discovery of the mistake, guardian procures her to convey the property to the wards by deed to be held *in escrow*, until wards' maturity, so as to give them option then to accept the conveyance, or to reject it and leave the property in the mother, and by accident the deed of conveyance is destroyed, and after her death the property is sold without objection on the wards' part, to pay her debts, guardian should not be held accountable. *Elliott v. Howell*, 78 Va. 297.

1. *Macphers. Inf.* 285; *March v. Bennett*, 1 Vern. 428; *Jennings v. Looks*, 2 P. Wms. 278; *Waters v. Ebral*, 2 Vern. 606.

Where a guardian, without leave of court, made payment from the income and profits of his wards' estate for taxes, interest and payment on the mortgage debt, such payments, being for the benefit of the wards, will be allowed against his estate. *Wright v. Comley*, 14 Ill. App. 551.

2. *Marvin v. Schilling*, 12 Mich. 356. See *Sheahan v. Wayne*, 42 Mich. 69.

And where a guardian holds a mortgage upon lands in trust for the ward, the latter has such an interest as will entitle him or the guardian in his behalf to redeem the land from a tax sale. *Witt v. Mewhirter*, 57 Iowa 545.

If a mortgagee enters for condition broken, and is subsequently put under guardianship, his guardian is authorized to restore possession to the mortgagor, and thereby prevent a foreclosure. *Botham v. McIntier*, 19 Pick. (Mass.) 346.

3. *Bethune v. Green*, 27 Ga. 56; *Howell v. Williamson*, 14 Ala. 419; *Martin v. Stevens*, 30 Miss. 159; *Taylor v. Hite*, 61 Mo. 142.

When a policy of insurance is taken out by a husband and father on his own

life, for the benefit of his wife and children, a present interest vests in the beneficiaries on the delivery of the policy, and if he afterwards surrenders the policy on payment of its cash value, receiving the share of his infant children as their guardian, under a regular appointment, he is liable to them for the amount so received, without regard to the parental relation, as any other guardian would be. *Waldrom v. Waldrom*, 76 Ala. 285.

A guardian is chargeable on final settlement for money of his ward borrowed from a former guardian, giving a note and mortgage therefor, although the former guardian refuses to surrender the security, claiming that the ward is indebted to him. *Jay v. Martin*, 49 Ala. 192.

A guardian who has received money by virtue of his office and for his ward, cannot exonerate himself from liability by showing that the money was due to the ward's father, who is a distributee of the estate from which it was derived. *Humble v. Mebane*, 89 N. Car. 410.

A guardian was held liable for the amount of a promissory note given by him to his ward's mother, and after her death taken into his own custody ostensibly for safe keeping, such note being found after his death among his effects, with his signature torn off, and also for the proceeds of sale of certain furniture, which also belonged to the ward's mother, and was sold at auction by him; and it was held to be no defence that no administration of the mother's estate was ever taken out; both the note and the furniture having been taken by the guardian as such, into his possession. *McGill v. O'Connell*, 33 N. J. Eq. 256.

If property of a ward be delivered to a person, and later he becomes guardian, *eo instante*, he becomes possessed of it as guardian, and is liable for it. *Thurston's Admr. v. Sinclair*, 79 Va. 101.

4. *State v. Womack*, 72 N. Car. 397; *Armfield v. Brown*, 73 N. Car. 81; *Stathoff v. Reed*, 32 N. J. Eq. 213; *Shurtleff v. Rile*, 140 Mass. 213. See,

j. Real Estate, Leasing, Care and Repair of, Etc.—The guardian should collect and account for the rents and profits of the ward's real estate.¹ He may lease the ward's lands for the term of his guardianship.² Any excess in a lease beyond that term will be void at the election of his successor or of the ward on becoming of age.³

He may grant easements terminating at the end of the guardianship;⁴ may authorize others to cut timber and carry it away,⁵ provided this is not a waste of the ward's estate,⁶ and may grant the right to cultivate the land.⁷

The guardian may also assign dower out of the estate in which his ward is interested and it seems that such assignment will bind the heir.⁸

also, cases under **COLLECTION OF ASSETS AND NEGLIGENCE.**

1. *Will's Appeal*, 22 Pa. St. 325; *Clark v. Burnside*, 15 Ill. 62; *Spelman v. Terry*, 74 N. Y. 448; *Bond v. Lockwood*, 33 Ill. 212; *Hughes' Appeal*, 53 Pa. St. 500.

He may employ a real estate agent if such is the custom. *Re Flinn*, 31 N. J. Eq. 640.

2. The guardian cannot lease for the benefit of others so as to sacrifice the ward's interests. *Knothe v. Kaiser*, 2 Hun. (N. Y.) 515; *Thackray's Appeal*, 75 Pa. St. 132.

He cannot lease oil or mineral lands for the purpose of working out the product, as such lease extends to something more than the mere usufruct. *Stoughton's Appeal*, 88 Pa. St. 198.

If the guardian himself cultivates the ward's farm, instead of letting it out, he must care for it prudently and will be held liable for any depreciation or any losses occurring to it through his bad management. *Willis v. Fox*, 25 Wis. 646; see *Harding v. Larned*, 4 Allen (Mass.) 426; he will be liable, also, for rent; *Royston v. Royston*, 29 Ga. 82.

He devised his real estate to his wife "during her natural life, for the purpose of her support and the education of her two children," and in case the wife should marry again, to be equally divided among her and the two children. The wife married, but the land was not divided, the daughter continuing to live with, and being supported by her mother. *Held*, that the latter, having carried out the spirit of the will, should not be charged, as guardian, with the rent of the daughter's estate. *Hughart v. Spratt*, 78 Ky. 313.

3. *Rex v. Oakley*, 10 East. 494; *Emerson v. Spicer*, 46 N. Y. 594;

People v. Ingersoll, 20 Hun. (N. Y.) 316; *Putnam v. Ritchie*, 6 Paige (N. Y.) 390; *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150; *Clark v. Burnside*, 15 Ill. 62; *Richardson v. Richardson*, 49 Mo. 29; *Magruder v. Peter*, 4 Gill & J. (Md.) 323; *Snook v. Sutton*, 5 Halst. L. (N. J.) 133; *Willis v. Cowles*, 4 Conn. 189; *Palmer v. Cheseboro*, 55 Conn. 114; *Alexander v. Buffington*, 66 Iowa 360. See *Muller v. Benner*, 69 Ill. 108, for statutory regulation.

[Formerly the excess avoided the whole lease. *Bac. Abr. Leases I*; 2 *Kent Com.* 228.]

This same rule applies to assignments of the ward's leases. *Ross v. Gill*, 4 Call (Va.) 250.

4. *Watkins v. Peck*, 13 N. H. 360; *Johnson v. Carter*, 16 Mass. 443.

5. *Thompson v. Boardman*, 1 Vt. 370; *Bond v. Lockwood*, 33 Ill. 212.

6. *Torry v. Black*, 58 N. Y. 485.

If it be waste and was done by permission of the guardian so that trespass could not be brought against the parties, the ward's remedy is against the guardian for compensation. *Truss v. Old*, 6 Rand. (Va.) 556.

7. A guardian of minor heirs gave a person permission to put in a crop on their land and to keep two-thirds of it when harvested. *Held*, that the guardian had a legal right to make this arrangement; and that upon the sale of the land under a probate license to one who had notice of it, the cropper's rights were not affected. And a removal of the crop by the purchaser, after the cropper had cut it, was a conversion. *Weldon v. Lytle*, 53 Mich. 1.

8. *Curtis v. Hobart*, 41 Me. 230; *Young v. Tarbell*, 37 Me. 509; *Jones v. Brewer*, 1 Pick. (Mass.) 314; *Boyers v. Newbanks*, 2 Ind. 388; *Clark v. Burn-*

It is the guardian's duty to keep the ward's premises in repair so far as the ward's income will admit,¹ but he cannot build or make extensive permanent improvements without leave of the court.²

k. Power to Mortgage.—Statutes now permit a guardian to mortgage or otherwise encumber the estate of the ward after obtaining sanction of the court but not otherwise.³

side, 15 Ill. 62; see *Mathes v. Bennett*, 1 Foster (N. H.) 204.

The deed of a married woman as guardian of infants will not convey her right of dower in the same estate. *Jones v. Hollopeter*, 10 S. & R. (Pa.) 326.

1. *Green v. Winter*, 1 Johns. Ch. (N. Y.) 26; *Cornell v. Vanartsdalen*, 4 Pa. St. 364.

If the guardian fails to keep the estate in tenable repair when the ward's income permits, he will be liable for the rent which he might have received if it had been repaired. *Smith v. Gummere*, 39 N. J. Eq. 27.

The guardian will be liable for depreciation in the value of his ward's buildings through his neglect to repair. *Willis v. Fox*, 25 Wis. 646; *Irvine v. McDowell*, 4 Dana (Ky.) 629.

Where a committee of a lunatic expends money of the *corpus* of the lunatic's estate in the repair of real estate, without obtaining an order of court authorizing him to do so, he runs the risk of having his action disapproved and of being surcharged. But where the court subsequently approves such expenditure as reasonable and necessary the ratification is equivalent to a previous order. *Frankenfield's Appeal*, 102 Pa. St. 589.

2. *Snodgrass' Appeal*, 37 Pa. St. 377; *Kearne's Account*, 1 Pa. St. 326; *Robinson v. Hersey*, 60 Me. 225; *Payne v. Stone*, 7 S. & M. (Miss.) 367; *Miller's Est.*, 1 Pa. St. 326; *Murphy v. Walker*, 131 Mass. 341; *Powell v. North*, 3 Ind. 392; *Lane v. Taylor*, 40 Ind. 495.

Where a guardian advances money for improvements without authority he is without a remedy. *Hassard v. Rowe*, 11 Barb. (N. Y.) 22; *Bellinger v. Shafer*, 2 Sandf. Ch. (N. Y.) 293; *Haggarty v. McCanna*, 10 C. E. Green (N. J.) 48.

But the court will sometimes protect such expenditures on the ground that the ward has received a benefit. *Macphers. Inf.* 295; 1 Atk. 489; *Hood v. Bridport*, 11 Eng. L. & Eq. 271; *Jack-*

son v. Jackson, 1 Gratt. (Va.) 143; *James v. Lane*, 33 N. J. Eq. 30.

Where the guardian does make expensive improvements upon the common property without the sanction of the county court, upon ordering a sale of the premises in a suit for partition, the ward should only be required to make compensation for his proportionate share of the improvements according to their then present cash value, and not according to their original cost. *Jessup v. Jessup*, 102 Ill. 480; *Jackson v. Jackson*, 1 Gratt. (Va.) 143.

And where the improvements were such that the court on application would have ordered them, the guardian will be reimbursed. *Waldrip v. Tully*, 48 Ark. 297; *Shepard v. Stebbins*, 48 Hun. (N. Y.) 247; cf. *Owens v. Pearce*, 10 Lea (Tenn.) 45.

Authority to expend a certain sum for improvements does not justify a larger expenditure, though needed. *Snodgrass' Appeal*, 37 Pa. St. 377. Nor has the builder any lien on the ward's real estate for such excess. *Guy v. Du Uprey*, 16 Cal. 195; *Copley v. O'Neill*, 57 Barb. (N. Y.) 299; *McCarty v. Carter*, 49 Ill. 53; *Payne v. Stone*, 7 Sm. & M. Miss. 397.

Stock and farming utensils on a ward's farm are *prima facie* his as against the guardian who has carried on the farm. *Tenney v. Evans*, 11 N. H. 346.

3. *Merritt v. Simpson*, 41 Ill. 391; *Lovelace v. Smith*, 39 Ga. 130; *Wood v. Truax*, 39 Mich. 628; *Edwards v. Taliaferro*, 34 Mich. 13; *Battell v. Torrey*, 65 N. Y. 294; U. S. Mortgage Co. v. *Sperry*, 24 Fed. Rep. (Ill.) 838.

In Oregon the statute does not permit the guardian to mortgage. *Trutch v. Bunnell*, 11 Or. 58.

Power to sell and convey does not include power to mortgage. *Tyson v. Latrobe*, 42 Md. 325.

Where a road, as located, passes through land owned by minors, the right of way is not secured therein by a deed executed by the guardian of such minors without authority from the probate

1. *Personal Estate, Care of, Investment of, Sale of.*—The guardian should keep all personal estate of the ward separate from his own. If he receives money of the ward and deposits it in the bank in his own name, such mingling of the funds will render him liable for the amount deposited if the bank fails.¹ So if he purchases stock or takes a promissory note in his own name in exchange for property of the ward, he and not the ward must bear any loss thereon.²

All sums received should be invested by the guardian in productive securities³ and usually no previous approval of the investment by the court is necessary.⁴

court. A guardian has no power to make such conveyance, and as against the minors the same is void. *State v. Commissioners*, 39 Ohio St. 58.

A guardian of an infant has authority, when so ordered by a court of competent jurisdiction, to subdivide the lands of the ward and to dedicate streets and highways to the public. *Indianapolis v. Kingbury*, 101 Ind. 200.

The statute does not authorize the court to empower a guardian to *donate* the right of way for a railroad over his ward's lands, and a deed by the guardian for such right, without the prior approval by the court of a *price* agreed upon by the guardian, is void. *Indiana, B. etc., R. Co. v. Brittingham*, 98 Ind. 294.

So without previous sanction of the court a guardian cannot bind his ward by an agreement made by him regarding the partition of an estate in which the ward is interested. *Rainey v. Chambers*, 56 Tex. 17.

1. *Fletcher v. Walker*, 3 Madd. 73; *Wren v. Kirton*, 11 Ves. 377; *McDonnell v. Harding*, 7 Sim. 178; *Matthews v. Brise*, 6 Beav. 239; *Jenkins v. Walter*, 8 Gill & J. (Md.) 218; see *In re Stafford*, 11 Barb. (N. Y.) 353.

Where a guardian has deposited prudently in his capacity as guardian he will not be held liable. *Post's Est.*, *Myrick's Prob.* (Cal.) 230; *Routh v. Howell*, 3 Ves. 565.

A *bona fide* deposit of his ward's money by guardian in his own name, provided it be shown that it was his ward's money, will protect him from liability for any loss which ensues, not by the *form* of the deposit, but by the general destruction of the currency and banking interests of the State. *Parsley's Adm'r v. Martin*, 77 Va. 376.

2. *White v. Parker*, 8 Barb. (N. Y.) 48; *Knowlton v. Bradley*, 17 N. H. 458; *Brown v. Dunham*, 11 Gray

(Mass.) 42; *contra*, *Barney v. Parsons*, 54 Vt. 623; see *Brisbane v. Bank*, 4 Watts (Pa.) 92; *Stanley's Appeal*, 8 Barr (Pa.) 431.

3. But the guardian may keep a suitable surplus on hand for current expenses; also sums too small to be well invested. *Baker v. Richards*, 8 S. & R. (Pa.) 12; *Knowlton v. Bradley*, 17 N. H. 458.

4. Where a guardian loans his ward's money, the statute requires that the county court must approve the security; and a ward may treat a loan made without such approval of the county court as an appropriation of the money to the guardian's own use. The statutory requirement that the security shall be approved by the court is mandatory, not merely directory. *McIntyre v. People*, 103 Ill. 142.

A guardian may invest moneys of his ward without an order of court; but, if he do, it may generally be said that he does it at his own risk. An order for investment obtained from the probate court would protect him even if misfortune were to follow. *Guardianship of Cardwell*, 55 Cal. 137.

Where an executor and guardian in Rhode Island, by virtue of such a special law, and by order of the probate court, conveyed the property of infants to a manufacturing corporation, by way of investment in its capital stock. *Held*, that the conveyance and investment were protected by the law, and that no account could be demanded except for the stock and its dividends. *Hoyt v. Sprague*, 103 U. S. 613.

If an investment is sanctioned by the court, the guardian is not liable for loss occurring thereon unless caused by his subsequent default. *Bryant v. Craig*, 12 Ala. 354; *O'Hara v. Shepherd*, 3 Md. Ch. 306; *Carlyle v. Carlyle*, 10 Md. 440; see, also, *Newman v. Reed*, 50 Ala. 297.

In general, either public securities or real securities are to be preferred.¹ By statute in some States fiduciary officers are limited in their investments to certain kinds of securities,² while in other States, as Massachusetts, there are no restrictions, but they are held only to the exercise of sound judgment and good faith.³

Loans on the credit of individuals or firms without security or with doubtful security are made at the risk of the guardian if loss occurs.⁴ So, also, of investments in indorsed notes of parties of bad or doubtful standing.⁵

But loans prudently made to individuals on good collateral security will be approved wherever the guardian has discretion.⁶

1. *Gray v. Fox*, Saxt. (N. J.) 259; *Worrell's Appeal*, 9 Barr (Pa.) 508; *Nance v. Nance*, 1 S. Car. 209.

2. In New York a trustee holding funds for investment for the benefit of minor children must invest in Government or real securities. *King v. Talbot*, 40 N. Y. 76.

A guardian, appointed in a State which is not the domicile of the ward, should not, in accounting in the State of his appointment for his investment of the ward's property, be held, unless in obedience to express statute, to a narrower range of securities than is allowed by the law of the State of the ward's domicile. *Lamar v. Micou*, 114 U. S. 218.

3. *Lovell v. Minot*, 20 Pick. (Mass.) 116; *Gary v. Cannon*, 3 Ired. Eq. (N. Car.) 64.

The investment should be preferably in public or real securities, or at least in bonds of third persons with proper sureties. *Spear v. Spear*, 9 Rich. Eq. (S. Car.) 184.

Investment in stock of the United States bank during the time of its prosperity has been upheld. *Boggs v. Adger*, 4 Rich. Eq. (S. Car.) 408. But not in stock of a State bank. *Smith v. Smith*, 7 J. J. Marsh (Ky.) 238.

But stock of railway, navigation and other companies, whose standing is uncertain, is unsuitable. *Worrell's Appeal*, 23 Pa. St. 44; *French v. Currier*, 47 N. H. 88; *Allen v. Gaillard*, 1 S. Car. 279; *King v. Talbot*, 40 N. Y. 76.

An investment during the war in Confederate securities which proved worthless, has, however, been upheld. *Robertson v. Wall*, 85 N. Car. 283; *Watson v. Stone*, 40 Ala. 451. See, however, *Fitz-Gerald v. Bailey*, 58 Miss. 658.

4. *Wyckoff v. Hulse*, 32 N. J. Eq. 697 (where the loan was made to the

child's parent); *Boyett v. Hurst*, 1 Jones Eq. (N. Car.) 166; *Smith v. Smith*, 4 Johns. Ch. (N. Y.) 281; *Lee v. Lee*, 55 Ala. 590; *Harbin v. Bell*, 54 Ala. 389; *May v. Duke*, 61 Ala. 53; *Clay v. Clay*, 3 Met. (Ky.) 548; *Clark v. Garfield*, 8 Allen (Mass.) 427; *Gilbert v. Guptill*, 34 Ill. 112; *Covington v. Leak*, 65 N. Car. 594. See *State v. Morrison*, 68 N. Car. 162.

A guardian of a minor lent money of his ward to B, on her promise to execute in the future her promissory note therefor, and a mortgage upon lands which she contemplated buying with said money. She bought the land, but refused to execute the note or mortgage. *Held*, that the guardian should be held responsible for the money loaned. *Estate of Post*, 57 Cal. 273.

The sureties are not liable for loss on an investment of the guardian on insufficient real estate security till the amount of the loss has been ascertained by foreclosure of the mortgage. *State v. Slevin*, 12 Mo. App. 321.

5. *Harding v. Larned*, 4 Allen (Mass.) 426; *Hurdle v. Leath*, 63 N. Car. 597.

But a guardian, if he acts with due care, prudence, diligence and good faith in loaning the funds of his ward, is not liable for a loss caused by the bankruptcy of his borrower, although he takes only his note, without other security; and although he loans money of his own to the same party, and receives but one note running to himself, not as guardian, as evidence of both debts. *Barney v. Parsons*, 54 Vt. 623.

6. *Lovell v. Minot*, 20 Pick. (Mass.) 116; *Covington v. Leak*, 65 N. Car. 594; *Jack's Appeal*, 94 Pa. St. 367; *Newman v. Reed*, 50 Ala. 297; *State v. Slevin*, 93 Mo. 253.

Where the guardian loaned money of the ward on mortgage to a man of good standing, causing the title to be ex-

A reasonable time after receiving the ward's funds, usually six months, is allowed the guardian for making the investment.¹ If, however, he suffers the money to lie idle beyond that time or mingles it with his own or employs it in his business, he is liable for interest,² and in case of misconduct, with compound interest.³

Or if the guardian's improper use of the funds proves profitable,

amined, but was deceived by fraudulent representations of the mortgagor made at the time of the execution of the mortgage a few days subsequent to the examination, the guardian was not held liable for loss thereon. *Slaughter v. Favorite*, 107 Ind. 291.

A guardian is not liable for an error in judgment in making investments of his ward's money, where he acts in good faith, and is reasonably prudent under the circumstances; he is not bound to exercise the highest degree of care. *Hughes v. People*, 10 Ill. App. 148.

1. *Huffer's Appeal*, 2 Grant (Pa.) 341; *Worrell's Appeal*, 23 Pa. St. 44; *Karr v. Karr*, 6 Dana, (Ky.) 3; *White v. Parker*, 8 Barb. (N. Y.) 48; *Owen v. Peebles*, 42 Ala. 338; *Ashley v. Martin*, 50 Ala. 537; *Pettus v. Sutton*, 10 Rich. Eq. (S. Car.) 356; *Bond v. Lockwood*, 33 Ill. 212; *Armstrong v. Walkup*, 12 Gratt. (Va.) 608.

A guardian is not liable for interest unless he is directed by the probate court to invest the money of his ward or take it on interest. *Reynolds v. Walker*, 29 Miss. 250.

There are some cases in which entire failure to invest would not subject the guardian to liability for interest. *Brand v. Abbott*, 42 Ala. 499; *Ashley v. Martin*, 50 Ala. 537; *State v. Foy*, 65 N. Car. 265.

Pending a decree upon his final balance, the guardian is not obliged to invest and should not be charged interest, unless he has used the fund or it has earned interest. *Re Mott*, 26 N. J. Eq. 509.

2. *Hughes' Appeal*, 53 Pa. St. 500; *Boynton v. Dyer*, 18 Pick. (Mass.) 1; *Barney v. Saunders*, 16 How. (U. S.) 535; *Stark v. Gamble*, 43 N. H. 465; *French v. Currier*, 47 N. H. 88; *Hapgood v. Jennison*, 2 Vt. 294; *Mackin v. Morse*, 130 Mass. 439; *Tyson v. Sanderson*, 45 Ala. 364; *Reynolds v. Walker*, 29 Miss. 250; *Snively v. Harkrader*, 29 Gratt. (Va.) 112; *Wilson v. Lineberger*, 88 N. Car. 416; *Smith v. Gummere*, 39 N. J. Eq. 27; *Matter of Thurston*, 57 Wis. 104; *Estate of Wid-*

does, 17 Phila. (Pa.) 477; *Bennett v. Hanifin*, 87 Ill. 31; *Stumph v. Pfeiffer*, 58 Ind. 472.

See, also, *Burke v. Turner*, 85 N. Car. 500; *Bush v. Bush*, 33 Kan. 556.

The statute which declares that the guardian shall be liable for the principal and legal interest of the ward's estate which he fails to invest or loan, when, by reasonable diligence, he could have invested or loaned it, is imperative; it was intended to secure the faithful administration of estates, and the courts cannot disregard its plain provisions. *Smythe v. Lumpkin*, 62 Tex. 242.

For money invested in Confederate bonds by order of the court the guardian is liable only for the principal during the pendency of the guardianship, but for interest thereafter. *Fitz-Gerald v. Bailey*, 58 Miss. 658.

Where a guardian loans the money on usury, and thereby forfeits the whole debt, he is liable for principal and interest. *Drapar v. Joiner*, 9 Humph. (Tenn.) 612.

But he is at liberty to loan at more than the usual rate if it is also a lawful rate. *Foteaux v. LePage*, 6 Iowa 123; *Frost v. Winston*, 32 Mo. 489.

3. *Swindall v. Swindall*, 8 Ired. Eq. (N. Car.) 285; *Clay v. Clay*, 3 Met. (Ky.) 548; *Knott v. Cottee*, 13 Eng. L. & Eq. 304; see *Huffer's Appeal*, 2 Grant (Pa.) 341.

Speculating with the ward's funds or employing them in the guardian's own business would be such misconduct as to render the guardian liable for compound interest. *Farwell v. Steen*, 46 Vt. 678.

But mere failure to file annual accounts will not render him liable to compound interest. *Ashley v. Martin*, 50 Ala. 537; *Childress v. Childress*, 49 Ala. 237.

Compound interest should cease on the ward's arriving at full age and simple interest only charged thereafter. *Tanner v. Skinner*, 11 Bush (Ky.) 120; *Clay v. Clay*, 3 Met. (Ky.) 548; see *Little v. Anderson*, 71 N. Car. 190; *Winstead v. Stanfield*, 68 N. Car. 40.

he may be required to surrender all profits made.¹

A guardian has power, if not restrained by statute, to sell his ward's personal estate without an order of the court.²

m. Deeds, Etc., of Guardian, Covenants.—All deeds or other instruments necessary to carry out his powers may be executed by the guardian,³ but he will be personally bound by all unauthorized covenants or agreements therein,⁴ though not by implied covenants.⁵

1. *Chanslor v. Chanslor*, 11 Bush (Ky.) 665; *Bond v. Lockwood*, 33 Ill. 212.

Where a guardian, instead of investing his ward's moneys in legal investments, employs them in his own business, the ward is entitled to elect to take either interest on his capital or the profits actually earned thereby. *Seguin's Appeal*, 103 Pa. St. 139.

Where a guardian invests in stocks, though illegally, and the investment proves profitable, he will be held liable for all dividends received and for the highest market value which he received or might have received for the stock. *French v. Currier*, 47 N. H. 88; *Lamb's Appeal*, 58 Pa. St. 142; see *Atkinson v. Atkinson*, 8 Allen (Mass.) 15.

Where a guardian invests the ward's money in his own business which is managed by his son who receives a portion of the profits as compensation, it is held that he is not chargeable with his son's share of the profits, there being no fraud against the ward. *Kyle v. Barnett*, 17 Ala. 306.

2. *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 150; *Woodward v. Donally*, 27 Ala. 108; *Wallace v. Holmes*, 9 Blatch. (U. S.) 67; *Humphrey v. Buisson*, 19 Minn. 182.

A guardian after the ward's death may transfer to a third person for collection, a note payable to the ward or bearer. *Fletcher v. Fletcher*, 29 Vt. 98.

In California under statute an order of the court is necessary for the guardian to sell any portion of the ward's estate. *Kendall v. Miller*, 9 Cal. 591; *De L. Montague v. Union Ins. Co.*, 42 Cal. 209.

In South Carolina a guardian cannot sell and assign his ward's bond and mortgage of real estate without judicial sanction. *McDuffie v. McIntyre*, 11 S. Car. 551; but the law of most States is probably otherwise. *Schouler Dom. Rel.*, § 352, n.

A guardian cannot mortgage his

ward's stock and agricultural implements or his future crops so as to bind the ward. *Sample v. Lane*, 45 Miss. 556.

3. *Schouler Dom. Rel.*, § 351.

A guardian has authority to discharge a mortgage made to the ward upon receiving payment for the same. *Chapman v. Tibbitts*, 33 N. Y. 289; *Smith v. Dibrell*, 31 Tex. 239; *Perkins v. Dyer*, 6 Ga. 401; and may extend or renew a mortgage note. *Willick v. Taggart*, 17 Hun. (N. Y.) 511.

A guardian may also accept delivery of a deed of conveyance to his ward. *Barney v. Seeley*, 38 Wis. 381.

In a deed of a married woman as guardian the joinder of her husband is unnecessary. *Palmer v. Oakley*, 2 Doug. (Mich.) 433.

4. *Whiting v. Dewey*, 15 Pick. (Mass.) 428; *State v. Clark*, 28 Ind. 138.

The rule *caveat emptor* applies to all sales by the guardian of his ward's estate under leave of court, the purchaser having no right to expect covenants of title by the guardian. *Byrd v. Turpin*, 62 Ga. 591.

Where a guardian included in his deed, by mistake, one lot to which the ward had no title and for himself and for his ward entered into covenants for title, it was held that he was personally liable upon these covenants. *Holyoke v. Clark*, 54 N. H. 578.

Where a guardian executed a deed under authority of the court ordering the sale, but it being found defective, he executed another deed for the purpose of correcting mistakes in the former one, it was held that the second deed being at most only the declaration of the guardian, could not bind the ward. *Young v. Lorain*, 11 Ill. 624.

A guardian who has obtained leave of court to mortgage his ward's land, cannot, under the Rhode Island statute, give a power of sale therein. *Barry v. Clarke*, 13 R. I. 65.

5. *Webster v. Conley*, 46 Ill. 13.

VI. JOINT GUARDIANS.—Two or more persons are sometimes appointed joint guardians of the same ward. In such case the survivor or survivors of them continue in the office when one of them dies, resigns or is removed.¹

Such joint guardians may act separately or in conjunction. They are jointly responsible for joint acts, and each is separately answerable for his separate acts and defaults.²

But the receipt of one is the receipt of all;³ though neither can act in opposition to the wishes of the other.⁴

VII. QUASI GUARDIANS.—A quasi-guardianship sometimes arises where a person without appointment or under a void appointment takes possession of the infant's property. Courts of equity will hold such person accountable for the property and for his acts

1. *People v. Byron*, 3 Johns. Cas. (N. Y.) 53; *Pepper v. Stone*, 10 Vt. 427.

In England, however, the rule in chancery is that the death of one determines the office of all, but as the court will at once re-appoint the survivors, the rule is merely formal. *Bradshaw v. Bradshaw*, 1 Russ. 528; *Hall v. Jones*, 2 Sim. 41.

One of two persons appointed joint guardians may qualify without the other. *Kevan v. Waller*, 11 Leigh (Va.) 414. And where one declines to act, all the powers and duties of the office devolve upon the other. *Matter of Reynolds*, 18 N. Y. Supr. Ct. 41.

The survivor of joint guardians is presumed to have received the whole estate, in the absence of proof to the contrary. *Graham v. Davidson*, 2 Dev. & Bat. Eq. (N. Car.) 155.

If a testamentary guardian declines to serve with his joint guardian and the latter thereby becomes sole guardian, the former may, nevertheless, be appointed at his request after the death of the latter. *Johnson's Case*, 2 Jones & Lat. 222.

2. *Kirby v. Turner*, Hopk. Ch. (N. Y.) 309; *Blake v. Pegram*, 101 Mass. 592.

Joint guardians may apportion the property among themselves, each taking charge of a part, and in such case any one of them is chargeable with no more than he so receives unless he has been unreasonably negligent in examining the acts of the others. *Jones' Appeal*, 8 Watts & Serg. (Pa.) 143.

The discharge of one joint guardian who has received no part of the property, relieves him from all liability. *Hocker v. Woods*, 33 Pa. St. 466.

But where one of two guardians de-

livered the assets in his hands to his co-guardian, and took no part in managing the estate, but afterward joined with his colleague in a statement of the guardianship account, and the latter became insolvent, the former was held liable for the property. *Clark's Appeal*, 18 Pa. St. 175.

And where one guardian consents to his co-guardian's misapplication of the funds, he is equally liable. *Pim v. Downing*, 11 S. & R. (Pa.) 66.

Having given a joint bond, they are not thereby made sureties for each other, but their sureties are responsible for both the joint and the separate acts of each, and the discharge of one guardian is not the discharge of the other, or of the sureties on the joint bond. *Kirby v. Turner*, Hopk. Ch. (N. Y.) 309; *Hocker v. Woods*, 33 Pa. St. 466.

In an action against A and B, on a joint guardian's bond for the sale of their ward's real estate, it appeared that they were separate guardians of separate heirs owning certain real estate as tenants in common; that the guardians had jointly petitioned for, and obtained, an order for the sale of their respective ward's real estate; that A had made sale accordingly, received the purchase-money, and failed to account for, or pay over, the same, and had been removed; *held* that the recital of the bond, that they were joint guardians was a mistake. *Hurlburt v. State*, 71 Ind. 154.

3. *Alston v. Munford*, 1 Brock. (U. S.) 266; *Rayman v. Wyman*, 18 Me. 385.

4. One joint guardian may maintain trespass against the other for forcibly removing the child against his wishes. *Gilbert v. Schwenck*, 14 M. & W. 488.

as if guardian,¹ and if he has given a bond under a void appointment his sureties thereon are equally liable with him.² So, where a guardianship has ended, the liability of the retiring guardian continues so long as he holds and controls the property of the ward.³

VIII. GUARDIAN AND EXECUTOR OR ADMINISTRATOR.—Where the same person is executor or administrator of the parent and guardian of his minor children his liability as guardian for the wards' share

1. Pennington v. Fowler, 3 Halst. Ch. (N. J.) 343; Alston v. Alston, 34 Ala. 15; Espey v. Lake, 15 Eng. L. & Eq. 579; Crooks v. Turpin, 1 B. Mon. (Ky.) 185; Hanna v. Spott's Heirs, 5 B. Mon. (Ky.) 365; Earle v. Crum, 42 Miss. 165; State v. Lewis, 73 N. Car. 138; Maguire v. Doonan, 24 W. Va. 507; Peale's Admr. v. Thurman, 77 Va. 753; Martin's Admr. v. Fielder, 82 Va. 455; Davis v. Harkness, 1 Gilm. (Ill.) 173.

If one appointed by will as executor and also as testamentary guardian, qualifies only in the former capacity, so that he is not a legal guardian, but nevertheless acts as such by loaning the funds of the estate, which he might have done as guardian had he qualified in that capacity, he will in equity be held liable to account as guardian. Wadsworth v. Connell, 104 Ill. 369.

But an executor or administrator in rightful possession of property inherited by an infant cannot be charged as quasi-guardian; for he holds in a different capacity. Bibb v. McKinley, 9 Port. (Ala.) 636; Minfee v. Ball, 7 Ark. 520.

A guardian, holding letters found to be void, is not thereby relieved from his acts done in his capacity as guardian; if he has received money of the ward, he will be estopped from denying his responsibility in a suit brought by a subsequent guardian to recover it. McClure v. Commonwealth, 80 Pa. St. 167.

A guardian cannot avoid his liability to account to his wards by contending that the records do not show that he qualified or was appointed, he having acted as such. Gregory v. Field, 63 Miss. 323; or by denying that he received the property as guardian, if he actually received it. Bombeck v. Bombeck, 18 Mo. App. 26; Portis v. Cummings, 21 Tex. 265; Humble v. Mebane, 89 N. Car. 410.

Similarly, one regularly appointed guardian is held responsible for acts committed before qualifying by giving bonds. Magruder v. Darnall, 6 Gill

(Md.) 269; Sargent v. Wallis, 67 Tex. 483.

A son who takes charge of an incompetent father's estate with the acquiescence of the latter may make his father an equitable ward. Jacox v. Jacox, 40 Mich. 473.

Where a guardian appointed in another State removed with his ward to Louisiana and obtained possession of the effects of the ward as guardian, even if his appointment had no effect in the latter State, he was liable as *gestor negotiorum* for the property received. Leverich v. Adams, 15 La. Ann. 310.

A special guardian whose appointment was found to be void will be held to account for the proceeds of a sale of the ward's land received by him, in the same manner as if regularly appointed. Dodge v. St. John, 96 N. Y. 260.

There is no such thing as a guardian *de facto* in Georgia. All the acts of persons not properly appointed by a court having jurisdiction are null and void, and they are liable to the person interested for the same. Bell v. Love, 72 Ga. 125.

Where one assumes to act as guardian without authority, his fraudulent or mistaken representations are no foundation for an equitable estoppel against the infant or the guardian subsequently appointed so as to bind the infant or his property. Sherman v. Wright, 49 N. Y. 227.

2. McClure v. Commonwealth, 80 Pa. St. 167; State v. Lewis, 73 N. Car. 138; Corbitt v. Carroll, 50 Ala. 315.

3. Mellish v. Mellish, 1 Sim. & Stu. 138; Armstrong v. Walkup, 12 Gratt. (Va.) 608.

If a guardian remarried and under such circumstances the letters of guardianship abated, she was bound to see that her wards' property was properly cared for; her liability did not cease upon her letters abating; and if she held on to the property of the minors, she would be liable for the rents thereof. Hood v. Perry, 73 Ga. 319.

of the real estate begins at once, for it descends at once to the heir, but for personal estate his liability begins only when his accounts as executor show a transfer to his account as guardian.¹

If no such transfer appears and the time allowed by law for the settlement of the estate has elapsed and there is no evidence of intent to hold longer as executor or administrator the law will presume that he holds as guardian.²

IX. EXTENT OF GUARDIAN'S AUTHORITY; FOREIGN GUARDIANS; ANCILLARY GUARDIANS.—The authority of a guardian over both person and estate of ward, is now considered to be strictly territorial, not extending beyond the State or country of his appointment.³

1. *Conkey v. Dickinson*, 13 Met. (Mass.) 51; *Alston v. Munford*, 1 Brock. (U. S.) 266; *Burton v. Tunnell*, 4 Harr. (Del.) 424; see *Buckingham v. Walker*, 48 Miss. 609.

If after settling his accounts as administrator, a guardian receives property of the deceased, he should account for it in his final account as guardian, the transfer at that late period being taken for granted. *Townsend v. Talant*, 33 Cal. 45.

The same person cannot be held liable both as guardian and administrator. *Wren v. Gayden*, 1 How. (Miss.) 365; *cf. Stillman v. Young*, 16 Ill. 318; *Foteaux v. Lepage*, 6 Iowa 123.

Where a person as executor of an estate holds a legacy payable to a legatee at the age of eighteen years he cannot as guardian of such legatee by his own election transfer the legacy before that time to his guardianship account so as to make the sureties on his guardianship bond liable. *Swope v. Chambers*, 2 Gratt. (Va.) 319.

2. *Watkins v. State*, 2 Gill & Johns. (Md.) 220; *Karr v. Karr*, 6 Dana (Ky.) 3; *Wilson v. Wilson*, 17 Ohio St. 150; *Re Wood*, 71 Mo. 623; *Re Scott's Acct.*, 36 Vt. 297; *Adams v. Gleaves*, 10 Lea (Tenn.) 367.

Such evidence as division of the parent's estate among the heirs, the payment of legacies, or placing chattels of the estate upon the ward's farm will suffice to show an intent to hold as guardian. *Johnson v. Johnson*, 2 Hill Ch. (S. Car.) 277; *Drane v. Bayliss*, 1 Humph. (Tenn.) 174.

An amount due by an administrator to the widow of his intestate was assigned by the widow to her infant son, of whose estate the administrator was also the guardian. *Held*, that the debt due by the administrator *as such* was paid and the amount became assets in his hands *as guardian*, for which he

and the sureties on the guardianship bond were liable. *Todd v. Davenport*, 22 S. Car. 147.

Where the liability is doubtful, it has been held that the ward may sue both sets of sureties, or either, leaving them to adjust their rights among themselves. *Harris v. Harrison*, 78 N. Car. 202.

Where there are joint executors or administrators, one of whom is guardian, there can be no presumption of transfer to the guardian. *Watkins v. State*, 2 Gill & Johns. (Md.) 220.

But *contra*, where A and B administered upon an estate of which C was a distributee, and A became guardian of C. *Held*, that for moneys in A's hands as administrator, due to C, A, as guardian, was liable, but of moneys put into the hands of a stranger by act of both A and B, A, as guardian, was chargeable with one-half, and for the other half B was indebted to the ward. *Coleman v. Smith*, 14 S. Car. 511.

An intestate left surviving him a widow and one child, who were entitled to all his personal estate. The widow was appointed his administratrix, and also the guardian of his child. In her account as administratrix she had charged herself with a certain mortgage, but neglected to claim allowance for the costs and execution fees which she had paid in connection with the mortgage. *Held*, that she could not be allowed credit for the amount of those costs and fees in her account as guardian. *Re Allen*, 40 N. J. Eq. 181.

3. *Kraft v. Wickey*, 4 Gill & Johns. (Md.) 332; *Burnet v. Burnet*, 12 B. Mon. (Ky.) 323; *Leonard v. Putnam*, 51 N. H. 247; *Weller v. Suggett*, 3 Redf. (N. Y.) 249; *Rogers v. McLean*, 31 Barb. (N. Y.) 304; *M'Liskey v. Reid*, 4 Bradf. (N. Y.) 334; *En parte Watkins*, 2 Ves. 470; *Grist v. Forehand*, 36 Miss. 69; *Potter v. Hiscox*, 30 Conn. 508.

As a matter of comity, however, a foreign guardian will sometimes be allowed to sue and will be otherwise recognized,¹ but statutes in many States now require him to comply with certain regulations before suing,² and in other States he must first obtain

Consequently, the disability of a person over whom a conservator is appointed in this State, does not follow him when he removes to another State, and a contract made by such a person in another State, being valid and binding in the State where made, is equally so in this State. *Gates v. Bingham*, 49 Conn. 275.

1. *Earl v. Dresser*, 30 Ind. 11; *Hoyt v. Sprague*, 103 U. S. 613; *Marts v. Brown*, 56 Ind. 386; *Sims v. Renwick*, 25 Ga. 58.

The courts of Minnesota will recognize the foreign appointment of a guardian, as creating the relation of guardian and ward in that State, subject to the laws of that State as to any exercise of power by virtue of that relation. *Townsend v. Kendall*, 4 Minn. 315.

On the principle of comity, the claims of a foreign guardian to the custody of a child whose legal domicile was in another State were upheld against those of a guardian within the jurisdiction of the court. *Woodworth v. Spring*, 4 Allen 321; *Nugent v. Vetzera*, L. R. 2 Eq. 704.

And where a guardian duly appointed in another State sought the custody of his wards, who had been taken by force from him and carried to another State the courts of that State held that, as he was their lawfully constituted guardian, appointed by the proper court, they should have been committed to his custody. *Wells v. Andrews*, 60 Miss. 373.

So in England, personal property may be paid to an owner, who, if resident in that country would not be allowed to receive it. *Goods of Countess Da Cunha*, 1 Hag. 237.

While a foreign guardian will be recognized as a matter of comity if appointed by a court of competent jurisdiction, yet if the ward has left his State, with no intention of returning, an appointment in that State, especially when the ward has no property there, will not be recognized. *Rice's Case*, 42 Mich. 528; see *Taney's Appeal*, 97 Pa. St. 74.

But where the courts of one jurisdiction have not respected the claims of a foreign guardian for custody of the

child, the courts of the State of such foreign guardian will not comply with the order of the other court directing that the property of the ward be given up to such court. *Ex parte Dawson*, 3 Bradf. (N. Y.) 130.

The courts of one State will not enforce the obligation of a probate guardian's official bond given in another State. *Probate Court v. Hibbard*, 44 Vt. 597.

2. The statute of Mississippi requires a foreign guardian before suing, to file in the proper court a certified copy of his letters and of his official bond, and to give bond to account in the State of his appointment for all money he may receive in the State. *Grist v. Forehand*, 36 Miss. 69; *Hines v. State*, 10 Sm. & M. (Miss.) 529.

For similar statutes in other States, see *Carlisle v. Tuttle*, 30 Ala. 613; *Warren v. Hofer*, 13 Ind. 167; *Shook v. State*, 53 Ind. 403; *Sims v. Renwick*, 25 Ga. 58; *Martin v. MacDonald*, 14 B. Mon. (Ky.) 544; *Bates v. Culver*, 17 B. Mon. (Ky.) 103; *Bell v. Clark*, 2 Met. (Ky.) 573.

A foreign guardian will have no standing in the courts of Pennsylvania unless it appears that he has given a bond in the other State in double the amount of the property, and that such other State extends the same privileges to citizens of Pennsylvania. *Estate of Rice*, 13 Phil. (Pa.) 385; *Taney's Appeal*, 97 Pa. St. 74.

A foreign guardian may file a bill in the courts of Tennessee for the sale of real estate belonging to his wards, but he cannot receive the proceeds until he has given a bond to the court for their proper disposition. *McClelland v. McClelland*, 7 Baxt. (Tenn.) 310.

In Illinois a foreign guardian must obtain an order of the court in order to sue a guardian appointed in that State, but he may take steps to compel him to account without such order, this not being strictly an action. *McCleary v. Menke*, 109 Ill. 294.

And a foreign guardian authorized to sell stock of a company in another State, need not obtain authority from the local courts in order to sell and compel a transfer on the books of the

ancillary letters of guardianship.¹

Although the guardian of the domicile of the infant will, on petition, usually be appointed the ancillary guardian,² a distinct ancillary guardian is sometimes appointed to care for property of the ward within the jurisdiction.³ Such guardian, having collected the property, will generally be ordered to transfer it to the domiciliary guardian.⁴

Whether one appointment is ancillary to another does not depend on its being later in point of time but on the domicile of the ward.⁵

company. *Ross v. Southwestern R. R. Co.*, 53 Ga. 514.

Before permitting property belonging to an infant to be transferred beyond the limits of the State the court must be satisfied (1) that the guardian has been regularly appointed according to the laws of the State in which the ward resides; (2) the fitness of such guardian for the appointment; and (3) that sufficient security has been given. *Cochran v. Fillans*, 20 S. Car. 237.

1. *Morrell v. Dickey*, 1 Johns. Ch. (N. Y.) 153; *Weller v. Suggett*, 3 Redf. (N. Y.) 249; *Re Gunther*, 3 Dem. (N. Y.) 386; *Beattie v. Johnston*, 1 Phillips 17; *Curtis v. Smith*, 6 Blatch. (U. S.) 537; 546.

Letters of guardianship will not be issued to a foreign guardian unless he shows that he has given a good bond in the State of his appointment, and that the removal of the ward's property out of the State will not conflict with the ward's interest. *Re Fitch*, 3 Redf. (N. Y.) 457.

The appointment of a foreign guardian will not be recognized in Louisiana. In order for him to sue in that State he must first qualify as tutor according to the laws of the State. *Succession of Stephens*, 19 La. Ann. 499.

Where a guardian appointed in Ohio petitioned in New York for the appointment of a guardian *ad litem* to a suit for partition and no summons or notice was given the ward, it was *held*, that such a procedure was void as the guardian had no authority to represent the ward in any manner without having been appointed within the State. *Rogers v. McLean*, 31 Barb. (N. Y.) 304; *contra*, *Freund v. Washburn*, 17 Hun. (N. Y.) 543.

A non-resident, on obtaining ancillary letters, may obtain authority from the court to break into the principal of the estate of the infants for their benefit, where the estate, whether con-

sisting of realty or personalty, is placed under the control of the court, although the guardian and wards are non-residents of the State, and the latter made defendants by publication. *Hart v. Czapski*, 11 Lea (Tenn.) 151.

2. *Hoyt v. Sprague*, 103 U. S. 613.

3. *Maxwell v. Campbell*, 45 Ind. 360.

4. *Watt v. Allgood*, 62 Miss. 38; *Earl v. Dresser*, 30 Ind. 11; *Swayzee v. Miller*, 17 B. Mon. (Ky.) 565; *Martin v. McDonald*, 14 B. Mon. (Ky.) 548; *contra*, *Stephens v. James*, 1 M. & K. 627; *Clay v. Brittingham*, 34 Md. 675.

In some cases a regular allowance is ordered to be paid to the foreign guardian. *McNeely v. Jamison*, 2 Jones Eq. (N. Car.) 186; *Ponder v. Foster*, 23 Ga. 489.

A person appointed in one State as special guardian for the sale of real estate at the instance of the domiciliary guardian in another State, is required to pay over the proceeds to such foreign guardian. *Johnson v. Avery*, 11 Me. 99.

But a receipt given to a guardian appointed in one State, by a guardian afterwards appointed in another State, for specific personal property of the ward, transferred by the former to the latter, does not discharge the former from responsibility to account for previous loss by his mismanagement of the ward's property. *Lamar v. Micou*, 112 U. S. 452.

And where a domiciliary guardian receives property of his ward in a foreign country he must account for it or show that he has done so elsewhere, *Secchi's Est.*, *Myrick's Prob.* (Cal.) 225.

5. Letters of guardianship granted in Georgia are ancillary although prior in time, to letters granted to the father in Alabama where the ward has his domicile, and a payment of a legacy by the Georgia guardian to the father as

X. LEGISLATIVE INTERVENTION.—Special acts of the legislature are sometimes passed for the purpose of authorizing or confirming a sale of lands by guardians or trustees; such acts are considered constitutional when their object is simply to provide a change of investment and not to divest the beneficiary of property rights.¹

XI. SALES OF WARD'S REAL ESTATE.—1. **Chancery Rules.**—In England, the court of chancery has no original jurisdiction to decree the sale of lands belonging to infants, except where the sale is necessary to pay actual debts or claims against the ward or his estate.² Chancery courts in the United States often claim a larger power to order the sale in their discretion.³

guardian will be upheld. *Metcalf v. Lowther*, 56 Ala. 312.

The appointment of a guardian for a lunatic in Ohio where all his property is situated is ancillary to an appointment in the State of his domicile, although he has no estate there. *Commonwealth v. Rhoades*, 37 Pa. St. 60.

Where a divorce was granted between parties in Michigan, and the mother with the child removed to New York, she having been given the custody, and on her death, the father being appointed guardian in Michigan, sought for ancillary letters in New York, it was held that such letters could not be granted as the statute required that original letters be obtained there, it being the domicile of the child. *Griffin v. Sarsfield*, 2 Dem. (N. Y.) 4.

An infant carried out of the State without the consent of her guardian does not lose or change her domicile. A guardian appointed in the other State is not a domiciliary guardian and has no authority to sue the first guardian for rents and profits of the ward's estate collected by him; he is still the guardian of the domicile. *Munday v. Baldwin*, 79 Ky. 121; *Grimmett v. Witherington*, 16 Ark. 377.

1. *Clarke v. Van Surlay*, 15 Wend. (N. Y.) 436; *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 365; *Davison v. Johannot*, 7 Met. (Mass.) 388; *Snowhill v. Snowhill*, 1 Green Eq. (N. J.) 38; *Brenham v. Davidson*, 51 Cal. 352; *Hoyt v. Sprague*, 103 U. S. 613; *Thomas v. Pullis*, 56 Mo. 211; *Stewart v. Griffith*, 33 Mo. 13; *McComb v. Gilkey*, 29 Miss. 146; *Estep v. Hutchman*, 14 S. & R. (Pa.) 435; *Thurston v. Thurston*, 6 R. I. 296; *Mason v. Wait*, 5 Ill. 127; *De Mill v. Lockwood*, 3 Blatchf. (U. S.) 56; *contra*, 4 N. H. 572; *Jones v. Perry*, 10 Yerg. (Tenn.) 59.

An act of the legislature may also authorize a foreign guardian to sell lands in the State. *Boon v. Bowers*, 30 Miss. 346; *Nelson v. Lee*, 10 B. Mon. (Ky.) 495.

But the legislature cannot authorize a stranger, not the guardian and holding no trust relation to the ward, to sell and confer a good title. The legislature will be supposed to respect a due appointment by the court. *Paty v. Smith*, 50 Cal. 153; *Lincoln v. Alexander*, 52 Cal. 482.

The legislature may enact a general law enabling guardians and other trustees to enter into agreements regarding property held by them, although the rights of persons remotely or contingently interested may be compromised without their consent. *Clarke v. Cordis*, 4 Allen (Mass.) 466.

2. *Schouler Dom. Rel.*, (3rd ed.) §§ 356, 357. *In re Haworth*, L. R. 8 Ch. 415; *Fentiman v. Fentiman*, 13 Sim. 171; *Taylor v. Phillips*, 2 Ves. 23; *Russell v. Russell*, 1 Moll. 525; *Calvert v. Godfrey*, 6 Beav. 97; and see, *Ware v. Polhill*, 11 Ves. 278; *Ex parte Phillips*, 19 Ves. 122.

For jurisdiction as to sale of reversionary interest of an infant, see *De Witte v. Palin*, L. R. 14 Eq. 251; *Munn v. Hancock*, L. R. 6 Ch. 850.

As a person's property is always liable for the payment of his debts, there is really no discretionary power in the English court to order a sale.

3. *Williams v. Harrinton*, 11 Ired. (N. Car.) 616; *Ex parte Jewett*, 16 Ala. 409; *Matter of Salisbury*, 3 Johns. Ch. (N. Y.) 347; *Huger v. Huger*, 3 Desaus. (S. Car.) 18; *Stapleton v. Langstaff*, 3 Desaus. (S. Car.) 22; *Goodman v. Winter*, 64 Ala. 410.

Contra, *Rogers v. Dill*, 6 Hill (N. Y.) 415; *Baker v. Lorillard*, 4 Comst. (N. Y.) 257; *Williams' Case*, 3 Bland

2. Sales Under Statute, When Authorized and When Valid.—American statute law gives the courts¹ discretionary power to order sales of real estate² by the guardian for a variety of purposes, embracing not only payment of debts, but for future support of the ward, for investment more productively and for other objects.³ These statutes usually require a special bond from the guardian for the purpose of the sale and a formal sale of the property, generally at public auction.⁴

The guardian to be authorized is the probate not the natural guardian.⁵

Such sales should be conducted in strict accordance with the terms of the statute authorizing them.⁶ Slight defects or irregu-

(Md.) 186; *Faulkner v. Davis*, 18 Gratt. (Va.) 651; see *Horton v. McCoy*, 47 N. Y. 21.

The chancery court may order a sale of equitable estate, if the interest of the ward favors. *Woods v. Mather*, 38 Barb. (N. Y.) 473; *Anderson v. Mather*, 44 N. Y. 249.

But a sale contrary to the provisions of a devise is void. *Rogers v. Dill*, 6 Hill (N. Y.) 415; see *Matter of Ellison*, 5 Johns. Ch. (N. Y.) 261; *Sutphen v. Fowler*, 9 Paige (N. Y.) 280.

And a part owner of lands in which a ward is interested is not a suitable person to be appointed special guardian to make sale of the ward's share. *In re Tillotsons*, 2 Edw. Ch. (N. Y.) 113.

Chancery cannot interfere with the lands of infants unborn. *Downin v. Sprecher*, 35 Md. 474.

1. A judge of the district court has authority at chambers in a proper case to grant license to a guardian to sell the real estate of his ward. *Stewart v. Daggy*, 13 Neb. 290; *Deitrich v. L. & N. W. R. R. Co.*, 14 Neb. 356.

2. Under the New York statute, the court has no authority to decree the sale of expectant interests or interests in remainder. *Jenkins v. Fahey*, 11 Hun. (N. Y.) 351.

But a sale of the ward's real estate will include any reversionary interest he may hold therein. *Foster v. Young*, 35 Iowa 27.

A sale of land by the guardian conveys only the estate of persons having vested or contingent interests therein, and who are required to have notice of the proceedings. The rights of incumbrancers are not affected. *Cool v. Higgins*, 8 C. E. Green (N. J.) 308; see *Matter of Steele*, 4 C. E. Green (N. J.) 120; *Matter of Heaton*, 6 C. E. Green (N. J.) 221.

The court has power to decree the sale of an undivided portion of an estate, although the other parties in interest do not join. *Gilmore v. Rodgers*, 41 Pa. St. 120.

3. It is only when a minor has no other means for his education and support that the orphans' court is empowered by the statute to order a sale of his land. *Morris v. Morris*, 2 McCart. (N. J.) 239; *Phelps v. Buck*, 40 Ark. 219.

The probate court has jurisdiction, on application of the guardian, pending the guardianship, to sell the real estate of a ward for the completion of his education; and, may be, to reimburse the guardian for such expenditures already judiciously incurred; but after the guardianship has terminated the court cannot empower the guardian to sell the lands of his past wards to pay advances made by him for their education. An order of the court to sell must find and adjudge that there are debts against the ward rendering the sale necessary, but not the amount thereof. *Pendleton v. Trueblood*, 3 Jones (N. Car.) 96.

4. *Schouler Dom. Rel.* (3d ed.), § 360.

5. *Morris v. Morris*, 2 McCart. (N. J.) 249; *Shanks v. Seamonds*, 24 Iowa 131.

The court has no authority to order a sale of the lands of an infant *feme covert* upon the application of her husband. *Dengenhart v. Cracraft*, 36 Ohio St. 549.

But if a person not the guardian be authorized to sell he will be held to account for the proceeds as if guardian. *Pope v. Jackson*, 11 Pick. (Mass.) 113.

6. *Barret v. Churchill*, 18 B. Mon. (Ky.) 387; *Cooper v. Sunderland*, 3 Iowa 114; *Wisenor v. Lindsay*, 33 L. Ann. 1211; *Calloway v. Nichols*, 47

larities in the procedure will not render the sale void or voidable;¹ but the statutory provisions as to jurisdiction of the court,² notice to parties interested,³ giving of special sale bond by the

Tex. 327; *Exendine v. Morris*, 8 Mo. App. 383.

1. *Thornton v. McGrath*, 1 Duv. (Ky.) 349; *Ackley v. Dygert*, 33 Barb. (N. Y.) 176; *Stall v. Macalester*, 9 Ohio 19; *Brigham v. B. & A. R. Co.*, 102 Mass. 14; *Gregory v. Lenning*, 54 Md. 51; *Beidler v. Friedell*, 44 Ark. 411.

A guardian's petition for license to sell the real estate is not fatally defective for not being sworn to; and as it is not required by statute to be signed, it is sufficient if it describes the guardian and he presents it in person. *Ellsworth v. Hall*, 48 Mich. 407.

Failure to mention the place of sale in the notice will not be fatal to the sale. *Williamson v. Warren*, 55 Miss. 199.

Under the statutes in force in 1860, the validity of a sale of real estate made by a guardian under an order of the probate court was not affected by a failure to accurately describe the land in the order; the statute requiring such description was directory. *Robertson v. Johnson*, 57 Tex. 62.

Omission of the court to fix the day of the sale will not avoid such sale. *Spring v. Kane*, 86 Ill. 580. See same case as to proof of notice after twenty years.

Failure to appoint a day for the infant defendant, on coming of age, to show cause against the decree, will not impair the sale. *Gregory v. Lenning*, 54 Md. 51.

Failure of the appraisers of the estate to sign their appraisal will not avoid the sale as against purchasers in good faith. *Worthington v. Dunkin*, 41 Ind. 515.

Where the court has jurisdiction and orders a sale, a *bona fide* but irregular arrangement between the guardian and the purchaser as to the delivery of the deed will not be held to invalidate the sale. *Mulford v. Beveridge*, 78 Ill. 455.

Failure to approve formally the sale bond is not sufficient ground for declaring a sale void in a collateral action. *Emery v. Vroman*, 19 Wis. 689.

A guardian's bond, payable to the county, instead of to the parties interested is not thereby vitiated, but inures to the benefit of the latter; such bond,

or the fact that it was not approved, will not invalidate the sale. *Pursley v. Hayes*, 22 Iowa 11.

2. A license to sell granted by the wrong county court will be invalid and the sale under it void. *Spelman v. Dowse*, 79 Ill. 66; *Foresman v. Haag*, 36 Ohio St. 103.

The court has no jurisdiction to authorize a mortgage under a petition which asks for a sale. *McMannis v. Rice*, 48 Iowa 361.

The probate court in some States has no authority to order a sale. *Summer v. Howard*, 33 Ark. 490.

Where a guardian gave notice by publication that he would apply to the court, at a certain term, to sell real estate of his ward and the application is made at a different term the former notice is of no avail and the proceedings will be void for want of jurisdiction. *Knickerbocker v. Knickerbocker*, 58 Ill. 399. see, *Williamson v. Warren*, 55 Miss. 199.

So a sale based on a notice returnable at a day other than a regular return day of the court has been held void. *Hawes v. Clark*, 337 Iowa 355.

3. Failure to give any notice to the ward of the filing of a petition for sale will, in all cases, render the proceedings void. *Rankin v. Miller*, 43 Iowa 11; *Kennedy v. Gaines*, 51 Miss. 625; *Musgrave v. Conover*, 85 Ill. 374; *Rule v. Broach*, 58 Miss. 552; *Temple v. Hammock*, 52 Miss. 360, 475.

Proceedings by a guardian to sell real estate for maintenance, are purely *in rem*. It is *ex parte*, in the name of the guardian in behalf of his ward after notice to all concerned. In this particular it differs from a sale to pay debts, when the heirs are necessary parties to the proceedings. *Mulford v. Beveridge*, 78 Ill. 455; *Spring v. Kane*, 86 Ill. 580; *Williams v. Williams*, 18 Ind. 345.

The proceedings being *in rem* in the interest of the ward, the court obtains jurisdiction immediately upon filing the petition and not by reason of due notice served upon persons interested which brings them before the court, and when the court has obtained jurisdiction, the ward cannot avoid the sale for a defective service of notice, if some notice was in fact given. *Mohr*

guardian¹ and the like, must be carefully followed in order to render the proceedings valid.

Failure to observe minor statutory regulations will also sometimes invalidate the sale.² And an erroneous description of the property is generally fatal.³

The guardian is also bound to complete the sale in exact accordance with the terms of the license granted him. A sale made at a different time from that stated in the license is invalid.⁴

v. Manierre, 101 U. S. 417; *Gager v. Henry*, 5 Sawyer (U. S.) 237; *Mohr v. Porter*, 51 Wis. 487; *Palmer v. Oakley*, 2 Doug. (Mich.) 433; *Dexter v. Cranston*, 41 Mich. 448; *Doe v. Jackson*, 51 Ala. 514.

In a proceeding by a guardian to sell the ward's real estate, there was a notice served upon the ward, and, although the service was imperfect. *Held*, that the defect could not be taken advantage of in a collateral proceeding to set aside the title of the purchaser at the guardian's sale. The court was not without jurisdiction, as in the case of no notice. *Bunce v. Bunce*, 59 Iowa 533; *Pursley v. Hayes*, 22 Iowa 11.

Where notice of petition to sell gives the wrong time or no time for the hearing thereof it is equivalent to no notice and a sale under it is void. *Lyons v. Vanatta*, 35 Iowa 521.

1. Failure to give a special sale bond has been held to render the sale void in the following cases. *Williams v. Morton*, 38 Me. 47; *Stewart v. Bailey*, 28 Mich. 251; *Blauser v. Diehl*, 90 Pa. St. 350; *McKeever v. Ball*, 71 Ind. 398; *Barnett v. Bull*, 81 Ky. 127. *Bunce v. Bunce*, 59 Iowa 533; *Vanderburg v. Williamson*, 52 Miss. 232.

But in some States an order of the probate court for the sale by a guardian of the real estate of his ward, where the bond provided for in the statute is not given, although it may be erroneous, is not void. *Arrowsmith v. Harmoning*, 42 Ohio St. 254; *Watts v. Cook*, 24 Kan. 278; *McKinney v. Jones*, 55 Wis. 39.

Failure of the guardian to give a general bond upon his appointment will not invalidate a sale subsequently made by him as against a *bona fide* purchaser. *Cuyler v. Wayne*, 64 Ga. 78.

Where the money paid is still in the hands of the chancellor, the sale should not be avoided, but the chancellor should require a bond from the guardian before paying the proceeds to

him. *Owens v. Cowan*, 7 B. Mon. (Ky.) 152.

2. Failure of guardian to take the required oath before fixing the time and place of sale is fatal. *Blackman v. Baumann*, 22 Wis. 611; *Wilkinson v. Filby*, 24 Wis. 441.

Failure to have an appraisal made before the sale is good reason for avoiding it. *Strouse v. Drennan*, 41 Mo. 289. See *Bobb v. Barnum*, 59 Mo. 394.

A petition which omits to state that an inventory has been filed, or that there are debts which the personal property is insufficient to pay, does not show sufficient reason for ordering the sale, and a sale so ordered will be set aside. *Patton v. Thompson*, 2 Jones Eq. (N. Car.) 285.

Where the statute required that the appraisers of the wards' estate should report its *net value*, but they reported only in general terms, a sale ordered on the basis of such report is invalid. *Woodcock v. Bowman*, 4 Met. (Ky.) 40.

In Louisiana property sold for a purpose other than to pay debts of the succession must bring the full amount of the appraisal; otherwise the sale will be void. *Fraser v. Zylicz*, 29 La. Ann. 534.

3. *Frazier v. Steenrod*, 7 Iowa 339; *Ex parte Guernsey*, 21 Ill. 443; *Hill v. Wall*, 66 Cal. 130. See *Pendleton v. Trueblood*, 3 Jones (N. Car.) 96. See, however, *Berry v. Young*, 15 Tex. 369.

Such misdescription can be taken advantage of only by those whose interests are injuriously affected, and not by strangers. *Kenniston v. Leighton*, 43 N. H. 312.

Where the guardian of one of several joint owners of an estate petitioned for the sale of the whole of it, without noticing the existence of another tenant in common: *Held*, that the purchaser obtained title of the part of the petitioner, and as to the other the sale was void. *Bryan v. Manning*, 6 Jones (N. Car.) 334. *Erwine v. Garner*, 108 Ind. 488.

4. *Brown v. Christie*, 27 Tex. 73.

A license to sell at auction will not authorize a private sale,¹ nor one to sell for cash, the acceptance of a note in payment.²

And where the sale is otherwise regular but, by the negligence of the guardian, is made at a grossly inadequate price it will be set aside.³

The guardian is also bound to apply the proceeds for the express object for which the sale was authorized,⁴ but the act of conveyance is official rather than personal, and may be carried out by a successor of the guardian who sold the property.⁵

The guardian has no power to sell real estate of his ward

1. *Hobart v. Upton*, 2 *Sawyer* (U. S.) 302.

But the court may confirm a private sale made after an auction has been duly held and no bidders for the estate appeared. *Rowland v. Thompson*, 73 N. Car. 419.

2. *In re Macey*, 84 N. Car. 59; *Brenham v. Davidson*, 51 Cal. 352.

Under a decree directing a guardian to sell his ward's land for cash, he sold the land and received one-half of the purchase-money in cash, and for the other half took the purchaser's promissory note. But the guardian reported to the court that he had received all of the purchase-money in cash, and the sale was confirmed as a cash sale. *Held*, that the sale was for cash only so far as the cash was paid, and that as between the parties, their heirs or grantees, with notice, the truth of the sale cannot be covered up by the recitals of the record, and that the ward had a lien on the property for the unpaid purchase-money. *Ferguson v. Shepherd*, 58 Miss. 804.

If the guardian receives notes in payment, the purchaser may be held accountable for the trust property, or its proceeds, if sold to an innocent purchaser. *Wallace v. Brown*, 41 Ind. 436.

And in general the ward has a right to subject land sold by his guardian to the payment of the purchase-money. *Murrill v. Humphrey*, 88 N. Car. 138.

Where it was claimed that the sale of a ward's land was not made for cash, as ordered by the court, but the transaction was merely barter or exchange, by which the guardian received other land in his own name, it was held that as against a subsequent purchaser in good faith this evidence was not admissible. *Worthington v. Dunkin*, 41 Ind. 515.

A sale of land by the guardian for support and education of the ward, which was authorized and confirmed

for cash, is not invalidated by the fact that it was actually made for the grantee's agreement to support and educate the ward. *Farrell v. Hennessey*, 21 Wis. 632.

Money paid to a guardian in anticipation of a sale by him under authority of the court, which sale was not made, cannot be regarded as against the ward as payment to the guardian's successor upon a sale made by him to the same person. *Downing v. Peabody*, 56 Ga. 40.

3. *Mitchell v. Jones*, 50 Mo. 438.

4. *Strong v. Moe*, 8 Allen (Mass.) 125; *Cool v. Higgins*, 8 C. E. Green (N. J.) 308.

The ward's assent to a different disposition of the proceeds will not justify such diversion. *Harding v. Larned*, 4 Allen (Mass.) 426.

Where an order is made empowering a guardian to mortgage the ward's land for the purpose of paying certain debts, he cannot refuse to pay one or more of them on the ground that the infant is not liable therefor. *Matter of Lampman*, 22 Hun. (N. Y.) 239.

The guardian's liability on his special bond is not discharged by the fact that he produced the money in court and was ordered to withdraw it, as the guardian and not the court is the proper custodian of it. *State v. Steele*, 21 Ind. 207.

A purchaser, however, is not bound to see to the disposition of the purchase money. *Fitzgibbons v. Lake*, 29 Ill. 165; *Mulford v. Beveridge*, 78 Ill. 455.

5. *Lynch v. Kirby*, 36 Mich. 238; *Herndon v. Lancaster*, 6 Bush (Ky.) 483; see *Wade v. Carpenter*, 4 Iowa 361.

A curator's deed which does not in apt words convey the land as that of his ward, although signed by him as curator and describing himself as such, is, strictly construed, his personal deed. *Bobb v. Barnum*, 59 Mo. 394.

without leave of the court.¹ And a sale by a person without being appointed guardian or where appointment is void is likewise of no effect.²

3. Confirmation of Sale.—In some States sales under the order of the court are not valid to pass title till confirmed by the court,³ and such confirmation will cure defects occurring in the previous proceedings.⁴

1. *Mason v. Wait*, 4 Scam. (Ill.) 127; *Ex parte Kirkman*, 3 Head (Tenn.) 517; *Wells v. Chaffin*, 60 Ga. 677; *House v. Burnett*, 69 Tex. 27; *Antonidas v. Walling*, 3 Gr. Ch. (N. J.) 42; *Shamleffer v. Peerless Mill Co.*, 18 Kan. 32; *Hudson v. Helmes*, 23 Ala. 385; see under "POWER TO CONVERT ESTATE" for other cases.

And he has no authority to contract to sell the ward's real estate. *Morrison v. Kinstra*, 55 Miss. 71; *Downing v. Peabody*, 56 Ga. 40; *Gaylord v. Stebbins*, 4 Kan. 42; *Worth v. Curtis*, 15 Me. 228; *Thacker v. Henderson*, 63 Barb. (N. Y.) 271.

For the same reason a guardian cannot confirm a deed made by his ward except by following the regulations prescribed by statute; he must obtain license, and execute a conveyance himself. *Doty v. Hubbard*, 55 Vt. 278.

2. *Shanks v. Seamonds*, 24 Iowa 131; *McKee v. Thomas*, 9 Kan. 343; *Higinbotham v. Thomas*, 9 Kan. 328; *Paty v. Smith*, 50 Cal. 153.

Where the statute does not authorize the court of common pleas to appoint guardians "for unknown heirs," it could not do so without express authority. Such an appointment was, therefore, void, and sale of real estate by such a guardian was void. *State v. McLaughlin*, 77 Ind. 335.

Where A presented a petition to the orphans' court, falsely alleging her previous appointment as guardian of certain minors, and praying for authority to mortgage their real estate: *Held*, that an order of court empowering her to make such a mortgage was of no effect, and that its validity could be impeached in a suit in equity for the cancellation and satisfaction of the mortgage. *Grier's Appeal*, 101 Pa. St. 412.

3. *Reid v. Hart*, 45 Ark. 41; *McVey v. McVey*, 51 Mo. 406; *People v. Circuit Judge*, 19 Mich. 296; *Maxwell v. Campbell*, 45 Ind. 360; *Gwynn v. McCauley*, 32 Ark. 97; *Tiltman v. Riker*, 43 N. J. Eq. 122; *Wade v. Carpenter*, 4 Iowa 361; *Chapin v. Curtenius*, 15 Ill. 427; *Musgrave v. Conover*, 85 Ill. 374;

Spellman v. Dowse, 79 Ill. 66; *Mulford v. Beveridge*, 78 Ill. 455; *Mulford v. Stalzenback*, 46 Ill. 303; *Spring v. Kane*, 86 Ill. 580; *Young v. Keogh*, 11 Ill. 642; *Ayres v. Baumgarten*, 15 Ill. 444; *Rawlings v. Bailey*, 15 Ill. 178.

Until confirmation of the sale of a ward's land the guardian has no legal authority to receive the purchase-money and if he does so he merely holds it as depository of the purchaser. *State v. Cox*, 62 Miss. 786.

4. *Hammann v. Mink*, 99 Ind. 279; *Brown v. Christie*, 27 Tex. 73; *Bunce v. Bunce*, 59 Iowa 533; *Pursley v. Hayes*, 22 Iowa 11; *Watts v. Cook*, 24 Kan. 278; *Emery v. Vroman*, 19 Wis. 689; *Mahoney v. McGhee*, 4 Bush (Ky.) 527; *Cooper v. Hepburn*, 15 Gratt. (Va.) 551; see *Flemming v. Roberts*, 84 N. Car. 532.

The court may confirm and adopt a sale made by a person without authority to sell so as to give the purchaser a good title. *Ex parte Kirkman*, 3 Head (Tenn.) 517; *contra*, *Seavers v. Gerke*, 3 Sawyer (U. S.) 353.

But confirmation will not make valid a sale where the express requirement of the statute that oath should be taken by the guardian before fixing the time and place of the sale is violated. *Blackman v. Baumann*, 22 Wis. 611.

An order of confirmation of a guardian's sale adjudicates only that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, or, if disproportionate, that a greater sum cannot be obtained. Hence, such order is proof of no other facts, or of any proceeding prior thereto. *Dawson v. Helmes*, 30 Minn. 107.

A deed, made by a commissioner appointed by the court for that purpose, upon the sale of a ward's real estate, under a petition therefor by his guardian, is proof sufficient, in the absence of any evidence to the contrary, that such sale was reported to and approved by the court. *Edwards v. Powell*, 74 Ind. 294.

After a sale of lands has been confirmed by the court, although the pro-

4. Defective Procedure, Who May Take Advantage of, and When.—The ward, on attaining his majority, or other parties having a similar interest with him, may take advantage of defective proceedings,¹ and the purchaser may sometimes maintain a bill in equity to rescind the sale for illegality.² The statute of limitations, or in some States, a special statutory limit will bar such suits.³

The validity of a sale, however, aside from the question of the jurisdiction of the court, cannot be attacked in any collateral proceeding.⁴

5. When Title Passes.—Title does not vest in the purchaser at a guardian's sale till the deed made pursuant to the license of the

ceedings have been irregular, yet if the title of the purchaser can be made good and it is for the interest of the infants to confirm the sale, the purchaser will not be released; otherwise if the infants are injured by the sale. *Daniel v. Leitch*, 13 Gratt. (Va.) 195.

1. *Marvin v. Schilling*, 12 Mich. 356; *Goldsmith v. Gilliland*, 10 Sawyer (U. S.) 606; see *Harrison v. Bradley*, 5 Ired. Eq. (N. Car.) 136.

No one can take advantage of defective proceedings upon the sale of a ward's lands except parties injuriously affected. *Kenniston v. Leighton*, 43 N. H. 309.

But where a minor on arriving at age, receives the proceeds of a guardian's sale, he is presumed to ratify it and is estopped to deny its validity. *Hatcher v. Briggs*, 6 Or. 31; *Brazee v. Schofield*, 2 Wash. Ter. 209; *Handy v. Noonan*, 51 Miss. 166; *Gaines v. Kennedy*, 53 Miss. 103; *Parmelee v. McGinty*, 52 Miss. 476.

2. The purchaser must first offer to surrender the premises and account for the use and occupation of them. *Shipp v. Wheelen*, 33 Miss. 646; *Loyd v. Malone*, 23 Ill. 43; *Anderson v. Layton*, 3 Bush (Ky.) 87.

And he may perhaps forfeit his right by his own laches. *Cooper v. Hepburn*, 15 Gratt. (Va.) 551.

Mere irregularities in the proceedings of the court ordering a sale which do not affect its jurisdiction, are not sufficient grounds for a purchaser refusing to complete the purchase. *Bedler v. Friedell*, 44 Ark. 411.

In sales of a ward's real estate, the rule *caveat emptor* applies, but if the land is purchased upon the representations of the guardian that the purchaser would acquire a good title which turns out to be untrue, the latter will not be

held either at law or in equity. *Black v. Walton*, 32 Ark. 321.

3. In Louisiana five years after the sale. *Fraser v. Zyllicz*, 29 La. Ann. 534.

The statute which provides that no one shall question the validity of a guardian's sale after five years, has no application to cases of appeal, writs of error or other process before an appellate court, nor does it cover sales made by a person without authority or where the court had no jurisdiction and no possession was taken by the purchaser. *Pursley v. Hayes*, 22 Iowa 11; *Rankin v. Miller*, 43 Iowa 11.

4. *Gilmore v. Rodgers*, 41 Pa. St. 120; *Davidson v. Bates*, 111 Ind. 391; *Walker v. Goldsmith*, 14 Or. 125; *Exendine v. Morris*, 76 Mo. 416; *Carr v. Spannagel*, 4 Mo. App. 285; *Frazier v. Steenrod*, 7 Iowa 339; *Pursley v. Hayes*, 22 Iowa 11; *Bunce v. Bunce*, 59 Iowa 533; *Young v. Lorain*, 11 Ill. 624; *Spring v. Kane*, 86 Ill. 580; *Gardner v. Maroney*, 95 Ill. 552; *Pennybacker v. Switzer*, 75 Va. 671.

The validity of a sale cannot be called in question on a collateral proceeding on the ground that the guardian was not regularly and properly appointed. *Dutcher v. Hill*, 29 Mo. 271.

A claim that the license to sell the estate of a ward was defective or that the sale was in fraud of the ward cannot be made by a person claiming adversely to the ward in a collateral proceeding. These objections are only available to the ward in a proceeding to set aside the sale. *Marvin v. Schilling*, 12 Mich. 356.

Sureties cannot deny that the guardian received cash upon a sale made by him if such sale was reported to the court by him as for cash and was so approved. *State v. Weaver*, 92 Mo. 673.

court is actually executed and delivered.¹

6. Proceeds of Sale.—The proceeds of such sale for purposes of descent retain in equity the character of realty.²

XII. GUARDIAN'S BOND, INVENTORY AND ACCOUNTS.—1. The Bond.—

a. When Required; When Valid.—Guardians are required by the English court of chancery to enter into a recognizance with sureties to account when ordered.³ And courts in this country, usually by statute requirement, make their appointment conditional upon the appointee giving a bond,⁴ with sureties approved by the court.⁵

1 This has been held to be the law, although the sale had already been confirmed by the court and the purchase money paid. *Doe v. Jackson*, 51 Ala. 514.

Where a lien was placed on land between the time of filing the petition of the guardian for sale and the actual sale under the petition, such lien was held to be a valid one placed upon the estate during the ownership of the ward and an incumbrance on his title. *Shaffner v. Briggs*, 36 Ind. 55.

Land owned by an insane person and not taxable during his ownership, cannot be taxed to his grantee till the conveyance by his guardian has actually been made and approved by the court, although such conveyance related back and took effect two years before. *Ordway v. Smith*, 53 Iowa 589.

2 *Wheldale v. Partridge*, 5 Ves. 396; 2 Kent Com. 230 and note; *Forman v. Marsh*, 1 Kern. 544; *Horton v. McCoy*, 47 N. Y. 21; *Fidler v. Higgins*, 6 C. E. Green (N. J.) 138; *Holmes' Appeal*, 53 Pa. St. 339; *March v. Berrier*, 6 Ired. Eq. (N. Car.) 524; *Huger v. Huger*, 3 Desaus. (S. Car.) 18.

Such proceeds lose their original character and become personalty on their first transmission, though to an infant. *Dyer v. Cornell*, 4 Pa. St. 359.

3 2 Kent Com. 227. As to chancery practice in New York, see *In re Morrell*, 4 Paige (N. Y.) 44; *Minor v. Betts*, 7 Paige (N. Y.) 596.

4 This bond is usually for a sum double in amount the estate of the ward; but where the estate is large the requirement of a double penalty may be relaxed. *Matter of Hedges*, 1 Edw. Ch. (N. Y.) 57.

The conditions of the bond generally require the guardian to make a true inventory of the ward's estate, to manage the property according to law and the best interest of the ward, to render stated accounts and to settle with the

ward at the expiration of the trust. In case of an infant there is a condition requiring suitable custody, education and maintenance, in case of an insane person or a spendthrift, suitable custody and maintenance is required. *Schouler Dom. Rel.*, (3rd ed.) § 366; *Smith's Prob. Pract.* (Mass.) 88, 89.

A joint bond may be given for several wards. *Pursley v. Hayes*, 22 Iowa 11; *Cranston v. Sprague*, 3 R. I. 205; *Ordinary v. Heishon*, 42 N. J. L. 15; *Brimson v. Brooks*, 68 Ala. 248. And the liability of the sureties on such bond for the estate of any one ward is where there are four wards, one-fourth of the penalty of the bond. *Hooks v. Evans*, 68 Iowa 52.

A bond voluntarily offered by the guardian and approved by the court is as binding as if ordered by the court. *Potter v. State*, 23 Ind. 550.

An obligor on a guardian's bond that has been accepted by the court is estopped to set up as a defence, that the court did not order the bond to be given. *Sebastian v. Bryan*, 21 Ark. 447.

The giving of the bond is a prerequisite to the validity of any act of the guardian as such. *Wuesthoff v. Germania Life Ins. Co.*, 107 N. Y. 580; *Poe v. Schley*, 16 Ga. 367.

5 Under the Kentucky statute which renders the judge liable for damages accruing if he accepts a surety of whose sufficiency he is not well satisfied, the judge should either have personal knowledge of his sufficiency or institute proper inquiries to ascertain the fact. *Colter v. McIntyre*, 11 Bush (Ky.) 565.

The husband of a guardian should be taken as sole bondsman only when his resources are known to be ample. *Ex parte Maxwell*, 14 Ind. 88.

The court having taken a bond with sureties from the guardian of the infant has no power to cancel the bond, while

But no bond is required of a natural guardian.¹

Such bond, even though inartificially drawn or slightly defective, will generally be held sufficient to bind the obligors.²

If it contains more than the law requires it is good for such part as is necessary,³ and when not conforming to the act, will be enforced, so far as it is consistent with the policy of the statute.⁴

A bond void in law may sometimes be upheld in equity.⁵

b. Liability Thereon.—The obligors are liable on the bond for all estate of the ward of whatever nature coming to the guardian's possession or knowledge, and for the profits thereof during his term of office.⁶

no new sureties are offered and the duties of the guardianship still remain. Newcomer's Appeal, 43 Pa. St. 43.

1. Thomas v. Williams, 9 Fla. 289; Westbrook v. Comstock, Walk. (Mich.) 314.

2. It is not invalidated by omission to mention the due appointment of the guardian. Pratt v. Wright, 13 Gratt. (Va.) 175.

It is not void by reason of the name of the ward being inserted in the wrong place in the instrument. State v. Martin, 69 N. Car. 175. Nor when it contains a proper recital of the ward's name although differing from that mentioned in the letters of guardianship. Shuster v. Perkins, 1 Jones (N. Car.) 325.

And where a person named as surety in the body of the instrument signed where the witnesses usually sign and the person intended as witness placed his signature against the seal, it was held that evidence of the real intention of the parties might be introduced to show the mistake. Richardson v. Boynton, 12 Allen. (Mass.) 138.

A bond given by a guardian which left a blank for the initials of his ward's name has been held valid. Turner v. Alexander, 41 Ark. 254.

A bond is enforceable although no penalty is named therein and is not invalidated by a failure to approve it. A mistake of fact, not one of law, must be shown. State v. Britton, 102 Ind. 214; State v. Richardson, 29 Mo. App. 595; *contra*, as to penalty, Austin v. Richardson, 1 Gratt. (Va.) 319.

A bond filed and executed by two sureties, though calling in its premises for three, is good against the two. Ordinary v. Thatcher, 41 N. J. L. 453.

If a guardian is appointed for three or more wards, manages their estates and renders accounts showing his indebtedness to each, but gives bond as

guardian of only two, his sureties on such bond are liable only to those two. Greenly v. Daniels, 6 Bush (Ky.) 41.

A bond given in a probate court of this State, in conformity with a law of another state, by a guardian in this State of a ward resident here, in order to obtain possession of property of his ward located in the other State, is a valid bond, and an action may be maintained on it for property received in virtue of it. The State v. Williams, 77 Mo. 463.

Where the bond given by the conservator of a lunatic was an ordinary administrator's bond, with the name of the ward inserted in the place of that of the intestate, but with no other alterations to adapt it to the case of a conservator, describing the ward as deceased, and stating, as the duties to be performed, all those of an administrator, and none of those of a conservator except so far as they happen in part to be the same as those of an administrator, it was held that the bond was void as being insensible and uncertain. Hayden v. Smith, 49 Conn. 88.

3. Pratt v. Wright, 13 Gratt. (Va.) 175; State v. Williams, 77 Mo. 463.

4. Ordinary v. Heishon, 42 N. J. L. 15; Stroup v. State, 70 Ind. 495; Alston v. Alston, 34 Ala. 15; Probate Court v. Strong, 27 Vt. 202.

5. Butler v. Durham, 3 Ired. Eq. (N. Car.) 589; Wiser v. Blackly, 1 Johns. Ch. (N. Y.) 607; Sikes v. Truitt, 4 Jones Eq. (N. Car.) 361; Bumpas v. Dotson, 7 Humph. (Tenn.) 310.

6. Mattoon v. Cowing, 13 Gray (Mass.) 387; Bond v. Lockwood, 33 Ill. 212; Neill v. Neill, 31 Miss. 36; McClendon v. Harlan, 2 Heisk. (Tenn.) 337; Hunt v. State, 53 Ind. 321; Armfield v. Brown, 73 N. Car. 81; Taylor v. Hemingray, 81 Ky. 158; Mitchell v. Miller, 6 Dana (Ky.) 79, 84; Taylor v. Taylor's Exec'r, 6 B. Mon. 561.

c. Suit Upon, When Accruing.—Therefore the proper remedy for losses or injuries occasioned by the default or misconduct of the guardian is by suit upon his bond.¹ Such suit cannot be brought while the relation of guardian and ward subsists,² and generally not until the amount of the guardian's liability has been ascertained by the court on settlement of his final account;³ but in

It is a sufficient averment of breach of a guardian's bond that the guardian had been removed from the trust and had not accounted to the wards, nor to any one of them, for moneys which had come to his hands. *Moody v. State*, 84 Ind. 433.

Property received from residents of another State is covered by the bond as much as property originally within the jurisdiction. *McDonald v. Meadows*, 1 Met. (Ky.) 507; *State v. Hull*, 53 Miss. 626; *Jefferson v. Glover*, 46 Miss. 510; *Pearson v. Dailey*, 7 Lea (Tenn.) 674.

But money devised to a ward to be paid to her when she comes of age and improperly paid over to the guardian while the ward is still a minor, is not received by him as guardian, because he has no business with it, and his sureties are not liable for it. *Hinckley v. Harriman*, 45 Mich. 343; *Livermore v. Bemis*, 2 Allen (Mass.) 394; *Allen v. Crosland*, 2 Rich. Eq. (S. Car.) 68; *Hindman v. State*, 61 Md. 471; see *Gunther v. State*, 31 Md. 21.

Similarly his bondsmen are not liable for money received by him through mistake. *Ballard v. Brummitt*, 4 Strobb. Eq. (S. Car.) 171.

But where a father insured his life for the benefit of his two children, both minors, and one died shortly after the death of the father, and the guardian of the other received the entire sum due under the policy; it was *held*, that his bond was liable for this entire amount. *Carr v. Askew*, 94 N. Car. 194.

1. Such suits are brought in the name of the judge or of the State, according as the statute may require, for the benefit of the ward or others interested. *Potter v. State*, 23 Ind. 607; *Davis v. Dickson*, 2 Stew. 370; *Pearson v. McMillan*, 37 Miss. 558.

A guardian's bond was sued in the name of the probate court to which it was given, and the writ was issued and served without being indorsed with the name of the person for whose benefit the suit was instituted. *Held*, that the omission of the indorsement was a fatal defect and one which could not be

amended by indorsement after service. *Hopkinton Probate Court v. Lamphear*, 14 R. I. 291.

One action may be brought in the name of the State for the use of several wards, on one bond, given by their guardian. *Walsh v. State*, 53 Md. 539.

In 1876 there was no statute authorizing proceedings against the legal representatives of a deceased curator for the purpose of ascertaining the amount of the ward's assets in the hands of the curator at the time of his death. The only remedy of the ward in such case was an action on the curator's bond. *Cohen v. Atkins*, 73 Mo. 163.

In Indiana by statute a creditor whose interests have been injuriously affected by the acts of the guardian may sue on his bond. *State v. Fitch*, 113 Ind. 478; *contra*, *Aldrich v. Williams*, 13 Vt. 373.

A suit against the guardian is no bar to one against the sureties, the latter being allowed credit for sums received on the suit against the guardian. *Sanders v. Forgasson*, 3 Baxt. (Tenn.) 249.

2. *Eiland v. Chandler*, 8 Ala. 781; *Ely v. Hawkins*, 15 Ind. 230.

3. *Ball v. LaClair*, 17 Neb. 39; *Bisbee v. Gleason*, 21 Neb. 534; *Vermilyea v. Bunce*, 61 Iowa 605; *O'Brien v. Strong*, 42 Iowa 643; *Foteaux v. Lepage*, 6 Iowa 123; *Stillwell v. Mills*, 19 Johns. (N. Y.) 304; *Beider v. Steinhauer*, 15 Abb. N. Cas. (N. Y.) 428; *Jarrett v. State*, 5 Gill & J. (Md.) 27; *Pratt v. McJunkin*, 4 Rich. (S. Car.) 5; *Bailey v. Rogers*, 1 Me. 186; *Hunt v. White*, 1 Cart. (Ind.) 105; *Allen v. Tiffany*, 53 Cal. 16; *Hailey v. Boyd*, 64 Ala. 399; *Ammons v. People*, 11 Ill. 6; *Justices v. Willis*, 3 Yerg. (Tenn.) 461; *Ordinary v. Heishon*, 42 N. J. L. 15; *Moore v. Nichols*, 39 Ark. 145; *Byrne v. Van Hoesen*, 5 Johns. (N. Y.) 66; *Connelly v. Weatherly*, 33 Ark. 658; *Vance v. Beattie*, 35 Ark. 93; *Gillespie v. See*, 72 Iowa 345; *Williams v. McNair*, 98 N. Car. 332; *Murray v. Wood*, 144 Mass. 195; *Graff v. Mesmer*, 52 Cal. 636; *Allen v. Tiffany*, 53 Cal. 16, (or until the guardian's personal representatives have settled his account; Rob-

some States such settlement is not necessary before suit,¹ nor is it necessary where the extent of the guardian's liability is already definitely fixed.²

A demand upon guardian or his personal representatives is not necessary to the maintenance of the action.³

d. Liability of Sureties.—The liability of sureties upon their bond is not terminated at the expiration of the guardianship⁴ nor

erts v. Calvin, 3 Gratt. (Va.) 342; see Edward's Succession, 22 La. Ann. 457.

So, in case the final indebtedness is in favor of the guardian, he cannot sue until the court has ascertained and decreed its amount. Smith v. Philbrick; 2 N. H. 395; Shollenberger's Appeal, 21 Pa. St. 337.

There must be a binding judgment against a guardian generally, and not on a particular fund, before his ward, who claims that he has committed a breach of his bond, can sue the surety thereon, unless the guardian be joined in the action, or is without the jurisdiction, or has placed himself in the position of a debtor liable to attachment, or is dead and his estate is unrepresented. Forrester v. Vason, 71 Ga. 49.

And the fact that an order entered by the court on final settlement did not specify the amount due the ward will not prevent action on the bond. McWilliams v. Kalback, 55 Iowa 110.

And a guardian cannot prevent action on his bond by failure or refusal to account. Wann v. People, 57 Ill. 202; State v. Roeper, 9 Mo. App. 21.

Where an intestate's wards, who were also her heirs at law, asserted a liability against a surety on the guardianship bond and accepted a settlement from such surety—in action afterwards brought by the surety to subject the lands of the deceased guardian to the repayment of the amounts so paid by him, these wards and heirs at law are estopped from objecting that the surety was not liable until after an accounting by the guardian. Richardson v. Day, 20 S. Car. 412.

In general, no action at law for moneys in the hands of the guardian can be maintained by a ward until the guardian's accounts have been settled in the county court. Kugler v. Prien, 62 Wis. 248.

A guardian cannot be charged as trustee of his ward until his accounts have been settled in court, and a balance found in his hands. Davis v. Drew, 6 N. H. 399.

1. Bonham v. People, 102 Ill. 434; Wolfe v. State, 59 Miss. 338; State v. Roeper, 82 Mo. 57; State v. Slevin, 93 Mo. 253; State v. Strange, 1 Smith (Ind.) 367; Call v. Ruffin, 1 Call (Va.) 333. See Davenport v. Olmstead, 43 Conn. 75.

Until there is a final settlement of his ward's estate, a curator is not liable to an action by the ward for money had and received. His bond constitutes the measure and limit of his liability, and the ward must have recourse to that. Garton v. Botts, 73 Mo. 274.

2. Sage v. Hammonds, 27 Gratt. (Va.) 651; Girvin v. Hickman, 21 Hun. (N. Y.) 316; Perkins v. Stimmel, 42 Hun. (N. Y.) 520.

3. Higgins v. State, 87 Ind. 282; Buchanan v. State, 106 Ind. 251; Hudson v. Barnes, 54 Ind. 378; Shook v. State, 53 Ind. 403.

The Kentucky statute requires a demand when suit is against the personal representatives. Rogers v. Mitchell's Execr., 1 Met (Ky.) 22.

4. Higgins v. State, 87 Ind. 282; Re Walling, 35 N. J. Eq. 105; State v. Thorn, 28 Ind. 306.

A guardian who resigns, and obtains a re-appointment in another county, where he gives bond and charges himself with the sums which had come into his hands under his first appointment, does not thereby discharge his first bondsmen from liability for a previous defalcation. Yost v. State, 80 Ind. 350.

If a guardian improvidently invests his ward's money in the note of a single person, the sureties on his bond are liable after his death, though the borrower, becoming administrator of his estate, returns the note as assets of the ward in his account of the intestate as guardian. Richardson v. Boynton, 12 Allen (Mass.) 138.

Similarly it is no defence to an action against the sureties that on the guardian's death, sufficient assets came into the hands of the guardian's administrator to pay the amount due the ward, but were wasted thereafter by the ad-

by the death of the surety.¹ In some States a statutory limit of three or more years after the end of the guardianship is fixed to suits on guardian's bond;² but without such statute, the sureties or their personal representatives are liable till the ordinary statute of limitations to suits on sealed instruments has run.³

Not even the statutory limitation to suits against the executor or administrator of the guardian will operate to relieve sureties on the bond of a deceased guardian.⁴

But their liability is limited to what the guardian receives or has done during his term of office, and not for anything done or received by him after its expiration.⁵

ministrator. *Humphrey v. Humphrey*, 79 N. Car. 396.

1. *Moore v. Wallis*, 18 Ala. 458; *Anderson v. Thomas*, 54 Ala. 104; *Hutchcraft v. Sprout's Heirs*, 1 Mon. (Ky.) 208.

The estate of a deceased surety is liable for a default of the guardian, which occurred after such surety's death and before the final settlement of the guardianship. *Voris v. State*, 47 Ind. 345; *Cotton v. State*, 64 Ind. 573.

But the claim of the ward must be filed within the time prescribed by law for presenting claims against the estates of intestates, otherwise it will be barred like any other claim. *Brooks v. Rayner*, 127 Mass. 268; *Glass v. Woolf's Admr.*, 82 Ala. 281.

In a suit against sureties, if one is dead, his personal representatives should be joined. *Lynch v. Rotan*, 39 Ill. 14.

2. In Massachusetts and Ohio the liability of sureties is limited to four years after the termination of the guardianship. *Loring v. Alline*, 9 Cush. (Mass.) 68; *Favorite v. Booher*, 17 Ohio St. 548.

In Indiana and North Carolina it is three years. *State v. Hughes*, 15 Ind. 104; *Hodges v. Council*, 86 N. Car. 181; *Williams v. McNair*, 98 N. Car. 332.

For Maryland rule, see *Byrd v. State*, 44 Md. 492.

The appellant having arrived at full age, released her guardian under circumstances that showed fraud upon the part of the latter. But the appellant waited for four years to attack the release for fraud. This laches is fatal to her right of recovery against the appellee as surety. *Aaron v. Mendel*, 78 Ky. 427; *Johnson v. Chandler*, 15 B. Mon. (Ky.) 584.

The limitation begins to run from the time when the guardian settles his account in court, not from the date of his informal accounting with the ward,

where the statute directs that it be reckoned from the guardian's "discharge." *Probate Court v. Child*, 51 Vt. 82; *Marlow v. Lacy*, 68 Tex. 154; *Motes v. Madden*, 14 S. Car. 488; *Nunnery v. Day*, 64 Miss. 457.

But in Michigan where by statute actions against the sureties on a guardian's bond are barred in four years from the guardian's discharge. *Held*, that this means four years after he ceases from any cause to be guardian. *Tate v. Stevenson*, 55 Mich. 320.

3. *Ragland v. Justices*, 10 Ga. 65; *Woodbury v. Hammond*, 54 Me. 332; *Bonham v. People*, 102 Ill. 434.

A plea to an action on a guardian's bond, by a surety, that he did not, at any time within sixteen years before the suit, execute the bond, is clearly bad. The limitation runs only from the time a cause of action accrues, and not from the date of the bond, and it requires both the execution of the bond and its breach to constitute a cause of action. *Bonham v. People*, 102 Ill. 434.

A surety's contingent liability, being provable against him in bankruptcy proceedings, may be avoided by such proceedings. *Davis v. McCurdy*, 50 Wis. 569. But not a guardian's. *Re Maybin*, 15 Bankr. Reg. 468.

If after majority, and after final accounting, the ward neglects for an unreasonable time to bring suit on the bond he may, upon application of the sureties, be ordered to bring the same within a time to be named, in default of which the sureties may be discharged. *Vermilya v. Bunce*, 61 Iowa 605.

4. *Chapin v. Livermore*, 13 Gray (Mass.) 561; *Ordinary v. Smith*, 55 Ga. 15; *Ashby v. Johnston*, 23 Ark. 163.

5. *Merrills v. Phelps*, 34 Conn. 109; *Shelton v. Smith*, 59 Tenn. 82.

Where a guardian is discharged with money of the ward in his hands, which has never been accounted for or paid,

e. Discharge of Sureties.—A surety may be discharged at any time upon his petition and after due notice to parties interested.¹

Such discharge dates from the time of the approval of the new bond. His liability for subsequent acts of the guardian then ceases, but not for acts precedent thereto.²

The discharge of one surety releases also his co-surety, unless the latter shows by word or act his consent to remain liable.³

The liability of the new sureties in some States covers not only acts subsequent to their joining in the bond but is retrospective, making them co-sureties with the former sureties for acts of the guardian precedent to their signing.⁴ In other States the new

and some years later is re-appointed, and thereafter accounts only for other moneys received during the second appointment, the sureties on the first bond are liable. *Naugle v. State*, 101 Ind. 284.

But the guardian is liable on his bond for payments made to him by one who was not aware that his authority had been revoked. *Sage v. Hammonds*, 27 Gratt. (Va.) 651.

A guardian surrendered his office in March, to one whom he supposed to be his legal successor and made a settlement with him, though he was not regularly appointed guardian until December following, but in the meantime acted as such in good faith. Held, that the management of the fund from March to December must be treated as an exercise of an agency of the former guardian, whose bond is responsible for any loss resulting therefrom. *Jennings v. Copeland*, 90 N. Car. 572.

Where a guardian becomes administrator of his deceased ward the sureties on his bond as guardian are discharged and the sureties on the administration bond are to be held liable. *Baker v. Wood*, 42 Ala. 664.

1. *Dempsey v. Fenno*, 16 Ark. 491.

Upon petition of the personal representative of a deceased surety the guardian may be compelled to furnish new security and the estate may be discharged. *Moore v. Wallis*, 18 Ala. 458.

Under the provisions of the Code regulating the discharge of the surety of a guardian from further liability on the guardian's bond, the new security to be approved by the court may be given by the new surety signing the old bond. *Hammond v. Beasley*, 15 Lea (Tenn.) 618.

2. *In re Conover*, 35 N. J. Eq. 108; *Bellune v. Wallace*, 2 Rich. (S. Car.)

80; *Mass. Gen. Stat.*, ch. 101, § 18; *Sebastian v. Bryan*, 21 Ark. 447; *Jones v. Blanton*, 6 Ired. Eq. (N. Car.) 115; *State v. Page*, 62 Ind. 209; *State v. Cox*, 62 Miss. 786; see, *Kendrick v. Wilkinson*, 18 Ind. 206.

A guardian of the person and property of a minor, having received, after giving bond, money belonging to his ward, and embezzled the same, the subsequent discharge of the surety in such bond, and the acceptance, by the probate court, of a bond with other surety, in lieu of the first bond, will not exonerate such surety in the first bond with respect to the money so embezzled, but he will be liable upon the ground that the guardian failed to faithfully perform his duties. *Eichelberger v. Gross*, 42 Ohio St. 549.

The approval of a new bond and discharge of a former surety terminates his liability so far as subsequent acts of the guardian are concerned, although the new security prove insufficient or fatally defective in form. *Hamner v. Mason*, 24 Ala. 480.

Where a part of the money with which a guardian is charged has come from the sale of real estate, and one who had been surety upon both the general bond and the additional bond has been discharged from liability, and a new bond executed by order of the court, the last named bond covers the liability of the guardian for all moneys or property of the trust in his hands at the time of its execution. *Moody v. State*, 84 Ind. 433.

3. *Fredrick v. Moore*, 13 B. Mon. (Ky.) 470; *Boyd v. Gault*, 3 Bush (Ky.) 644; *Jamison v. Cosby*, 11 Humph. (Tenn.) 273; *Spencer v. Houghton*, 68 Cal. 82; *Tyner v. Hamilton*, 51 Ind. 259.

4. *Bell v. Jasper*, 2 Ired. Eq. (N. Car.) 597; *Hutchcraft v. Shrout*, 1

sureties are liable only for acts of their principal subsequent to the approval of their bond.¹

f. Additional Bond, Liability of Sureties Thereon.—Where the court has required the guardian to give security in addition to his bond already approved, the sureties on such new bond are deemed to be co-sureties with those on the first bond and equally liable with them for the whole guardianship;² only, however, to the extent of, or in proportion to the penalty of the bond, where penalties of the two bonds differ.³

Mon. (Ky.) 206; Jones v. Blanton, 6 Ired. Eq. (N. Car.) 115; Ammons v. People, 11 Ill. 6; Steele v. Reese, 6 Yerg. (Tenn.) 263.

A substituted surety on a guardian's bond is liable for money before received by the guardian from the sale of real estate of the ward. Tuttle v. Northrop, 44 Ohio St. 178.

A periodical statutory bond is required in some States and such bonds are held to be cumulative under the statute, though contribution should be in inverse order to that of the execution. Tenn. Hospital v. Fuqua, 1 Lea (Tenn.) 608. Jamison v. Cosby, 11 Humph. (Tenn.) 273; Crook v. Hudson, 4 Lea (Tenn.) 448.

If a guardian makes an unauthorized settlement in court, resigns and is re-appointed, giving a new bond, the wards have the election of suing the sureties on the first or second bond for acts of the guardian prior to his resignation, but these two sets of sureties are not co-sureties. Lee v. Lee, 67 Ala. 406.

1. Lowry v. State, 64 Ind. 421; Williams v. State, 89 Ind. 570; State v. Shackleford, 56 Miss. 648; Sebastian v. Bryan, 21 Ark. 447; State v. Jones, 89 Mo. 470; see, McWilliams v. Norfleet, 63 Miss. 183.

The sureties on a guardian's bond are not liable for defalcations which antedate the bond, but only for acts done under the bond which they executed; but if, after the giving of the new bond, the guardian replaces and has in his possession moneys previously converted to his own use, the sureties on the new bond become liable therefor. Parker v. Medsker, 80 Ind. 155.

The sureties of a curator's bond in force at the final settlement are *prima facie* responsible for the sum found due the ward, although it was received before the bond was given. To make the former bondsmen liable it must be shown that the misappropriation oc-

curred before their discharge. State v. Paul's Exec'r, 21 Mo. 51.

2. State v. Hull, 53 Miss. 626; Loring v. Bacon, 3 Cush. (Mass.) 465; Commonwealth v. Cox, 36 Pa. St. 442; Allen v. State, 61 Ind. 268; Stevens v. Tucker, 87 Ind. 109; McGlothlin v. Wyatt, 1 Lea (Tenn.) 717; Hutchcraft v. Sprout's Heirs, 1 Mon. (Ky.) 208.

Where a guardian filed a new bond with sureties, but was not discharged or re-appointed, nor were the sureties on the old bond discharged, and the evidence failed to show whether he then had the money previously received, or had misappropriated it; *held*, that such bond was an additional or cumulative security for the entire guardianship; and that the obligors thereon were liable for the entire defalcation. Douglass v. Kessler, 57 Iowa 63.

Where an additional bond is given as further security for a guardian's performance of his trust, the sureties thereon are liable for a failure of the guardian to account for moneys on hand at the time of the execution of the bond. In the absence of evidence to the contrary it will be presumed that there had been no misappropriation of moneys previously received, and that they were on hand when the additional bond was given. Clark v. Wilkinson, 59 Wis. 543.

Where a guardian gave a bond approved by the court and later voluntarily gave another, in each case with sureties, the latter bond was held valid, relating back to the time of the guardian's appointment and the sureties on the first bond were discharged. Sayers v. Cassell, 23 Gratt. (Va.) 525.

3. Jones v. Hays, 3 Ired. Eq. (N. Car.) 502; Jones v. Blanton, 6 Ired. Eq. (N. Car.) 115; Loring v. Bacon, 3 Cush. (Mass.) 465.

Where a guardian in default gave a new bond and then committed other defalcations, and, dying, his estate was

g. Estoppel.—Sureties are estopped by the recitals of the bond from denying the fact of the guardianship of their principal;¹ or that his appointment is valid;² or that the bond is valid;³ and a surety cannot evade responsibility by showing that his signature was obtained by fraud of the guardian or upon promises as to securing other sureties or by other arrangements to which the court, the ward and the parties to be protected were not privy.⁴

A surety is concluded, beyond objection, by the decision of the court as to the amount due from his principal on the final settlement,⁵ although it is occasionally held *contra*, where the sureties were not parties to the accounting.⁶ And a private settlement

insolvent, *held* that payments should be made *pro rata* upon the amounts due on the two bonds. *Bond v. Armstrong*, 88 Ind. 65.

Damages on a guardian's bond cannot be assessed beyond the penalty of the bond. *Re Wilson*, 38 N. J. Eq. 205.

1. *State v. Mills*, 82 Ind. 126; *Hayden v. Smith*, 49 Conn. 83; *Shroyer v. Richmond*, 16 Ohio St. 455; *Sasscer v. Walker*, 5 Gill & J. (Md.) 102.

But a judgment that their principal is not guardian, is available to the sureties although rendered in a proceeding to which they were not parties. *Crum v. Wilson*, 61 Miss. 233.

2. *Corbitt v. Carroll*, 50 Ala. 315; *Martin v. Tully*, 72 Ala. 23; *State v. Lewis*, 73 N. Car. 138.

3. *Vincent v. Starks*, 45 Wis. 458; *Sebastian v. Bryan*, 21 Ark. 447.

4. *Vincent v. Starks*, 45 Wis. 458; *Sasscer v. Walker*, 5 Gill & Johns. (Md.) 102; *State v. Hewitt*, 72 Mo. 603; *Brown v. Probate Judge*, 42 Mich. 501.

A surety cannot plead that when he signed the bond the name of another appeared in the body of the instrument and that he supposed and understood that such party would also sign. *State v. Lewis*, 73 N. Car. 138.

Delivery of a guardian's bond to the proper office, cannot be shown, after a long lapse of time, to have been merely in escrow. *Ordinary v. Thatcher*, 41 N. J. L. 403.

5. *Commonwealth v. Rhoads*, 37 Pa. St. 60; *McCleary v. Menke*, 109 Ill. 294; *Ream v. Lynch*, 7 Ill. App. 161; *Gravett v. Malone*, 54 Ala. 19; *Braiden v. Mercer*, 44 Ohio St. 339; *Badger v. Daniel*, 79 N. Car. 372; see, also, *Corbin v. Westcott*, 2 Dem. (N. Y.) 559; *Smith v. Bush*, 2 Dem. (N. Y.) 595; and *infra*, under "FINAL ACCOUNTS."

The ward may maintain a bill against the guardian alone, without joining the

sureties, to compel a settlement of the guardianship; and the sureties may intervene by petition to protect their interests, if they desire to do so; but, whether they intervene or not, the decree is binding and conclusive on them, in the absence of fraud, and will support an action of law against them on the guardian's bond. *Hailey v. Boyd*, 64 Ala. 399.

Where the guardian claimed in his final report that certain land sold was his, and not the ward's, but the court charged him in his final account with the proceeds, and the sureties were before the court as intervenors, it was held that the settlement was conclusive upon them. *McWilliams v. Kalback*, 55 Iowa 110.

A surety in a guardian's bond, in an action against him by the ward, is entitled to make the same defences that his principal would have been entitled to make. *Hughart v. Spratt*, 78 Ky. 313.

Sureties cannot set up their principal's misappropriation with the ward's connivance while under age. *Judge of Probate v. Cook*, 57 N. H. 450; see *Scobey v. Gano*, 35 Ohio St. 550.

6. *State v. Hull*, 53 Miss. 626; see *Brodrub v. Brodrub*, 56 Cal. 563.

Where the administrator of an estate was also the guardian of one of the distributees, and in the latter capacity receipted to himself as administrator for a certain amount received from the estate, and made corresponding returns as guardian, and on the basis thereof the ordinary rendered a judgment finding the amount due by the guardian to the ward, such proceedings would be *prima facie* but not conclusive evidence of indebtedness as against the sureties, in an action on the guardian's bond. *Weaver v. Thornton*, 63 Ga. 655.

In Vermont sureties cannot become parties to the accounting of their prin-

made between the guardian and his former ward in lieu of a final accounting is open to attack and falsification by the sureties.¹

h. Indemnity and Contribution Between Sureties.—As in case of other bonds a surety may seek indemnity from his principal or contribution from co-sureties.² If co-sureties on one bond pay the whole deficiency of their principal, they may resort to the sureties on the other bond for proportional repayment.³

A surety may take security from his principal for his own reimbursement, but not the ward's property as such security.⁴

i. Special Sale Bond.—Where a special bond for the sale of real estate of the ward has been given, the sureties on such bond, and not those on the guardian's general bond, are liable for the guardian's misuse of the proceeds of such sale.⁵

principal, either in the original proceedings or by way of petition for revising the accounts. *In re Scott's Account*, 36 Vt. 297.

The surety is not regarded as a party to the settlement made by the guardian, though upon a decree rendered against the guardian by the probate court, an execution may issue against him and the sureties. *Gravett v. Malone*, 54 Ala. 19; *Martin v. Tully*, 72 Ala. 23; *Smith v. Jackson*, 56 Ala. 25.

1. *Davenport v. Olmstead*, 43 Conn. 67; *State v. Hoster*, 61 Mo. 544.

2. *Rapp v. Masten*, 4 Redf. (N. Y.) 76; *Jones v. Blanton*, 6 Ired. Eq. (N. Car.) 115.

Where there are three sureties and one proves insolvent, the surety who has alone responded in damages may compel his solvent co-surety to reimburse him the extent of one-half the amount. *Waller v. Campbell*, 25 Ala. 544; see *Haygood v. McKown*, 49 Mo. 77.

3. *Commonwealth v. Cox*, 36 Pa. St. 442; *Frederick v. Moore*, 13 B. Mon. (Ky.) 470.

4. *Poultney v. Randall*, 9 Bosw. (N. Y.) 232; *Foster v. Bisland*, 23 Miss. 206; *Miller v. Carnall*, 22 Ark. 274; *Howell v. Cobb*, 2 Cold. (Tenn.) 104.

But, *contra*, it is held not to be illegal or against public policy for a guardian to agree with the surety on her bond to invest her ward's money, when received, in State bonds, and deposit them with the surety, to indemnify him against loss as such, there being no other funds in her hands except those to be thus invested. *Rogers v. Hopkins*, 70 Ga. 454.

5. *Williams v. Morton*, 38 Me. 47; *Fay v. Taylor*, 11 Met. (Mass.) 529; *Blausen v. Diehl*, 95 Pa. St. 350; *Brooks*

v. Brooks, 11 Cush. (Mass.) 22; *Madison Co. v. Johnston*, 51 Iowa 152; *Potter v. State*, 23 Ind. 607; *Colburn v. State*, 47 Ind. 310; *Henderson v. Coover*, 4 Nev. 429; *Withers v. Hickman*, 6 B. Mon. (Ky.) 292; *Andrews Heirs' Case*, 3 Humph. (Tenn.) 592; *Morris v. Cooper*, 35 Kan. 156; *Muir v. Wilson*, Hopk. (N. Y.) 512; *Bunce v. Bunce*, 69 Iowa 333; *Madison Co. v. Johnston*, 51 Iowa 152; *Smith v. Gummere*, 39 N. J. Eq. 27; *contra*, *Hart v. Stribling*, 21 Fla. 136; *Commonwealth v. Loyd*, 12 Phila. (Pa.) 221.

Where the proceeds of the sale and the other funds of the ward have been blended together by the guardian so that a proven defalcation cannot be identified with either fund, it is a breach of both bonds; and the action may be on either bond, if not for the entire loss, certainly for a *pro rata* share of it. *Yost v. State*, 80 Ind. 350.

The general guardian of an infant was also appointed its special guardian to sell certain lands, and gave different bondsmen in each capacity. From his imperfect mode of keeping his accounts it was impossible to tell which of the two funds should be credited with a certain investment. *Held*, that each fund should be credited with one-half of the amount of the investment. *Smith v. Gummere*, 39 N. J. Eq. 274.

A bond given by a guardian to procure an order of court to sell his ward's real estate at private sale, which is granted, is not avoided by a subsequent order changing the sale from a private to a public sale. *Stevenson v. State*, 69 Ind. 257; s. c., 71 Ind. 52.

If before confirmation of a special sale, the sureties on the guardian's original bond be released and a new bond taken, they are not liable after

They are liable not only for his general misuse of the funds but for failure to carry out the specific object for which the sale was authorized.¹

2. Inventory.—The inventory of the ward's estate is made by disinterested persons appointed by the court who certify their return under oath.² It is not conclusive of the existence of the assets or their value and a guardian may show on filing his accounts omissions or errors therein.³

3. Accounts.—*a. Annual Accounts, Effect Of.*—Probate guardians are required to render accounts periodically, usually once each year, to the court appointing them.⁴

confirmation of the sale for the purchase money received by the guardian before confirmation, even though at the time of its reception they had not been released from their bond. *State v. Cox*, 62 Miss. 786.

The sureties on a special bond cannot escape liability by showing that the curator has charged himself, on a settlement in the probate court, with the proceeds of the sale, and that at the time of settlement he had such proceeds in his possession. The bond is intended as an additional security for the safe keeping and proper disbursement of the money; and the sureties are liable for any conversion by the curator, whenever it may occur. *State v. Coleman*, 73 Mo. 684.

If the principal has received the proceeds of the sale, the surety cannot escape liability for his misappropriation of them by claiming the sale to be void; even if it was void, the bond is not thereby avoided. *Dodge v. St. John*, 96 N. Y. 260.

If the surety on the special bond proves insolvent, the ward has no right to rescind the sale and claim the property for that reason. *Marquis v. Davis*, 113 Ind. 219.

Where the sale has been made, not by the guardian, but by a referee in partition proceedings, the liability for the proceeds is on the general bond. *Hooks v. Evans*, 68 Iowa 52.

1. Where a guardian has been licensed to sell for investment and fails to invest he should be held responsible for the proceeds of the sale on his special bond, but for the interest upon his general bond. *Mattoon v. Cowing*, 13 Gray (Mass.) 387; see *Pratt v. McJunkin*, 4 Rich. (S. Car.) 5.

A surety on a special bond, given by a guardian upon obtaining a license to sell his ward's real estate for maintenance, is liable for a failure by the guardian to invest the proceeds of the sale

not needed for maintenance. *McKirm v. Morse*, 130 Mass. 439.

2. The statute requiring the overseer to return an inventory of the property of his ward is complied with, if such return is not signed by the overseer. *Clark v. Whitaker*, 18 Conn. 543.

3. *State v. Stewart*, 36 Miss. 652; *Green v. Johnson*, 3 Gill & Johns. (Md.) 388.

And a guardian's sureties are not precluded by the inventory from showing the true ownership of alleged assets. *Sanders v. Forgassen*, 3 Baxt. (Tenn.) 249.

Where a guardian receives a conveyance of property in his own name and later includes it in the inventory of his ward's estate and in his guardian's account, he will be held as trustee for the ward. *Fogler v. Buck*, 66 Me. 205.

If notes are inventoried and the guardian's accounts do not charge him with interest thereon or credit him with their loss as worthless, either fraud or neglect on his part will be presumed, and he will be liable for the notes and interest. *Starrett v. Jameson*, 29 Me 504.

In a suit against a guardian for appropriating moneys left in the keeping of his ward, there is no error in excluding defendant's inventory of the ward's property filed in the probate court by him as guardian, especially if defendant does not offer to show that he has in good faith paid out the money for the ward's benefit, or done any act that would debar him from full protection on the settlement of his guardianship account in the probate court. *Martin v. Sheridan*, 46 Mich. 93.

4. The accounts of different wards, especially if they have different interests in property, should be rendered separately. *Armstrong v. Walkup*, 9 Gratt. (Va.) 372; *State v. Foy*, 65 N. Car. 265; *Wood v. Black*, 84 Ind. 279; *Crow v.*

These periodic accounts do not conclude the parties;¹ they are at most, after approval by the court,² *prima facie* evidence of their correctness,³ and may be rectified and changed on a subsequent accounting.⁴

b. Final Account, Effect Of.—But the final account, when approved by the court, is conclusive against all parties, of all matters lawfully embraced therein.⁵ It cannot be collaterally attacked;⁶ but direct proceedings to set it aside may be had at

Reed, 38 Ark. 482; Est. of Widdoes, 17 Phila. (Pa.) 469; Foteaux v. Lepage, 6 Iowa 123.

In some States the final account should embrace all the items of former accounts and not begin with the balance on the last one. Foltz's Appeal, 55 Pa. St. 428; Woodmansie v. Woodmansie, 32 Ohio St. 18; Walls' Appeal, 104 Pa. St. 12.

The account should include only transactions between guardian and ward, terminating at the expiration of the trust. Cunningham v. Cunningham, 4 Gratt. (Va.) 43; Crowell's Appeal, 2 Watts (Pa.) 295; *In re Allgier*, 65 Cal. 228.

1. Prindle v. Holcomb, 45 Conn. 111; Diaper v. Anderson, 37 Barb. (N. Y.) 168; Bourne v. Maybin, 3 Woods. (U. S.) 724; Coffin v. Bramlitt, 42 Miss. 194; Kidd v. Guibar, 63 Mo. 342; *In re Davis*, 62 Mo. 453; Douglass' Appeal, 82 Pa. St. 169; State v. Booth, 9 Mo. App. 583; State v. Engelke, 6 Mo. App. 356; Wall's Appeal, 104 Pa. St. 14; Yeager's Appeal, 34 Pa. St. 173; Beaher v. State, 63 Ind. 302; Bennett v. Hanifin, 87 Ill. 31.

2. An account-current, under oath, filed by a guardian, and ordered to be recorded, but without any other action taken on it by the court or probate judge, is not an annual or partial settlement, nor to be presumed correct on final settlement. Radford v. Morris, 66 Ala. 283.

Mere filing of accounts without an order of the court approving them concludes nobody. State v. Roche, 94 Ind. 372; Beedle v. State, 62 Ind. 26.

3. Latham v. Myers, 57 Iowa 519, 521; Heath's Est., 58 Iowa 36; West v. West, 75 Mo. 204; Spedden v. State, 3 Harr. & Johns. (Md.) 251; State v. Baker, 8 Md. 44; Cook v. Rainey, 61 Ga. 452; Cardwell's Case, 55 Cal. 137; Davis v. Coombs, 38 N. J. Eq. 473; Matlock v. Rice, 6 Heisk. (Tenn.) 33; Ashley v. Martin, 50 Ala. 537; State v. Jones, 89 Mo. 470; Bond v. Lockwood, 33 Ill. 212.

An annual settlement is not judicial in its character, and may be reviewed in an action on the guardian's bond, brought before final settlement.

In such an action, where the guardian's accounts are referred for re-examination, the referee may refuse to admit balances found in the guardian's annual settlement as *prima facie* in his favor. State v. Roeper, 9 Mo. App. 21.

4. Willis v. Fox, 25 Wis. 646; Starret v. Jameson, 29 Me. 504; Crump v. Gerock, 40 Miss. 765.

The fact that one of two joint guardians has died will not prevent accounts filed by his co-guardian jointly with him from being re-opened on a settlement of the co-guardian's accounts. Blake v. Pegram, 101 Mass. 592.

The contents of annual settlements, where the records have been destroyed by fire, may be proved by parol. Kidd v. Guibar, 63 Mo. 342.

5. Candy v. Hanmore, 76 Ind. 125; State v. Hoster, 61 Mo. 544; State v. Leslie, 83 Mo. 60; Briscoe v. Johnston, 73 Ind. 573; McCleary v. Menke, 109 Ill. 294; Allman v. Owen, 31 Ala. 167; Holland v. State, 48 Ind. 391; King v. King, 40 Iowa 120.

The administrator of a deceased ward cannot ignore a final settlement of a guardian's accounts and cause another decree to be entered in the same court. Foust v. Chamblee, 51 Ala. 75.

In Tennessee and Kentucky county court settlements are only *prima facie* correct. Henley v. Robb, 86 Tenn. 474; Campbell v. Williams, 3 Mon. (Ky.) 124.

6. Holland v. State, 48 Ind. 391; State v. Slaughter, 80 Ind. 597; Candy v. Hanmore, 76 Ind. 125; Garton v. Botts, 73 Mo. 274; Lynch v. Rotan, 39 Ill. 14; Brodrib v. Brodrib, 56 Cal. 563.

But a settlement made by the administrator of a deceased guardian is only *prima facie* evidence of the liability of the guardian's sureties on his bond. They may falsify it. State v. Martin, 18 Mo. App. 468.

any time on the ground of fraud or gross errors therein.¹

A final settlement does not, however, have the force or effect of a judgment for the sum found due, but is only evidence of indebtedness.²

c. Defective Settlements.—A settlement may be set aside also for failure to notify parties in interest of its presentation to the court, and for other irregularities in procedure before the court;³ but such defects cannot usually be made use of beyond a limited statutory period.⁴

A final settlement by guardian, made or instituted during the minority of the ward, or before the guardian has resigned, is void.⁵

1. *Cummings v. Cummings*, 128 Mass. 532; *Yeager's Appeal*, 34 Pa. St. 173; *Brent v. Grace*, 30 Mo. 253; *Reed v. Ryburn*, 23 Ark. 47; *Phelps v. Buck*, 40 Ark. 219; *State v. Leslie*, 83 Mo. 60; *McDow v. Brown*, 2 S. Car. 95.

It is not necessary to show fraud in an accounting in order to have the settlement re-opened if it was an accounting *en pais*. *Batts v. Winstead*, 77 N. Car. 238.

2. It is well settled that the probate court cannot render a judgment against a ward which shall bind him personally. If upon a settlement it appears that a balance is due the guardian, the probate court has no power to render judgment against the ward for the balance; nor does the finding have the force and effect of a judgment; neither can the guardian have recourse on the ward for such balance, unless there be an express or implied promise by the ward to pay; and this is so, even though the settlement be final, and the ward of full age and present in court when it is made. The record of the court is only admissible as tending to show a settlement *inter partes*. *Brown v. Chadwick*, 79 Mo. 587; see *Brent v. Grace*, 30 Mo. 253; *Hutton v. Williams*, 60 Ala. 133; *contra Gravett v. Malone*, 54 Ala. 19; *Martin v. Tully*, 72 Ala. 23; *Smith v. Jackson*, 56 Ala. 25.

3. *Jacobs v. Fouse*, 23 Minn. 51; *Buchanan v. Grimes*, 52 Miss. 82; *Mead v. Bakewell*, 8 Mo. App. 549; *Jenkins v. Whyte*, 62 Md. 427; *McCown v. Moores*, 12 Lea (Tenn.) 635.

Where no notice was given or citation issued upon filing an account, such an account irregularly approved is not good as *prima facie* evidence of its correctness. *Burnham v. Dalling*, 1 C. E. Green (N. J.) 144.

A final settlement has only the

effect of an annual settlement, unless made upon notice by advertisement in compliance with the statute. *Murphy v. Murphy*, 2 Mo. App. 156.

But where all the parties interested are before the court a citation is not necessary. *Roberts v. Schultz*, 45 Tex. 184.

A guardian's account irregular on its face will not be allowed until the ward being of full age consents, although it does not appear at the time that he objects. *Freeman v. Mohrman*, 1 Dem. (N. Y.) 461.

4. *Gravett v. Malone*, 54 Ala. 19; *Stabler v. Cook*, 57 Ala. 22; *Hagerty v. Scott*, 10 Tex. 525; *Favorite v. Slauter*, 79 Ind. 562.

The same limitation applies to the time in which an action may be commenced to set aside the final settlement of a guardian, as to actions to set aside the final settlement of an executor or administrator. *Briscoe v. Johnson*, 73 Ind. 573.

Where the settlement of a guardian account has been sanctioned by the court and assented to by the wards, an action by the complaining party to re-open the same, if there be no allegation of fraud, must be brought within three years after his majority. *Timberlake v. Green*, 84 N. Car. 658.

5. *Glass v. Glass*, 76 Ala. 368; *Lewis v. Allred*, 57 Ala. 628; *Lee v. Lee*, 67 Ala. 406; *Cox v. Johnson*, 80 Ala. 22.

But where the guardian's trust has terminated during the infancy of the ward, a final account is sometimes allowed after examination by a suitable guardian *ad litem*, on the ward's behalf, but it seems this will not entirely debar the ward from disputing the account on becoming of age. *Jones v. Fellows*, 58 Ala. 343; *Hutton v. Williams*, 60 Ala. 133; *Stabler v.*

d. Reasonable Expenses of Guardian Allowed.—The guardian may obtain allowance in his accounts for *bona fide*, though unusual, expenses incurred in behalf of his ward when they are reasonable and necessary;¹ but he cannot compel the ward's estate to pay for advice and services rendered for his private benefit under any pretext.²

The onus of proving the correctness of charges against the estate, by vouchers or otherwise, devolves upon the guardian.³

e. Payment, How Made.—For the sum found due the ward his guardian is liable in money or good securities.⁴

f. Lapse of Time No Bar to Accounting.—A guardian may be required to account long after the guardianship has ended, even though he has already made a private settlement with his former ward and has a receipt in full from him.⁵

Cooke, 57 Ala. 22; see *Racquillat v. Requena*, 36 Cal. 651.

1. The guardian will be allowed *bona fide* expenses for removing the ward to another State; *Cummins v. Cummings*, 29 Ill. 452; or for keeping himself his ward's horse. *Owens v. Peebles*, 42 Ala. 338.

The guardian has been allowed to charge interest on money necessarily advanced by him to his ward. *Hayward v. Ellis*, 13 Pick. (Mass.) 272; But see, *Evarts v. Nason*, 11 Vt. 122.

A guardian who keeps a store may in good faith supply the ward's necessities, charging him at customary rates of profit. *Moore v. Shields*, 69 N. Car. 50.

Reasonable expenses for counsel fees may be allowed. *Ashley v. Martin*, 50 Ala. 537; *Caldwell v. Young*, 21 Tex. 800.

It is proper for such committee to include, in his settlement of accounts as such, a debt due from the lunatic's estate to such committee before his appointment. Such, in fact, is his only remedy, as he could sue neither himself nor his predecessor. *Carter v. Edmonds* 80 Va. 58.

For special cases of allowances, see *Brewer v. Ernest*, 81 Ala. 435; *Taliaferro v. Day*, 82 Va. 79; *Paxton v. Gamewell*, 82 Va. 706; *McNeill v. Hodges*, 83 N. Car. 504.

2. *McElhenny's Appeal*, 46 Pa. St. 347; *Alexander v. Alexander*, 8 Ala. 796; *State v. Foy*, 65 N. Car. 265; *Blake v. Pegram*, 101 Mass. 592; *Voessing v. Voessing*, 4 Redf. (N. Y.) 360; *Moore v. Shields*, 69 N. Car. 50; *Johnston v. Haynes*, 68 N. Car. 509; *May v. May*, 109 Mass. 252.

Where a guardian purchased a piano

for her ward and on the latter's marriage refused to give it up to her: *Held*, that the item charging the ward's estate therewith was properly disallowed. *Pierce v. Prescott*, 128 Mass. 140.

3. *Matter of Gill*, 5 Thomp. & C. (N. Y.) 237; *Newman v. Reed*, 50 Ala. 297; *Hutton v. Williams*, 60 Ala. 133.

4. *Sage v. Hammonds*, 27 Gratt. (Va.) 651; *Manning v. Manning*, 61 Ga. 137; *Coles v. Allen*, 64 Ala. 98; see *State v. Bolte*, 72 Mo. 272.

A collusive settlement with a successor collusively appointed will not discharge the former guardian from liability to the ward. *Ellis v. Scott*, 75 N. Car. 108; *Manning v. Manning*, 61 Ga. 137.

A bond given by the guardian upon settlement with his ward after she becomes of age is no payment to the ward or discharge of the guardianship bond. *Hamblin v. Atkinson*, 6 Rand. (Va.) 574.

5. *Wall's Appeal*, 104 Pa. St. 14; *Man's Appeal*, 78 Pa. St. 66; *Say v. Barnes*, 4 S & R. (Pa.) 112; *Wade v. Lobdell*, 4 Cush. (Mass.) 510; *Bard v. Wood*, 3 Met. (Mass.) 74; *Gilbert v. Guptill*, 34 Ill. 112; *Hiestand v. Kuns*, 8 Blackf. (Ind.) 345; *Stark v. Gamble*, 43 N. H. 465; *Kimball v. Ives*, 17 Vt. 430; *Briers v. Hackney*, 6 Ga. 419.

Neither the insolvency of the guardian nor the lapse of six years after the ward becomes of age, will release the guardian or his personal representatives from liability to account. *Woodbury v. Hammond*, 54 Me. 332.

It is no objection to requiring a full accounting that the ward had acquiesced for a time in an irregular accounting by receiving the balance stated therein to be due him. *Sullivan v. Blackwell*, 28 Miss. 737.

g. Death of Guardian, Who Should Present Account.—And if a guardian die during his term of office, his personal representatives should present his final account; but for any deficit beyond the assets actually in their hands the sureties must answer.¹

These representatives have no authority to manage the property;² they merely transmit it to the successor.

h. Compensation of Guardian.—The services of the guardian under the English rule are gratuitously rendered,³ but in this country the court may by statute grant him a reasonable compensation, or, as in most States, he is entitled to a percentage of the ward's property by way of commission.⁴

The foreclosure by the ward on becoming of age of a mortgage given by the guardian as security of the ward will not bar an action of account against the guardian. *Lanier v. Griffin*, 11 S. Car. 565.

But such an account, if rendered long after the guardianship has ceased, is not required to be so full or exact as would otherwise be required, if there is no suspicion of fraud by the guardian. *Gregg v. Gregg*, 15 N. H. 190; *Pierce v. Irish*, 31 Me. 254; *Smith v. Davis*, 49 Md. 470.

1. *Royston v. Royston*, 29 Ga. 82; *Connelly v. Weatherly*, 33 Ark. 658; *Gregg v. Gregg*, 15 N. H. 190; *Kittredge v. Betton*, 14 N. H. 401; *Peck v. Braman*, 2 Blackf. (Ind.) 141; *Waterman v. Wright*, 36 Vt. 164; *Salisbury v. Van Hoesen*, 3 Hill (N. Y.) 77; *Farnsworth v. Oliphant*, 19 Barb. (N. Y.) 30; *State v. Grace*, 26 Mo. 87; *Hemphill v. Lewis*, 7 Bush (Ky.) 214; see *In re Allgier*, 65 Cal. 228; *Ordway v. Phelps*, 45 Iowa 279.

The administrator of a deceased surety has been permitted to supply a missing final account. *Curtis v. Bailey*, 1 Pick. (Mass.) 108, and where a guardian dies without personal representatives, a court of equity on suit of the ward will call his sureties and make them liable for the ward's estate. *Spotswood v. Dandridge*, 4 Munf. (Va.) 280. A surety cannot allege waste by the guardian's administrator, as against the ward. *Humphrey v. Humphrey*, 79 N. Car. 396.

Where a guardian is dead a demand by his successor before suing on his bond for money of the wards in the hands of the former guardian is not necessary to fix liability on the sureties, it being the duty of the administrator of the deceased to pay without demand. *Higgins v. State*, 87 Ind. 282; *Buchanan v. State*, 106 Ind. 251.

2. The administrator of a deceased guardian cannot maintain an action on the bond of third party to recover a fund alleged to be due the ward. *Davis v. Fox*, 69 N. Car. 435.

A guardian's administrator has no authority to invest the ward's funds, nor to discharge the guardian's general indebtedness, by setting apart a portion of the guardian's estate for that purpose. *Moorehead v. Orr*, 1 S. Car. 304; *Clark v. Tompkins*, 1 S. Car. 119.

The executor of a deceased guardian has no right to draw from the bank or the bank to pay over to him money deposited by the deceased as guardian. *Gary v. Bank*, 20 S. Car. 538.

3. Schouler Dom. Rel. (3rd ed.), § 375.

4. *Snively v. Harkrader*, 29 Gratt. (Va.) 112; *May v. May*, 109 Mass. 252; *McElhenny's Appeal*, 46 Pa. St. 347; *Vanderheyden v. Vanderheyden*, 2 Paige (N. Y.) 287; *In re Harland's Accounts*, 5 Rawle (Pa.) 323; *Walton v. Erwin*, 1 Ired. Eq. (N. Car.) 136; *Newman v. Reed*, 50 Ala. 297; *In re Roberts*, 3 Johns. Ch. (N. Y.) 43; *Holcombe v. Holcombe*, 2 Beasl. (N. J.) 415; *Hughes v. Smith*, 2 Dana (Ky.) 253; *Knowlton v. Bradley*, 17 N. H. 458; *State v. Foy*, 65 N. Car. 265; *Covington v. Leak*, 65 N. Car. 594; *Huffer's Appeal*, 2 Grant (Pa.) 341.

Where the fund in the hands of a guardian was small, it was not error for the court to allow him the interest on such fund in lieu of compensation. *Mattox v. Patterson*, 60 Iowa 434.

A guardian can charge commissions only on sums actually collected and paid out. *Reed v. Timmins*, 52 Tex. 84.

A guardian who is also trustee should not be allowed commissions on both his guardian and trustee accounts, where the performance of double services is merely nominal. *Blake v. Pegram*, 101 Mass. 592.

He may also make specific charges for special services in addition to or instead of a commission, provided the whole charge is not excessive.¹

The guardian may forfeit his right to compensation by misconduct in managing the property.²

XIII. RIGHTS AND LIABILITIES OF THE WARD.—Right to an Account.—Whenever guardianship has terminated, the ward or his

Where a guardian retires from office upon the ward reaching fourteen years at the request of the latter, he is entitled to commissions on the entire principal turned over to his successor. *Phillips v. Lockwood*, 4 Dem. (N. Y.) 299.

A guardian is not entitled to commissions upon any disbursement made after his ward becomes of age. *McNeill v. Hodges*, 83 N. Car. 504.

The New York statute establishing the compensation of guardians does not apply to special guardians for the sale of the estate of infants, their compensation being entirely within the discretion of the court. *Re Matthews*, 27 Hun. (N. Y.) 254.

A guardian's duties are personal and honorary, and the position is not to be assumed with a view of profit; but in Michigan he is entitled to such reasonable compensation as the circumstances warrant, such as the size and character of the estate, the amount and kind of his services, the duration of the trust, the obligation to maintain an oversight of the person, etc. *Gott v. Culp*, 45 Mich. 265.

1. *Longley v. Hall*, 11 Pick. (Mass.) 120; *Rathbun v. Colton*, 15 Pick. (Mass.) 471; *Emerson's Appeal*, 32 Me. 159; *Dixon v. Homer*, 2 Met. (Mass.) 420; *Roach v. Jells*, 40 Miss. 754; *Evarts v. Nason*, 11 Vt. 122; *State v. Foy*, 65 N. Car. 265.

The guardian of a wealthy insane adult may fairly claim compensation for personal visits and care. *May v. May*, 109 Mass. 252.

If the ward's estate consists entirely of a pension from the United States Government, it is not improper to allow the guardian in his final settlement the amount which he paid in necessary fees in preparing the requisite proof to obtain the pension and in reducing it to possession, in addition to his commissions as guardian. 60 Miss. 509.

An agreement by the guardian that the father shall manage the estate, and that the former shall receive no compensation till after the death of the latter does not prevent the guardian

from charging reasonable sums for services rendered to the ward's estate during the father's lifetime. *Williams' Appeal*, 119 Pa. St. 87.

But in New York a guardian, who is also a counselor, cannot charge for professional services rendered by himself, being restricted to his statutory commission. *Morgan v. Hannas*, 49 N. Y. 667. So personal services of the guardian as a mechanic or architect or in any other capacity will not receive compensation beyond the regular commissions of the guardian. *Morgan v. Hannas*, 49 N. Y. 667; *Wilson v. Linberger*, 88 N. Car. 416.

2. *Vanderheyden v. Vanderheyden*, 2 Paige (N. Y.) 287; *Knowlton v. Bradley*, 17 N. H. 458; *Trimble v. Dodd*, 2 Tenn. Ch. 500; *Starrett v. Jameson*, 29 Me. 504; *Royston v. Royston*, 29 Ga. 82; *Magruder v. Darnall*, 6 Gill (Md.) 269; *Clowes v. VanAntwerp*, 4 Barb. (N. Y.) 416; *Reed v. Ryburn*, 23 Ark. 47; *Neilson v. Cook*, 40 Ala. 498; *Bond v. Lockwood*, 33 Ill. 212; *Stephens v. Marshall*, 33 Hun. (N. Y.) 641; *Schurr's Estate*, 13 Phila. (Pa.) 353; *Foteaux v. Lepage*, 6 Iowa 123; *Mattox v. Patterson*, 60 Iowa 434.

A guardian will not be allowed compensation for taking care of the trust fund while he is himself the borrower of it. *Farwell v. Stein*, 46 Vt. 678; see *Pirce v. Prescott*, 128 Mass. 140.

If a guardian speculates with his ward's property or employs it in his business, though the venture be successful and the ward derive the benefit, the guardian will not be allowed commissions on the fund. *Seguin's Appeal*, 103 Pa. St. 139; *Burke v. Turner*, 85 N. Car. 500; *contra*, if he makes regular returns to the court. *Carr v. Askew*, 94 N. Car. 194.

A conservator failed to make reports as required by law and to keep accounts; *Held*, that had forfeited his claim to compensation. *Re Hall*, 19 Ill. App. 295; *McCloud's Estate*, 12 Phila. (Pa.) 81; *Dissenger's Case*, 12 Stew. (N. J.) 227.

legal representatives, if he is still under disability, have the right to compel an account from the guardian.¹ This right may be barred by limitation reckoned from the time the ward becomes competent to act.²

2. Right to Follow Property; Resulting Trust.—Fraudulent transactions of the guardian cannot stand as against the ward. In such case the latter, on becoming of age, has not only his remedy against the guardian, but where his property is traceable,³ he may instead follow it even into the hands of third person.⁴

Thus, he may either establish a resulting trust in lands purchased with his funds and standing in the name of the guardian or transferred to another, or demand the fund invested from the

1. The only action in a court of law which can be brought against a guardian, *qua* guardian, other than an action on the bond, is an action of account. *Green v. Johnson*, 3 Gill & J. (Md.) 391; *Stumph v. Guardian of Pfeiffer*, 58 Ind. 472.

After the termination of the guardianship an action of account lies in behalf of the ward against the guardian, not only for the time the defendant held the property as bailiff, but also while he held it as guardian. *Harris v. Harris*, 44 Vt. 320; *Field v. Torrey*, 7 Vt. 372.

The settlement of a deceased guardian's account should be demanded by proceedings in the probate court by citing in the administrator. *Waterman v. Wright*, 36 Vt. 164.

Generally a ward must be of age before he can require his guardian to account, yet in chancery a ward may during his minority call him to account if it should be deemed necessary. *Peck v. Braman*, 2 Blackf. (Ind.) 141.

In case of chancery guardians a bill for an account is the usual mode, but probate guardians are generally called to account by proceedings in the probate court followed by an action on the bond. *Schouler Dom. Rel.*, § 382; *Monell v. Monell*, 5 Johns. Ch. (N. Y.) 283; *Linton v. Walker*, 8 Fla. 144; *Swan v. Dent*, 2 Md. Ch. 111; *Lemon v. Hansbarger*, 6 Gratt. (Va.) 301; *Manning v. Manning*, 61 Ga. 137; *Jones v. Beverly*, 45 Ala. 161; *Sage v. Hammonds*, 27 Gratt. (Va.) 651; *Stanard v. Whittlesey*, 9 Conn. 559; *Pfeiffer v. Knapp*, 17 Fla. 144; *Waller v. Creswell*, 4 S. Car. 353.

In some cases of *quasi* guardianship the ward has been allowed to sue in *assumpsit*, in such a case the old action of account being held proper. *Pickering*

v. DeRochemont, 45 N. H. 67; see, also, *Ryan v. Gallman*, 13 S. Car. 332.

2. In case of chancery guardians this term is the same as that necessary to bar other legal proceedings. *Bones' Appeal*, 27 Pa. St. 492; *Magruder v. Goodwyn*, 2 P. & H. (Va.) 561; *Adams v. Riviere*, 59 Ga. 793.

But with probate guardians the right to an account continues so long as the guardian's bond remains in force. *Gilbert v. Guptill*, 34 Ill. 112.

Short delays by the ward in bringing the guardian to account after the guardianship has ceased, should not prejudice his rights against either guardian or sureties. *Pfeiffer v. Knapp*, 17 Fla. 144.

But one who has been under guardianship is chargeable with constructive notice of the probate papers on file and the proceedings relative thereto, and should prosecute his rights seasonably. *Robert v. Morrin*, 27 Mich. 306; see, also, *Railsback v. Williamson*, 84 Ill. 494.

3. If the fund cannot be traced unto some specific thing or be clearly identified, the ward cannot assert his right. *Vason v. Bell*, 53 Ga. 416. He becomes only a general creditor of the guardian's estate. *Covey v. Neff*, 63 Ind. 391.

4. Where a guardian is suspected of fraud, his estate being insolvent and his sureties irresponsible, it is held that it is not necessary for the ward to sue them before filing a bill to recover such property as he can trace. *Hill v. McIntire*, 39 N. H. 410.

A summary process for ascertaining stolen or missing property of wards is provided by statute in some States, by which all suspected persons, even the guardian, may be summoned to answer inquiries under oath. *Sherman v. Brewer*, 11 Gray (Mass.) 510.

guardian;¹ although where money of the ward is used in paying for land previously acquired by the guardian, there is no resulting trust in favor of the ward.² And there is none where a third person buying the property had no notice of the trust.³

Similarly, personal estate fraudulently conveyed by the guardian may be recovered by suit in equity.⁴

1. *Royer's Appeal*, 11 Pa. St. 36; *Hammett's Appeal*, 72 Pa. St. 337; *Boisseau v. Boisseau*, 79 Va. 73; *Sterling v. Arnold*, 54 Ga. 690; *Fogler v. Buck*, 66 Me. 205; *Robinson v. Robinson*, 22 Iowa 427; *Beazley v. Harris*, 1 Bush (Ky.) 533; *Gannaway v. Tarpley*, 1 Cold. (Tenn.) 572; *Turner v. Petigrew*, 6 Humph. (Tenn.) 438; *Shelton v. Lewis*, 27 Ark. 190; *Johnson v. James*, 48 Ga. 554; *White v. Parker*, 8 Barb. (N. Y.) 48; *Robinson v. Robinson*, 22 Iowa 427; *Armitage v. Snowden*, 41 Md. 119; *Wood v. Stafford*, 50 Miss. 370; *Eustice v. Holmes*, 52 Miss. 305; *Rowland v. Thompson*, 73 N. Car. 419; *Beam v. Froneberger*, 75 N. Car. 540; *Younce v. McBride*, 68 N. Car. 532; *Durling v. Hammer*, 5 C. E. Green (N. J.) 220; *Padfield v. Pierce* 72 Ill. 500; *Peck v. Braman*, Blackf. (Ind.) 544; *Snell v. Elam*, 2 Heisk. (Tenn.) 82; see, *Skipwith v. Glathary*, 34 La. Ann. 28.

Where a guardian, having purchased a lot of land, partly for cash, and partly on a credit, used his ward's funds in making the cash payment, taking the title in his own name, and securing the unpaid purchase-money by mortgage on the lot, which was afterwards foreclosed under a power of sale contained therein, and purchased by one charged with notice of the trust character of the funds used in making the cash payment, the fact that the guardian on final settlement of his guardianship did not receive a credit for the fund so used, but a decree was rendered therefor against him and his sureties, which had not been satisfied, does not estop the ward from pursuing the funds into the lot in which they were invested, and from subjecting the lot to sale for the payment thereof. *Robinson v. Pebworth*, 71 Ala. 240.

And such trust will be established even though creditors of the guardian having no notice of the trust have recovered judgment and levied upon the property, the equity of the ward being held superior. *Hartsock v. Russell*, 52 Md. 619; *Sheetz v. Neagley*, 13 Phila. (Pa.) 506.

Where a guardian holding a mort-

gage in his own right agreed to substitute the ward's money for his own, leaving the securities the same as before, this was held to be an equitable investment of the ward's money and the right of the ward was upheld against a subsequent assignment of the mortgage to secure his creditors even though the latter had no notice of the trust. *Evertson v. Evertson*, 5 Paige (N. Y.) 644.

Where a guardian buys land with funds of his ward without authority and takes title as trustee, he cannot convey a good title to the purchaser, but it will be subject to the right of the ward to pursue the fund into the land. *Morrison v. Kinstra*, 55 Miss. 71.

Where a guardian purchases with the ward's funds only the equitable title to land, the ward on becoming of age can secure no equity in the land superior to the holder of the legal title. *McFarland v. Conlee*, 44 Ill. 455.

A mother interested in lands with her children, being appointed their guardian, bought the lands at partition sale, and without paying the purchase money gave a mortgage therefor, taking an assignment to herself as guardian, held that the claim of a second mortgagee with notice was postponed to the first unrecorded mortgage. *Messervey v. Barelli*, 2 Hill Ch. (S. Car.) 567.

2. *French v. Sheplor*, 83 Ind. 266; *Richardson v. Day*, 20 S. Car. 412.

3. Land belonging to an estate was sold by the executors to the guardian to pay debts. The transaction was in good faith on both sides, and full consideration was paid. The guardian afterwards sold to others who knew nothing of the guardianship and had no notice of it from the record of title. Held, that the facts would not warrant a ward in bringing ejectment against the purchasers, who were not bound to look beyond the registry of deeds to ascertain their grantor's title. *Taylor v. Brown*, 55 Mich. 482.

4. *Villalonga v. Hicks*, 13 S. Car. 163; *Carpenter v. McBride*, 3 Fla. 292.

Where a guardian transfers a note with words importing a trust to his

But the ward cannot have both his remedy against the guardian and a recovery of the specific property at the same time.¹

3. Right of Election.—Where the act of the guardian is not fraudulent, but is unauthorized, the ward,² at his majority, may elect either to ratify or reject it,³ unless the court has previously confirmed it.

creditors as security for his own debt, the ward can follow it into their hands or against other parties and stop payment whether the holder paid a consideration or not. *Lockhart v. Phillips*, 1 Ired. Eq. (N. Car.) 342. *Lemly v. Atwood*, 65 N. Car. 46.

But where A being indebted to certain infants of whom B is guardian, agreed with B that he would give his note to C for a debt which B owed the latter, taking from B a discharge of the debt due his wards, it was held that C having no notice of this arrangement between A and B, was not responsible to the wards for the amount received from A. *Hill v. Johnson*, 3 Ired. Eq. (N. Car.) 432.

For the rights of the ward where the guardian placed the ward's property in a partnership and afterwards died and the surviving partners became insolvent, as also the sureties on the guardian's bond, see *Carter v. Lipsey*, 70 Ga. 417.

A minor may maintain a suit in equity to compel one to account for the trust fund he has fraudulently obtained from his guardian for an inadequate consideration; but, if it be a suit for rescission, he must offer to restore to the defendant, as far as he is able, all the consideration he has received; otherwise, he cannot claim entire restoration to his rights in the fund. *Myrick v. Jacks*, 39 Ark. 293.

1. A ward who has repudiated an unauthorized investment of his moneys in land and has enforced his claim against his guardian for the money, cannot set up any legal or equitable claim to the land nor transfer title thereto. *Rowley v. Trowsley*, 53 Mich. 329; *Clayton v. McKinnon*, 54 Tex. 206; *Edmonds v. Morrison*, 5 Dana (Ky.) 223; *Beam v. Froneberger*, 75 N. Car. 540.

The ward is not confined to his action on the bond but has the cumulative remedy of repudiating the transaction and recovering stock illegally sold by his guardian; but where the stock or its value has been fully recovered, the plaintiff in a suit on the bond would be entitled to nominal damages only. *State v. Murray*, 24 Md. 310.

An unproductive suit on a guardian's bond will not operate as an estoppel upon the wards from the recovery of the property or its value from a third person having notice. *Branch v. DuBois*, 55 Ga. 21.

2. The right of election goes to the ward's personal representatives if he dies under age. *Singleton v. Love*, 1 Head (Tenn.) 357.

3. *Jones v. Beverly*, 45 Ala. 161; *Tomlinson v. Simpson*, 33 Minn. 443; *Cromwell v. Kirk*, 1 Dem. (N. Y.) 599; *Sherry v. Sansberry*, 3 Ind. 320; *Eckford v. DeKay*, 8 Paige (N. Y.) 89; *Irvine v. McDowell*, 4 Dana (Ky.) 632; see *Randlett v. Gordy*, 32 La. Ann. 904; *Milligan v. Dick*, 107 Pa. St. 259;

When a guardian or other trustee makes an unauthorized sale of lands belonging to his ward, or the *cestui que trust*, the latter may at his election, either repudiate the sale and recover the lands, or ratify the sale and claim the purchase money; and if he elects to ratify it, his ratification relates back to the date of the sale, and clothes him with all the rights of the original vendor, including the right to enforce the vendor's lien for the unpaid purchase money. *Shorter v. Frazer*, 64 Ala. 74.

Where a guardian loans the trust funds in his hands to a firm of which he is a member, with the knowledge of his other partners, it becomes a partnership debt, and the successor of such guardian, in the interest of his wards, has the right to elect to consider the money as a loan, or to hold the former guardian responsible on his official bond. *Bush v. Bush*, 33 Kan. 556.

The ward is not bound by his guardian's exchange of his land for other land, unless he chooses to ratify such act. *Morgan v. Johnson*, 68 Ill. 190.

Where a guardian contracts to buy real estate for the ward's benefit, the latter may reject the contract, on becoming of age, and look to the guardian for payment. *Lloyd v. Malone*, 23 Ill. 43; *Overback v. Heermance*, Hopk. Ch. (N. Y.) 337.

But he cannot, in the absence of

If he repudiates the transaction, he must first resign whatever benefit he has received through it.¹ And ratification will be presumed, if, after becoming of age he receives and retains the benefit, with knowledge of the facts, or acquiesces in the action for a long time,² or by other acts shows his approval.³

4. Transactions After the Expiration of the Guardianship.—When the ward has arrived at full age and the guardian instead of settling his accounts in court makes a private settlement with his former ward, such settlement, if it is fraudulent towards the ward,

fraud, compel the vendor to refund the money paid down as a bonus. *Floyd v. Johnson*, 2 Litt. (Ky.) 109.

An infant cannot elect to ratify an act of the guardian in part and to disaffirm in part; he must accept or reject the entire transaction. *Singleton v. Love*, 1 Head (Tenn.) 357.

If the guardian, without authority, sells lands and the ward elects to take the money therefor, the title vests absolutely with the grantees. *Chancellor v. Chancellor*, 11 Bush (Ky.) 663.

1. Where a sale of land by the guardian was vacated by the ward on becoming of age, *held*, that the guardian might recover from his former ward the sum charged him in his final account as proceeds of the sale. *Burleigh v. Bennett*, 9 N. H. 15.

Where a guardian sold land under a void authority of the court, *held*, that the wards could not recover the property without returning the purchase money and the estimated cost of improvements made thereon in good faith by the purchaser. *Summers v. Howard*, 33 Ark. 490; *Douglass v. Bennett*, 51 Mo. 680; *Hudson v. Strickland*, 58 Miss. 186.

But where a guardian incumbered the land by a deed of trust to satisfy a debt payable by the guardian individually, the wards may have the deed cancelled without refunding to a purchaser under the deed, the consideration therefor. *Price v. Estill*, 87 Mo. 378.

2. *Cassidy v. Casey*, 58 Iowa 326; *Hoyt v. Sprague*, 103 U. S. 613; *Voltz v. Voltz*, 75 Ala. 555; *In re Wood*, 71 Mo. 623; *Teipel v. Vanderweier*, 36 Minn. 443; *Deford v. Mercer*, 24 Iowa 118; *Parmele v. McGinty*, 52 Miss. 476; *O'Connor v. Carver*, 12 Heisk. (Tenn.) 436; *Fisk v. Miller*, 1 Hoff. Ch. (N. Y.) 267; *Binion v. Miller*, 27 Ga. 78; *Steadham v. Sims*, 68 Ga. 741; *Scott v. Freeland*, 7 Sm. & M. (Miss.) 409; *Hume v. Hume*, 3 Barr. (Pa.) 144; *Worrell's Appeal*, 23 Pa. St. 44; *Sherry v. Sansberry* 3 Ind. 320; *Web-*

ster v. Bebinger, 70 Ind. 9; *Penn v. Heisey*, 19 Ill. 295; *Trader v. Lowe*, 45 Md. 1; *Ferguson v. Lowry*, 54 Ala. 510; *Singleton v. Love*, 1 Head (Tenn.) 357; *Lee v. Brown*, 4 Ves. 361; *Cory v. Gertchen*, 2 Madd. 40; *Allfrey v. Allfrey*, 11 Jur. 981; *Wardell's Estate*, 14 Phila. (Pa.) 290; *Pearson v. Caldwell*, 70 N. Car. 291; *Moore v. Moore*, 12 B. Mon. (Ky.) 651, 662.

The ward will be presumed to have ratified the guardian's purchase of a horse and buggy for him out of the principal of his estate, if after majority he continued to use them and received the proceeds of their sale. *Caffey v. McMichael*, 64 N. Car. 507.

While a sale of land by a minor to her guardian is not a legal sale, yet if it is acted on and she receives a valuable consideration and retains it, or receives the benefit of it after majority, with full knowledge of her rights, she thereby ratifies the sale and will be bound by it. *Howard v. Tucker*, 65 Ga. 323; *Parmele v. McGinty*, 52 Miss. 476.

A settlement by a ward after he comes of age, with his guardian, acceptance of the proceeds of sales made by him, and discharge of the guardian and sureties on his bond, is a ratification of his acts. *Seward v. Didier*, 16 Neb. 58.

3. An investment by the guardian may be ratified by the act of the ward in joining in an action after becoming of age which had already been begun by the guardian to recover the property. *Collins v. Dixon*, 72 Ga. 475.

Where the guardian without authority gave a bond to convey real estate of the ward and received the notes of the purchaser therefor and the ward after becoming of age with her husband executed and tendered a deed of warranty to the maker of the notes which he refused to receive, *held*, that the bond was adopted by the ward by making and tendering the deed and that the obligee was bound to pay the notes. *Mason v. Caldwell*, 10 Ill. 196.

giving him less than his rights and tending to the benefit of the guardian, will be set aside;¹ and a release from the ward under such circumstances will be void;² but otherwise if it appears to be full and fair, and done in good faith,³ and in examining such settlements every reasonable intendment is to be made in favor of the ward.⁴

1. *Revett v. Harvey*, 2 Sim. & Stu. 502; *Hall v. Cone*, 5 Day (Conn.) 543; *Richardson v. Linney*, 7 B. Mon. (Ky.) 571; *Stark v. Gamble*, 43 N. H. 465; *Douglass v. Low*, 36 Hun. (N. Y.) 497; *Harris v. Carstarphen*, 69 N. Car. 416; *Voltz v. Voltz*, 75 Ala. 555; *Cotton v. Fenner*, 73 N. Car. 566; see, *Fridge v. State* 3 Gill & J. (Md.) 103.

2. *Forbes v. Forbes*, 5 Gill (Md.) 29; *Myer v. Rives*, 11 Ala. 760; *Womack v. Austin*, 1 S. Car. 421; *Johnson v. Johnson*, 2 Hill Ch. (S. Car.) 277; *Fish v. Miller*, 1 Hoff. Ch. (N. Y.) 267; *Rapalje v. Norsworthy*, 1 Sandf. Ch. N. Y.) 399.

A release of a guardian and his sureties by a ward after her majority, she being the daughter of the former and ignorant of her rights, without any consideration, being a virtual gift to the father, will be presumed to have been obtained by undue influence and is void. *Carter v. Tice*, 120 Ill. 277.

A receipt by a ward for property held by his guardian is no more conclusive than any other receipt, and while it justifies the guardian's discharge neither the receipt nor the discharge precludes the ward from showing that under a mutual arrangement the guardian has not actually accounted for part of the property; *Powell v. Powell*, 52 Mich. 432.

But such release if freely made without fraud or undue influence by the former guardian will stand. *Kirby v. Taylor*, 6 Johns. Ch. (N. Y.) 242; *Satterfield v. John*, 53 Ala. 127; *Cheever v. Congdon*, 34 Mich. 296; *Steadham v. Sims*, 68 Ga. 741; *Estate of Beck*, 17 Phila. (Pa.) 471.

Action being brought by a ward after his majority against his guardian simply for an account without impeaching in any way a private settlement had between them, such settlement and receipt is a bar to the action. *Dunsford v. Brown*, 19 S. Car. 560.

3. *Hunter v. Atkins*, 3 M. & K. 135; *Hawkins' Appeal*, 32 Pa. St. 203; *Smith v. Davis*, 49 Md. 470; *Smith v. McKee*, 67 Iowa 161; *McClellan v. Kennedy*, 8 Md. 230; *Livingston v.*

Wells, 8 S. Car. 347; *Lewis v. Brown-ling*, 111 Pa. St. 493; *Davenport v. Olmstead*, 43 Conn. 67; *Estate of Stryker*, 17 Phila. (Pa.) 507.

A guardian may acquit himself by an outside informal settlement with his ward. But the guardian who relies upon such a settlement must clearly show that he made a full disclosure of everything to the ward, and that the latter knew and understood that he was making a full, final settlement. *Gregory v. Orr*, 61 Miss. 307.

Settlement with ward, if free from fraud or mistake, is as binding and conclusive as if before a court. *Vaughn v. Bibb*, 46 Ala. 153; *Motley v. Motley*, 45 Ala. 555; *Mobley v. Leopahrt*, 47 Ala. 257; *Wise v. Norton*, 48 Ala. 214; *Satterheld v. John*, 53 Ala. 127; *Hester v. Watkins*, 54 Ala. 44.

If after becoming sane the ward, aided by counsel, settles with his guardian and receives and retains the proceeds paid him at such settlement, he will be estopped from impeaching it. *Mohr v. Tulip*, 40 Wis. 66.

To authorize the cancellation of a contract of settlement made between a ward and his former guardian, there must be evidence of bad faith on the part of the latter. In this case a payment to the ward in bonds, which afterward became worthless, is held to be binding upon him, although made upon the day he reached his majority, there being no evidence that the guardian acted in bad faith. *Hardin v. Taylor*, 78 Ky. 593.

The fact that a settlement between the guardian and ward with allowances in the guardian's favor is not conclusive of fraud, though all acts are to be construed in the ward's favor. *Kirby v. Taylor*, 6 Johns. Ch. (N. Y.) 242; *McClellan v. Kennedy*, 8 Md. 230; *Spalding v. Brent*, 3 Md. Ch. 411; *Meek v. Perry*, 36 Miss. 190; *Myer v. Rives*, 11 Ala. 760.

4. *Spalding v. Brent*, 3 Md. Ch. 411. But where no transaction or dealing between the guardian and ward is involved in an action by the latter against the former, to set aside a final

So gifts, leases, conveyances or agreements by the former ward inuring to the benefit of the guardian, will often be set aside, both when occurring before final settlement and afterward.¹

But the ward's right to set aside such transactions may be lost by his delay in asserting it.²

XIV. GUARDIAN AD LITEM.—1. Appointment Of.—Every court wherein an infant is sued has the power to appoint a guardian *ad*

report and to recover damages for negligence in the management of the trust, it is error to instruct the jury that it is their duty "to presume in favor of the ward and against the guardian as strongly as the facts will warrant." *Wainwright v. Smith*, 106 Ind. 239.

1. *Hylton v. Hylton*, 2 Ves. 547; *Hatch v. Hatch*, 9 Ves. 206; *Wood v. Downes*, 18 Ves. 120; *Mulhallen v. Marum*, 3 Dr. & W. 317; *Aylward v. Kearney*, 2 Ball & B. 463; *Dawson v. Massey*, 1 Ball & B. 219; *Waller v. Armistead*, 2 Leigh (Va.) 11; *Clowes v. VanAntwerp*, 4 Barb. (N. Y.) 416; *Tucker v. Buckholz*, 43 Iowa 415.

See *Duke of Hamilton v. Lord Mohun*, 1 P. Wms. 118; *Huguenin v. Baseley*, 14 Ves. 273.

When a guardian buys his ward's estate shortly after he becomes of age at a price grossly inadequate and without settling his accounts, such purchase will be set aside for fraud. *Eberts v. Eberts*, 55 Pa. St. 110; *Williams v. Powell*, 1 Ired. Eq. (N. Car.) 460.

Anyone occupying a fiduciary relation so recently that the influence arising therefrom is presumed still to exist, cannot avail himself of bounty from his late ward or other persons holding the relation unless there is clear and distinct evidence that the influence is determined and that the donor acted in a manner perfectly free, independent and unbiased. *Garvin's Adm'r v. Williams*, 50 Mo. 206.

A female minor is emancipated by marriage so far as the reception of her estate from her guardian is concerned, and a receipt therefor signed by herself and husband is as effectual as if she were adult; but the guardian cannot, under guise of delivering her property, make a contract with her by which she gets something else. *Bickerstaff v. Marlin*, 60 Miss. 509.

The gift from a ward to a guardian is voidable; and the burden of proof is on the donee to show that the transaction was fair; that it was freely, voluntarily and understandingly made; and that the donor had competent and

disinterested advice *as to the subject-matter of the gift*. Mere lapse of time is no protection to the guardian. *Wade v. Pulsifer*, 54 Vt. 45.

A conveyance by a minor on the day he becomes of age, of all his real estate to his former guardian, while he is still under his influence and control, and not advised of his rights, is not binding, and can be upheld in equity only by clear proof that it was just and equitable. *Berkmeyer v. Kellerman*, 32 Ohio St. 240.

Where a guardian procured his late ward's indorsement of his own notes without consideration, parties who took such notes with knowledge of the former fiduciary relation, were enjoined from enforcing them against the indorser. *Gale v. Wells*, 12 Barb. (N. Y.) 84.

And where a step-father who had been no more than a *quasi* guardian, procured a similar indorsement, the indorser was similarly protected. *Espey v. Lake*, 15 Eng. L. & Eq. 579.

A purchase by the late guardian of the rights of his ward in his father's property for a grossly inadequate sum, will be set aside. *Wright v. Arnold*, 14 B. Mon. (Ky.) 513; *Williams v. Powell*, 1 Ired. Eq. (N. Car.) 460; *Wickiser v. Cook*, 85 Ill. 68.

A gift from a guardian to his ward is not, however, voidable by the guardian. *Bond v. Lockwood*, 33 Ill. 212; *Pratt v. McJunkin*, 4 Rich. (N. Car.) 5.

2. *Estate of Stryker*, 17 Phila. (Pa.) 507; *Fish v. Miller*, 1 Hoff. Ch. (N. Y.) 267.

When the ward seeks in equity to set aside and avoid a settlement between him and his guardian, or a receipt and discharge given by him to his guardian shortly after attaining his majority, he must act with diligence, or give a satisfactory excuse for any delay in asserting his rights. In this case, the bill being filed after the death of the guardian, and nearly ten years after the settlement: *It was held*, that the delay was fatal to the bill, even if the case made by the bill were fully proved. *Jackson v. Harris*, 66 Ala. 565.

litem to conduct his defence.¹

The infant cannot appear either in person or by attorney.² If he has a general guardian already appointed, such guardian may in some States appear for him;³ in other States he cannot appear, but a guardian *ad litem* is necessary.⁴

1. A second guardian *ad litem* cannot be appointed till the previous appointee has been removed. *Bondurant v. Sibley*, 37 Ala. 565.

Where the number and names of infant heirs are not known, it is not practicable to appoint a guardian *ad litem*. *Kountz v. Davis*, 3 Ark. 590.

And an appointment without naming the minors is inoperative. *Sullivan v. Sullivan*, 42 Ill. 315.

2. *McIntosh v. Atkinson*, 63 Ala. 241; *Nicholson v. Wilborn*, 13 Ga. 467; *Kesler v. Penninger*, 59 Ill. 134; *Peak v. Shasted*, 21 Ill. 137; *De La Hunt v. Holderbaugh*, 58 Ind. 285; *Timmons v. Timmons*, 6 Ind. 8; *Wetherill v. Harris*, 67 Ind. 452; *Bedell v. Lewis*, 4 J. J. Marsh. (Ky.) 562; *Meredith v. Saunders*, 2 Bibb (Ky.) 162; *Beeler v. Bullitt*, 4 Bibb (Ky.) 12; *Gamache v. Prevost*, 71 Mo. 84; *Lee v. Jenkins*, 30 Miss. 592; *Bradwell v. Weeks*, 1 Johns. Ch. (N. Y.) 325; *Alderman v. Tirrell*, 8 Johns. (N. Y.) 418; *Shepherd v. Hibbard*, 19 Wend. (N. Y.) 96; *Starbird v. Moore*, 21 Vt. 529; *Somers v. Rogers*, 26 Vt. 585; *Fall River F. Co. v. Doty*, 42 Vt. 412; *Clark v. Turner*, 1 Root (Conn.) 200.

An infant after appearance by a guardian *ad litem* may defend by an attorney. *Alexander v. Frary*, 9 Ind. 481; *Doe v. Brown*, 8 Blackf. (Ind.) 443.

The mother cannot appear for an infant defendant without appointment as guardian *ad litem*. *Letcher v. Letcher*, 2 A. K. Marsh. (Ky.) 158.

If a counter claim is presented against a ward, his next friend in the original suit cannot act for the infant defendant in the cross suit without appointment as guardian *ad litem* by the court. *Morris v. Edmonds*, 43 Ark. 427; *Bush v. Linthicum*, 59 Md. 344.

3. It is only where an infant has no legal guardian or where he fails to appear upon summons, that the court may appoint a guardian *ad litem*. *Winston v. McLendon*, 43 Miss. 254; *Weeks v. Smith*, 44 Miss. 296; *Mansur v. Pratt*, 101 Mass. 60; *Pierson v. Hichtner*, 10 C. E. Green (N. J.) 130; *Pucket v. Johnson*, 45 Tex. 550; *Gronfier v. Puymirol*, 19 Cal. 629; *Hinton v.*

Bland, 81 Va. 588; *McMakin v. Stratton*, 82 Ky. 226; *Re Kennelly*, 3 Dem. (N. Y.) 219; see *Smith v. McDonald*, 42 Cal. 484.

A judgment by default cannot be rendered against the infant where his general guardian fails to appear upon summons, but a guardian *ad litem* should be appointed. *Woodall v. Delatour*, 43 Ark. 521; *Lloyd v. Kirkwood*, 112 Ill. 329.

Where service of process is made upon a general guardian, and he appears and makes defence, and is heard by the court, such action is equivalent to his appointment as guardian *ad litem*. *Price v. Winter*, 15 Fla. 67.

In a suit for partition against infants, the guardian of their persons and estates may appear in his own name as guardian and plead in their behalf, and in the same name as a party appeal to the supreme court. *Miller v. Smith*, 98 Ind. 266.

Where a guardian appears for his ward it is not necessary to appoint a guardian *ad litem*. *Hughes v. Sellers*, 34 Ind. 337; though the existence of a general guardian even in the same jurisdiction will not prevent the appointment of a guardian *ad litem*. *Alexander v. Frary*, 9 Ind. 481.

4. A guardian cannot voluntarily appear for an infant, but the latter must be served with process, and a guardian *ad litem* appointed. *Fitch v. Cornell*, 1 Sawyer (U. S.) 157.

It is an inflexible rule of practice in the Alabama court of chancery that infant defendants be represented by guardians *ad litem*. *Roach v. Hix*, 57 Ala. 576; *Stammers v. McNaughton*, 57 Ala. 277. See *Cato v. Easley*, 2 Stew. (Ala.) 214.

Another than the general guardian may be appointed guardian *ad litem* of a lunatic who is a non-resident. *Sturges v. Longworth*, 1 Ohio St. 544.

On the final settlement of the estate of decedent by his administrator, a guardian *ad litem* should be appointed for infant distributees, and failure to appoint will render the decree reversible. *Willis v. Willis*, 16 Ala. 652; *Clack v. Clack*, 2 Ala. 461; *Searcy v. Holmes*, 43 Ala. 608; *King v. Collins*,

Where an appointment is necessary, it is the duty of the court, if the defendant does not move therefor, to appoint a guardian *ad litem* on motion of the plaintiff,¹ and in some States whether motion is made or not.²

After suit has been begun it is within the discretion of the judge to allow amendment by appointing a guardian *ad litem*.³

Such guardian cannot properly be appointed till the infant has been brought into court as the party defendant by some process of summons or publication required by the local law.⁴ And neither the guardian nor the minor can waive the service of process.⁵

21 Ala. 363; *Barwick v. Buckley*, 45 Ala. 215; *Petty v. Britt*, 46 Ala. 491; *Frisby v. Harrison*, 30 Miss. 452; *Cason v. Cason*, 31 Miss. 578.

But the general guardian may appear for the distributee. *Smith v. Smith*, 21 Ala. 761; *Morgan v. Morgan*, 35 Ala. 303; *Hatcher v. Dillard*, 70 Ala. 343.

1. *Mockey v. Grey*, 2 Johns. (N. Y.) 192; *Bullard v. Spoor*, 2 Cow. (N. Y.) 430; *Brick's Estate*, 15 Abb. Pr. (N. Y.) 12; *Montgomery v. Montgomery*, 3 Barb. Ch. (N. Y.) 132; *Clarke v. Gilman*, 12 N. H. 515; *Mace v. Scott*, 17 Abb. N. C. (N. Y.) 100.

The plaintiff is not bound to move for the appointment of a guardian *ad litem*, and his failure to do so is not a ground for discontinuance. *Turner v. Douglass*, 72 N. Car. 127.

2. *Loyd v. Malone*, 23 Ill. 43; *Covington & L. R. R. Co. v. Bowles*, 9 Bush (Ky.) 468; *Morris v. Gentry*, 89 N. Car. 248; *Jack v. Davis*, 29 Ga. 219; *Peak v. Shasted*, 21 Ill. 137.

In foreclosure proceedings, if there are infant defendants, it is a matter of course to make an absolute appointment of a guardian *ad litem*, if they, or some one in their behalf do not. *Ontario Bank v. Strong*, 2 Paige (N. Y.) 301; *Concklin v. Hall*, 2 Barb. Ch. (N. Y.) 136.

3. *Boyce v. Lake*, 17 S. Car. 481.

But the court will not appoint a guardian *ad litem* after judgment rendered, and where its attention is first called to the insanity of a party upon the hearing of a motion to confirm a sale of real estate made on execution issued on the judgment. *Kuhn v. Killmer*, 16 Neb. 699.

4. *Walker v. Hallett*, 1 Ala. 379; *Hodges v. Wise*, 16 Ala. 509; *Preston v. Dunn*, 25 Ala. 507; *Bondurant v. Sibley*, 37 Ala. 565; *McIntosh v. Atkinson*, 63 Ala. 241; *Cook v. Rogers*, 64 Ala. 406; *Irwin v. Irwin*, 57 Ala.

614; *Rowland v. Jones*, 62 Ala. 322; *Clark v. Gilmer*, 28 Ala. 265; *Freeman v. Russell*, 40 Ark. 56; *Pillow v. Sentelle*, 39 Ark. 61; *Evans v. Davies*, 39 Ark. 235; *Gray v. Palmer*, 9 Cal. 616; *Johnston v. S. F. Sav. Union*, 63 Cal. 554; *Clark v. Thompson*, 47 Ill. 25; *Carver v. Carver*, 64 Ind. 194; *Good v. Morley*, 28 Iowa 188; *Claypoole v. Houston*, 12 Kan. 324; *Patton v. Furtmiller*, 16 Kan. 29; *Graham v. Sublett*, 6 J. J. Marsh. (Ky.) 44; *Shaefer v. Gates*, 2 B. Mon. (Ky.) 456; *Collard v. Groom*, 2 J. J. Marsh. (Ky.) 487; *Coleman v. Coleman*, 3 Dana (Ky.) 398; *Chambers v. Warren*, 6 B. Mon. (Ky.) 246; *Nagel v. Schilling*, 14 Mo. App. 576; *Prewett v. Land*, 36 Miss. 495; *Price v. Crone*, 44 Miss. 571; *Ingersoll v. Ingersoll*, 42 Miss. 155; *McAllister v. Moye*, 30 Miss. 258; *Erwin v. Carson*, 54 Miss. 282; *Ingersoll v. Mangam*, 84 N. Y. 622 (see *Gotendorf v. Goldschmidt*, 83 N. Y. 110); *Moore v. Stark*, 1 Ohio St. 369; *Moore v. Gidney*, 75 N. Car. 34; *Linnville v. Darby*, 1 Baxt. (Tenn.) 307; *McCloskey v. Sweeney*, 66 Cal. 53; *Helms v. Chadbourne*, 45 Wis. 60; *Jarman v. Lucas*, 15 C. B. (N. S.) 474.

Where infants are not in court owing to the fact that notice by publication was irregularly given, the appointment of a guardian *ad litem* is void. *McDermaid v. Russell*, 41 Ill. 489.

Where the record shows that upon motion a guardian *ad litem* was appointed, and no further record appears, it will be presumed that the minors were regularly summoned into court. *Horner v. Doe*, 1 Ind. 130; *Brackenridge v. Dawson*, 7 Ind. 383; *Fowler v. Young*, 19 Kan. 150; *Word v. Martin*, 66 Barb. (N. Y.) 241. See, however, *Martin v. Starrs*, 7 Ind. 224.

5. *Pugh v. Pugh*, 9 Ind. 132; *Robbins v. Robbins*, 2 Ind. 74; *Martin v. Starr*, 7 Ind. 224; *Peoples v. Stanley*,

An appointment made without proof of infancy is also an error which avoids a decree made thereunder.¹

No person should be appointed who has any interests adverse to the minor.²

Although at law a guardian *ad litem* is appointed only for an infant defendant,³ by statute in some States a guardian *ad litem* for an infant plaintiff is now provided.⁴

2. Rights and Duties.—The guardian *ad litem* is not a party to the action⁵ and his authority terminates with the suit.⁶

It is his duty only to file an answer for his ward in the suit,⁷

6 Ind. 410; *Whitesides v. Barber*, 24 S. Car. 373; *contra*, *Thompson v. Doe*, 8 Blackf. (Ind.) 336; *Doe v. Harvey*, 5 Blackf. (Ind.) 487; *Hough v. Canby*, 8 Blackf. (Ind.) 301.

A judgment against an infant is irregular only and not void where he has accepted service instead of being regularly served, a guardian *ad litem* having been appointed, and such irregularity is cured by statute. *Cates v. Pickett*, 97 N. Car. 21.

1. *Rhett v. Martin*, 43 Ala. 86; *Erwin v. Ferguson*, 5 Ala. 158; *Carter v. Ingraham*, 43 Ala. 78; *Sullivan v. Sullivan*, 42 Ill. 315.

2. *George v. High*, 85 N. Car. 113; *Damouth v. Klock*, 29 Mich. 289; *Parker v. Lincoln*, 12 Mass. 16; *Matter of Frits*, 2 Paige (N. Y.) 374; *Grant v. Van Schoonhoven*, 9 Paige (N. Y.) 255; *Hecker v. Sexton*, 43 Hun. (N. Y.) 593.

The plaintiff's husband should not be appointed guardian *ad litem* for the defendant. *Bicknell v. Bicknell*, 111 Mass. 265.

The executor and residuary legatee named in a will is not a proper person to protect the rights of an insane heir at law of the testator, to whom no part of the estate has been devised or bequeathed, although the executor is the general guardian of such heir. And the court may proceed, as though such insane heir had no general guardian, to appoint a guardian *ad litem* to prosecute an appeal from an order admitting the will to probate. *Marx v. Rowland*, 59 Wis. 110.

A master who is to take an account in which an infant is interested should not be appointed guardian *ad litem*. *Walker v. Hallett*, 1 Ala. 379.

The appointment of the plaintiff's attorney as guardian *ad litem* is wholly unauthorized. *Sargeant v. Rowsey*, 89 Mo. 617.

The guardian *ad litem* should not be

one appointed by the adverse party. *Rhoads v. Rhoads*, 43 Ill. 239; *Ralston v. Lahee*, 8 Iowa 17; *Knickerbacker v. De Freest*, 2 Paige (N. Y.) 304.

3. *Clark v. Platt*, 30 Conn. 285.

4. *Crawford v. Neal*, 56 Cal. 321; *Sparmann v. Keim*, 6 Abb. N. C. (N. Y.) 353; *Hill v. Thaxter*, 3 How. Pr. (N. Y.) 407; *Rutter v. Puckhofer*, 9 Bosw. (N. Y.) 638; *Grantman v. Theall*, 19 Abb. Pr. (N. Y.) 308; *Hof-talling v. Teal*, 11 How. Pr. (N. Y.) 188; *Freyberg v. Pelerin*, 24 How. Pr. (N. Y.) 202; *Bond v. Dillard*, 50 Tex. 302; *Brooke v. Clark*, 57 Tex. 105.

An action to recover money or personal property belonging to an infant may be brought in the name of the infant by his guardian *ad litem*, although he has a general guardian. *Segelkin v. Meyer*, 94 N. Y. 474.

A general guardian may be appointed guardian *ad litem*, and bring an action in the names of his wards to foreclose a mortgage which he holds in his own name as such general guardian. *Straka v. Lander*, 60 Wis. 115.

5. *Bryant v. Livermore*, 20 Minn. 271.

An appeal by a guardian *ad litem* cannot, therefore, be taken in his own name. *Harlan v. Watson*, 63 Ind. 143.

He is not liable for costs in a suit against the ward. *Sanford v. Phillips*, 68 Me. 431; *Leavitt v. Bangor*, 41 Me. 458.

6. *Davis v. Gist*, Dud. Eq. (S. Car.) 1.

7. *Abdil v. Abdil*, 26 Ind. 287; *Hough v. Canby*, 8 Blackf. (Ind.) 301; *Farmers' Loan & Tr. Co. v. Reid*, 3 Edw. (N. Y.) 414.

The court may compel him to answer or appoint a successor. *Henly v. Gore*, 4 Dana 136.

And a judgment against a minor whose guardian *ad litem*, failed to answer is erroneous. *Richards v. Richards*, 17 Ind. 636; *Ullery v. Blackwell*, 3 Dana (Ky.) 300.

and to defend his interests therein;¹ but he cannot bind his ward by any collateral agreements or undertakings relative to the suit.² Nor is the ward bound by his admissions in his answer.³ A decree made solely upon the answer of a guardian *ad litem* is erroneous; full proof of the facts alleged must be made by the plaintiff regardless of the answer filed.⁴

It is not sufficient for the answer of a guardian *ad litem*, to deny generally, such of the allegations of the complaint as may be important to controvert, and submit the minor's interest to the protection of the court. The answer should be a full defence, specifically denying the material allegations, without regard to the truth of the denials as to anything which may be prejudicial to the minor. *Varnier v. Rice*, 44 Ark. 236; *Pillow v. Sentelle*, 39 Ark. 61; *Brenner v. Bigelow*, 8 Kan. 496.

1. If by his negligence the interests of the ward are likely to suffer, it is the duty of the court to remove him. *Litchfield v. Bunwell*, 5 How. Pr. (N. Y.) 341.

It is the duty of the court to see that the guardian *ad litem* makes a proper defence and it is error to allow him to withdraw a plea or to allow judgment by default against the infant. *Peak v. Price*, 21 Ill. 164; *Lloyd v. Kirkwood*, 112 Ill. 329; *Carneal v. Streshley*, 1 Marsh. (Ky.) 471.

If a person is guardian *ad litem* for infants in partition proceedings and purchases their interest at a partition sale, the ward may set aside the sale within a reasonable time and may follow the property into the hands of a purchaser with notice. *Gallatin v. Cunningham*, 8 Cow. (N. Y.) 361.

2. A guardian *ad litem* has no power to make an absolute settlement of the whole matter in controversy. *Edsall v. Vandemark*, 39 Barb. (N. Y.) 589.

He cannot submit his ward's rights to arbitration, he is appointed only to defend. *Fort v. Battle*, 13 S. & M. (Miss.) 133.

He has no authority, if guardian in several suits, to agree that the decision in one shall determine that in another, although the cases are identical. *McClure v. Farthing*, 51 Mo. 109.

He cannot execute a release discharging the interest of a witness. *Walker v. Ferrin*, 4 Vt. 523.

But a guardian *ad litem* of an infant in a partition suit, has authority to bind his ward by a stipulation in the nature of a waiver of proof. *LeBourgeoise v. McNamara*, 82 Mo. 189.

A guardian *ad litem* was appointed

to bring an action on behalf of certain infants and an insane person. The guardian employed an attorney to prosecute the action, and made a contract with him as to the compensation he should receive: *Held*, that the guardian *ad litem* had no power to make the contract. *Cole v. Hunt*, 63 Cal. 86.

Application should first be made to the court for leave to employ counsel and to fix the compensation. *Smith v. Smith*, 69 Ill. 308; *Colgate v. Colgate*, 8 C. E. Green (N. J.) 372.

3. *Mattson v. Dowling*, 54 Ala. 202; *Evans v. Davies*, 39 Ark. 235; *Tibbs v. Allen*, 27 Ill. 119; *Chaffin v. Heirs of Kimball*, 23 Ill. 36; *Turner v. Jenkins*, 79 Ill. 228; *Fischer v. Fischer*, 54 Ill. 231; *Ralston v. Lahee*, 8 Iowa 17; *Collins v. Trotter*, 81 Mo. 275; *Thayer v. Lane*, Walk. Ch. (Mich.) 200; *Cooper v. Mayhew*, 40 Mich. 528; *Ingersoll v. Ingersoll*, 42 Miss. 155; *Johnson v. McCabe*, 42 Miss. 255; *Wells v. Smith*, 44 Miss. 296; *Bank of U. S. v. Ritchie*, 8 Pet. (U. S.) 128; *Gibbons v. McDermott*, 19 Fla. 852; *Cavender v. Smith*, 8 Iowa 360; *Massie v. Donaldson*, 8 Ohio 377; *Bank of Alexandria v. Patton*, 1 Rob. (Va.) 499, 535; *Wrottesley v. Bendish*, 3 P. Wms. 237; see *Randall v. Turner*, 17 Ohio St. 262.

Similarly, the ward is not bound by any waiver of his rights by the guardian *ad litem*. *Cartwright v. Wise*, 14 Ill. 417; *Litchfield v. Burwell*, 5 How. Pr. (N. Y.) 341.

But judgment against an infant by consent of the guardian *ad litem* is not wholly void. *San Fernando H. Asso. v. Porter*, 58 Cal. 81. If it be for his advantage it will stand subject to his right to reverse it on becoming of age. *Pulliam v. Pulliam*, 4 Dana (Ky.) 125; *Walsh v. Walsh*, 116 Mass. 377.

4. *McClay v. Norris*, 4 Gilm. (Ill.) 370; *Reavis v. Fielden*, 18 Ill. 77; *Rhoads v. Rhoads*, 43 Ill. 239; *Enos v. Capps*, 12 Ill. 255; *Gooch v. Green*, 102 Ill. 507; *Hough v. Doyle*, 8 Blackf. (Ind.) 300; *Driver v. Driver*, 6 Ind. 286; *Crain v. Parker*, 1 Ind. 374; *Tucker v. Bean*, 65 Me. 352.

A decree against an infant defendant would be reversed on error or appeal,

The court will allow the guardian *ad litem* compensation for his services.¹

3. Failure to Appoint, Effect of Judgment in Such Case.—A judgment obtained against an infant without the appointment of a guardian *ad litem*, where such appointment is necessary, is not void but voidable only.² It is erroneous, however, and will be revoked upon writ of error or other direct proceeding³ by parties in interest.⁴

The same rule applies where the appointment by the court is irregular or void;⁵ but no decree can be collaterally attacked for such errors.⁶

if the record affirmatively showed that it was rendered without any other evidence than the admissions of the guardian *ad litem*, whether contained in his answer, or made for the purposes of a hearing. *Ashford v. Patton*, 70 Ala. 479.

1. *McCue v. O'Hara*, 5 Redf. (N. Y.) 336. And he is entitled to a lien for the same upon the property protected. *Kerbaugh v. Vance*, 5 Lea (Tenn.) 113.

Compensation should be paid out of the rents rather than from the corpus of the ward's estate sold to satisfy the lien of the guardian *ad litem*. *Persons v. Young*, 7 Lea (Tenn.) 293.

2. *Frierson v. Travis*, 39 Ala. 150; *Trapnell v. State Bank*, 18 Ark. 53; *Peak v. Shasted*, 21 Ill. 137; *Millard v. Marmon*, 116 Ill. 649; *Blake v. Douglass*, 27 Ind. 416; *Drake v. Hanshaw*, 47 Iowa 291; *Myers v. Davis*, 47 Iowa 325; *Bickel v. Erskine*, 43 Iowa 213; *Hoover v. Kinsey Plough Co.*, 55 Iowa 668; *Walkenhorst v. Lewis*, 24 Kan. 420; *Porter v. Robinson*, 3 Marsh. (Ky.) 254; *Simmons v. McKay*, 5 Bush (Ky.) 25, 35; *Creech v. Creech*, 10 Mo. App. 586; *Bailey v. Fitzgerald*, 56 Miss. 578; *Knapp v. Crosby*, 1 Mass. 479; *Valier v. Hart*, 11 Mass. 300; *Goodridge v. Ross*, 6 Met. (Mass.) 487; *Crockett v. Drew*, 5 Gray (Mass.) 399; *Swan v. Horton*, 14 Gray 179; *Austin v. Charlestown Seminary*, 8 Met. (Mass.) 196; *McMurray v. McMurray*, 66 N. Y. 175; *Barber v. Graves*, 18 Vt. 290; *Parker v. Starr*, 21 Neb. 680.

A decree to sell land of an infant without a guardian *ad litem* having been appointed for him is void. *Macalister v. Moye*, 30 Miss. 258; see, however, *Burrus v. Burrus*, 56 Miss. 92; *Johnson v. Cooper*, 56 Miss. 608.

3. *Nicholson v. Welborn*, 13 Ga. 467; *Groce v. Field*, 13 Ga. 24; *Kesler v. Penninger*, 59 Ill. 134; *Hall v. Davis*, 44 Ill. 494; *Quigley v. Roberts*, 44 Ill.

503; *Lemon v. Sweeney*, 6 Bradw. (Ill.) 507; *Rowland v. Cock*, 1 J. J. Marsh. (Ky.) 453; *Chalfant v. Monroe*, 3 Dana (Ky.) 36; *Bustard v. Gates*, 4 Dana (Ky.) 429, 437; *Dodge v. Foulkes*, 11 B. Mon. (Ky.) 178; *Finley v. Robinson*, 17 S. Car. 439; *Taylor v. Rowland*, 26 Tex. 293; *Taylor v. Whitfield*, 33 Tex. 181; *McDonald v. McDonald*, 3 W. Va. 676; *Piercy v. Piercy*, 5 W. Va. 199; *Myers v. Myers*, 6 W. Va. 369; *Roberts v. Stanton*, 2 Munf. (Va.) 129; see, *Brooke v. Clark*, 57 Tex. 105.

A judgment will not be reversed because an attorney appeared for the infant where the decision was in favor of the latter. *Holton v. Towner*, 81 Mo. 360.

The record must affirmatively show the appointment of a guardian *ad litem* or the decree cannot be sustained. *Darrington v. Borland*, 3 Port. (Ala.) 10; and W. Va. cases, cited in the first paragraph of this note. *Contra*, where the record is silent, the court will presume that the appointment was regular. *Emeric v. Alvarado*, 64 Cal. 529, *Tibbs v. Allen*, 27 Ill. 119.

The subsequent appointment of a guardian *ad litem* by the chancellor will not cure want of capacity in minors to submit to arbitration unless such submission be made under order of the court. *Jones v. Payne*, 41 Ga. 23.

4. Where there are two defendants one of whom is an adult, it is not a ground of error, available to secure a reversal of the decree against him, that his infant co-defendant had no guardian *ad litem*. *Harris v. Rosenberg*, 43 Conn. 231; *McCarthy v. McCarthy*, 66 Ind. 128.

5. *Bondurant v. Sibley*, 37 Ala. 565; *Emeric v. Alvarado*, 64 Cal. 529; *Searcy v. Morgan*, 4 Bibb (Ky.) 96; *Benningsfield v. Reed*, 8 B. Mon. (Ky.) 105.

6. *Millard v. Marmon*, 116 Ill. 649; *Magruder v. Campbell*, 40 Ala. 611; *Ward v. Lowndes*, 96 N. Car. 367.

Statutes sometime limit the time within which the ward after becoming of age may attack the decree;¹ in other cases the court fixes the day for the ward to show cause against it after becoming of age.²

A judgment rendered against a ward who appears by a guardian *ad litem* duly appointed is as binding upon him as one rendered against a person *sui juris*.³

GUEST.—(See INNS AND INN-KEEPERS.)

A visitor or friend received and entertained for a short time; a lodger at a hotel, lodging or boarding-house.⁴ (See BOARDER, LODGER, TRAVELLER.)

Who is a Guest.—A guest is a traveller or wayfarer who comes to an inn and is accepted.⁵ A neighbor or friend who comes to an inn on the invitation of the inn-keeper is not deemed a guest.⁶ Nor is a person a guest in the sense of the law who comes upon a special contract to board and sojourn at an inn; he is deemed a boarder.⁷ One may become a guest by going to an inn for temporary refreshment, either food or drink.⁸ Neither the length of time that a man remains at an inn, nor any agreement he may make, as to the price of board per day, or per week, deprives him of his character as a traveller and a guest, provided that he retains his *status* as a traveller in other respects.

The test questions are: Was he a traveller and a wayfarer, and was he received and entertained as such by the inn-keeper in his inn? If he was he at once becomes the inn-keeper's guest, and the relation exists so long as he sojourns there as a traveller.⁹

"The first day a man comes into a place he is a stranger; the second day he is considered as a *guest*, and the third day he becomes an inhabitant."¹⁰

1. Kennedy v. Kennedy, 2 Ala. 574; Hull v. Hull, 26 W. Va. 1.

2. Gooch v. Green, 102 Ill. 507; Shields v. Bryan, 3 Bibb (Ky.) 525; Ewing v. Armstrong, 4 J. J. Marsh. (Ky.) 69.

The ward cannot dispute a decree except upon the same grounds that an adult would be able to. Ralston v. Lahee, 8 Iowa 17.

Seven years after rendition of a judgment against an infant, it will not be set aside because a guardian *ad litem* was not served and did not appear, it appearing that there was no defence and adult co-defendants making none. Williamson v. Hartman, 92 N. Car. 236.

3. Waring v. Lewis, 53 Ala. 615; Phillips v. Dusenbury, 8 Hun. (N. Y.) 348; McCrosky v. Parks, 13 S. Car. 93; Smith v. Taylor, 34 Tex. 589.

A guardian who has obtained a judgment in his name as such, on the relation of the State, for breach of the conditions of his predecessor's bond, holds such judgment as trustee of an express

trust, and a decree of foreclosure of an older mortgage on lands, upon which the judgment is also a lien, concludes the ward, if the guardian was a party thereto. Loehr v. Colborn, 92 Ind. 24.

4. Webster s Dict.

5. Story on Bailments, § 477.

6. Bac. Abr., Inn and Inn-keeper, 5 Com. Dig. B. 2.

7. Per Green, J., Manning v. Wells, 9 Humph. (Tenn.) 748; McIntosh v. Likens, 25 Iowa 555.

8. Bennet v. Mellor, 5 T. R. 273; McDonald v. Edgerton, 5 Barb. (N. Y.) 560.

9. Norcross v. Norcross, 53 Me. 169; Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 417; Pinkerton v. Woodward, 33 Cal. 557; Jalle v. Cardinal, 35 Wis. 118; Hancock v. Rand, 17 Hun. (N. Y.) 279; s. c., 94 N. Y. 1 (and see comments on this case, 20 Albany Law) 64.

10. Republica v. Steele, 2 Dall. (U. S.) 93; Smith v. Keys, 2 N. Y. Sup. Ct. 650.

What Constitutes a Guest.—In order to constitute one a *guest* it is not necessary that he should be actually *infra hospitium*.¹ It is enough that his property be there in charge of his wife, servant or agent, who is there in his employ or as a member of his family, but the property must be there under such circumstances that the law will presume the possession to be in him and not in the bailee in charge of it.² If a traveller having stopped at an inn leave his horse there and go out to dine or lodge he does not thereby cease to be a guest.³

Transient Accommodation.—A person receiving transient accommodation at an inn, for which he is charged by the inn-keeper, is a guest, and entitled to all the rights of a guest, although he be not actually a traveller.⁴

One who attends a ball given in a hotel and while there purchases liquors and cigars at a saloon kept in connection with the hotel, cannot be said to be a guest of the proprietor.⁵

Distinction Between Guest and Boarder.—(See BOARDER.)⁶

One who leaves his horse, though he lodge elsewhere, becomes a guest;⁷ but one who leaves his horse at an inn without receiving or asking accommodation or entertainment for himself, but *to the knowledge* of the inn-keeper is provided for and lodged at the house of another, does not become the guest of the inn-keeper.⁸ But the mere leaving of baggage at an inn would not constitute a person a guest.⁹ Nor if *upon arriving* a special contract is made as to board or use of room he does not become a guest.¹⁰

Presumption as to Continuance of Relation of Guest.—Where the evidence shows the plaintiff came to defendant's inn as a traveller, and was received as such, his *status* as a traveller and guest must be presumed to have continued unless something appears affirmatively to the contrary.¹¹

1. Grinnell v. Cook, 3 Hill (N. Y.) 485.

2. Coykendall v. Eaton, 55 Barb. (N. Y.) 188.

3. Grinnell v. Cook, 3 Hill (N. Y.) 485.

4. Walling v. Potter, 35 Conn. 183; Hall v. Pike, 100 Mass. 495; Houser v. Tully, 62 Pa. St. Rep. 92; Rend v. Amidon, 41 Vt. 15.

5. Carter v. Hobbs, 12 Mich. 52.

6. See, also, Chamberlain v. Master-son, 26 Ala. 377; Willard v. Rheinhardt, 2 E. D. Smith (N. Y.) 149.

7. York v. Grindstone, Salk. 388; Mas-son v. Thompson, 9 Pick. (Mass.) 280; Peel v. McGraw, 25 Wend. (N. Y.) 653; McDaniels v. Robinson, 26 Vt. 316; York v. Grenaugh, 2 Ld. Ray-mond 866; Washburn v. Jones, 14 Johns. (N. Y.) 193.

8. Ingalsbee v. Wood, 36 Barb. (N. Y.) 452; Healey v. Swag, 68 Me. 489; Binns v. Pigot, 9 Car. & P. 208; Grinnell v. Cook, 3 Hill (N. Y.) 485; Ingalsbee v. Wood, 33 N. Y. 577.

9. Orange Co. Bank v. Brown, 9 Wend. (N. Y.) 114, 115; Greeley v. Clerk, Cro. Jac. 188.

10. Ewing v. Stark, 8 Rich. (S. Car.) 423; Chamberlain v. Masterson, 26 Ala. 371; Hursh v. Byers, 29 Mo. 469; Parker v. Flint, 12 Mod. 255; Jeffords v. Crump, 12 Phila. 500; Vance v. Throckmorton, 5 Bush (Ky.) 41; Kisler v. Hildebrand, 9 B. Mon. (Ky.) 75; Wharton's Law of Inn-keepers; Story on Bail, § 477.

11. Lusk v. Belok, 22 Minn. 468; Allen v. Smith, 12 C. B. N. S. 638.

As to rights and liabilities of guests see INNS AND INN-KEEPERS.

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I. DEFINITION AND NATURE OF WRIT.—The writ of habeas corpus is one directed to a person detaining another and commanding him to produce the body of the person detained, at a certain time and place, with the time and cause of the caption and detention, and to do, submit to, and receive whatsoever the court or judge awarding the writ shall determine in that behalf.¹ It is a high prerogative writ,² summary in its character.³ Its object is to free from illegal restraint; not to punish the respondent, or afford the party redress for his illegal detention.⁴ The allowance of the writ is not a mere ministerial act but a judicial one.⁵ And the writ may issue in civil as well as in criminal cases.⁶ In civil

1. *Ex parte Watkins*, 3 Pet. (U. S.) 193, 201.
 2. *Ex parte Watkins*, 3 Pet. (U. S.) 193, 201.
 3. Church on Habeas Corpus, § 177; Wilmott's Opinions, 106.
 4. *Ex parte Coupland*, 26 Tex. 386; *Com. v. Chandler*, 11 Mass. 83; *Wales v. Whitney*, 114 U. S. 571.
 5. Church on Habeas Corpus, §§ 92, 93, 94; *Williamson's Case*, 26 Pa. St. 9; *ex c.*, 67 Am. Dec. 374.
 6. *Ex parte Randolph*, 2 Brock. Mar. (U. S.) 477; *Hecker v. Jarrett*, 3 Binn.

cases it issues as matter of course; but in criminal cases it must be on motion.¹ A proceeding by habeas corpus is a civil proceeding to enforce a civil right;² and is the *cause* or *suit* of the party making the application.³ The writ of habeas corpus is a remedy for every illegal imprisonment.⁴ It is prosecuted by ordinary proceedings, and the determination of the court upon the facts has the effect of a verdict of a jury.⁵ The writ of habeas was not framed to retry issues of fact, or to review the proceedings of a legal trial.⁶ It cannot be used as a substitute for an appeal or writ of error.⁷ Errors and irregularities of law, not going to the question of jurisdiction, are not reviewable on habeas corpus.⁸ This writ cannot be used to try rights of property,⁹ or to try

(Pa.) 404; *People v. Willett*, 15 How. Pr. (N. Y.) 213; *Ex parte McCullough*, 35 Cal. 97. Compare *Cable v. Cooper*, 15 Johns. (N. Y.) 152; *Ex parte Wilson*, 6 Cranch (U. S.) 52.

1. See *Reardon's Case*, 2 Cranch C. C. 639, and cases last cited.

2. *Ex parte Tom Tong*, 108 U. S. 556. But in Indiana and Kansas an application for a writ of habeas corpus is held not to be a civil action. *Milligan v. State*, 97 Ind. 355; *Gleason v. Comm'rs of McPherson Co.*, 30 Kan. 53; but is to be considered as a criminal case.

3. *Ex parte Milligan*, 4 Wall. (U. S.) 2.

4. *Com. v. Lecky*, 1 Watts (Pa.) 66; s. c., 26 Am. Dec. 37.

5. *Bonnett v. Bonnett*, 61 Iowa 199.

6. *Ex parte Lemkuhi*, (Cal.) 13 Pac. Rep. 148; *Matter of Wright*, 29 Hun. (N. Y.) 357; s. c., 65 How. Pr. (N. Y.) 119; *People v. New York Catholic Protectory*, 101 N. Y. 195. Thus, the question of the reasonableness or unreasonableness of a city ordinance prohibiting bicycles from being used in public parks, cannot, after conviction, be retried on habeas corpus. See *Matter of Wright*, 29 Hun. (N. Y.) 357; s. c., 65 How. Pr. (N. Y.) 119.

7. *Ex parte Lemkuhi*, (Cal.) 13 Pac. Rep. 148; *Wales v. Whitney*, 114 U. S. 571; *Ex parte Shaw*, 7 Ohio St. 81; s. c., 70 Am. Dec. 55; *Williamson's Case*, 26 Pa. St. 9; s. c., 67 Am. Dec. 374; *Smith v. Hess*, 91 Ind. 424; *Ex parte Milburn*, 59 Wis. 24; *Ex parte Williams*, 1 Wash. 240; *Ex parte Yarbrough*, 110 U. S. 651; s. c., 5 Crim. L. Mag. 549; *Matter of Moses*, 13 Abb. N. C. (N. Y.) 189; s. c., 66 How. Pr. (N. Y.) 296; *Ex parte Brandon*, (Ark.) 4 S. W. Rep. 452; *Hamilton's Case*, 51 Mich. 174; *Sennott v. Swan*, (Mass.) 16 N. E. Rep. 448; note to *Com. v.*

Lecky, 1 Watts (Pa.) 66; s. c., 26 Am. Dec. 41.

8. *Ex parte Mirande*, (Cal.) 14 Pac. Rep. 888; *In re Kowalsky*, (Cal.) 14 Pac. Rep. 399; *Ex parte Cameron*, 81 Ala. 87; s. c., 1 So Rep. 20; *Ex parte Crouch*, 112 U. S. 178; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Watkins*, 3 Pet. U. S. 193; *Ex parte Carll*, 106 U. S. 521; *Ex parte Shaw*, 7 Ohio St. 81; s. c., 70 Am. Dec. 55; *State v. Orton*, 67 Iowa 554; note to *Com. v. Lecky*, 1 Watts (Pa.) 66; s. c., 26 Am. Dec. 49; note to *Ex parte Grace*, 12 Iowa 208; s. c., 79 Am. Dec. 536; *Ex parte Yarbrough*, 110 U. S. 651; s. c., 5 Crim. L. Mag. 549; *In re Rolfs*, 30 Kan. 758; s. c., 4 Am. Crim. Rep. 446; *Ex parte Harding*, 120 U. S. 782; *Sennott v. Swan*, (Mass.) 16 N. E. Rep. 448; *Ex parte Brandon*, (Ark.) 4 S. W. Rep. 452; *Zelle v. McHenry*, 51 Iowa 572; *In re Balcom*, 12 Neb. 316; *State v. Orton*, 67 Iowa 554.

Thus, a writ of habeas corpus from the supreme court of the United States cannot be used to correct or prevent possible future errors, in violation of the constitution of the United States, by a state court in a cause pending in that court in which the parties and the subject-matter are within its jurisdiction. *Ex parte Crouch*, 112 U. S. 178. And errors of law committed by a United States circuit court which passed sentence upon a prisoner, cannot be inquired into on habeas corpus proceedings to test the jurisdiction of the court which passed sentence. *Ex parte Yarbrough*, 110 U. S. 651.

9. *Shue v. Turk*, 15 Gratt. (Va.) 256; *DeLacy v. Antoine*, 7 Leigh (Va.) 438; *Ruddle's Exrs. v. Ben*, 10 Leigh (Va.) 468; *Clark v. Gantley*, 8 Fla. 360; *State v. Frazer, Dudley* (Ga.) 42; *Foster v. Alston*, 6 How. (Miss.) 406.

rights of guardianship.¹ Neither can it be used as a writ of *quo warranto*.²

II JURISDICTION OF STATE COURTS.—The state constitutions recognize the writ of habeas corpus as an existing remedy for unlawful imprisonment, but they do not point out the cases in which it may be employed. For such information we must look, therefore, to the common law, the statute and the decisions of the courts.³

1. *In re Taylor*, L. R. 4 Ch. Div. 157; *Rex v. Delaval*, 3 Burr. 1436; *Rex v. Johnson*, 1 Stra. 579; s. c., 2 Ld. Raym. 1333; *Rex v. Smith*, 2 Stra. 982; s. c., *Ridgw. Rep.* 200; *State v. Banks*, 25 Ind. 495; *Mathews v. Wade*, 2 W. Va. 464; *People v. Wilcox*, 22 Barb. (N. Y.) 186; *Fitts v. Fitts*, 21 Tex. 511; *Com. v. Hamilton*, 6 Mass. 273; *Ferguson v. Ferguson*, 36 Mo. 197; *People v. Mercier*, 8 Paige (N. Y.) 47.

2. *State v. Bloom*, 17 Wis. 521; *Ex parte Strahl*, 16 Iowa 369; *Clark v. Com.*, 29 Pa. St. 129; *Russell v. Whiting*, 1 Winst. (N. Car.) L. 465; *In Matter of Wakker*, 3 Barb. (N. Y.) 162.

3. **Issuance of Writ.**—(a) *Issues, When*—The state courts will issue the writ of habeas corpus in favor of a party who is unlawfully detained or confined; as, under an unlawful judgment. *Bell v. State*, 4 Gill (Md.) 301; s. c., 45 Am. Dec. 130; or invalid bond; *McLendon v. Smith*, 68 Ga. 36; or where any other proceedings, whether civil or criminal, under which he is detained, are void, as where the court has no jurisdiction, or where the statute on which the proceedings are based, is unconstitutional. *Ex parte Rollins*, (Va.) 20 Rep. 765; s. c., 9 Va. L. Jour. 683; *In Re Curd*, 11 Week. L. Bul. 186; cited in 5 Crim. L. Mag. 621; or, where, being a convict, the prisoner is held under a void contract of labor, made by his custodian, the contractor, with the lessees of the penitentiary. *State v. Neel*, (Ark.) 3 S. W. Rep. 631. The writ lies upon a *prima facie* case showing that petitioner is entitled to discharge or bail. *Williamson's Case*, 26 Pa. St. 9; s. c., 67 Am. Dec. 374; or to admit to bail in civil actions; *Re Cazin*, 56 Vt. 297; or where a person, entitled to the custody of another, is unlawfully deprived of the same. *In Re Curd*, 11 Week. L. Bul. 186; by illegal commitment to a public institution. *Goodchild v. Foster*, 51 Mich. 601; or otherwise, See *post* chapters on CUSTODY OF CHILDREN. Some cases even hold

that the writ will issue in a state court to determine the rightful custody of a child which is at the time in another State and in another jurisdiction. *Rivers v. Mitchell*, 57 Iowa 193; *Townsend v. Kendall*, 4 Minn. 412. A court of chancery has power to grant the writ of habeas corpus by the common law, independently of the statute. *Mercein v. People*, 25 Wend. (N. Y.) 64; s. c., 35 Am. Dec. 653. A court commissioner in Wisconsin has jurisdiction to issue a writ of habeas corpus and to hear it. His judgment is final and conclusive and cannot be reviewed, reversed or annulled by an appellate court except by *certiorari*. *In Re Crow*, 60 Wis. 349.

(b) *Will be refused, When*.—A state court has no jurisdiction to issue a habeas corpus unless the detention or confinement of the prisoner is shown, *prima facie* at least, to be unlawful. *Ex parte Maule*, 19 Neb. 273; *Com. v. Lecky*, 1 Watts (Pa.) 66; s. c., 26 Am. Dec. 37; note 40-49; *Williamson's Case*, 26 Pa. St. 9; s. c., 67 Am. Dec. 374, note 395-398, showing when a court may refuse to issue the writ. *State v. Miller*, 97 N. Car. 450. Thus it will not issue to liberate an applicant restrained of his liberty by a sheriff under a valid commitment; after trial and judgment of conviction for a felony, where the court had jurisdiction. *Ex parte Fuller*, 19 Tex. App. 242; nor to liberate one who had given bail before a committing magistrate, after an indictment for manslaughter, where he has been committed in default of giving a new bond. *State v. Brusle*, 34 La. Ann. 61. A warden of the penitentiary has no authority to surrender a prisoner upon habeas corpus to comply with a void order of court. *Ex parte Holmes*, 21 Neb. 324. Only when there is no jurisdiction to restrain the defendant, or when one is entitled to the custody of another, can the writ be invoked; *State v. Sloan*, 65 (Wis.) 647; *In Re Curd*, 11 Week. L. Bul. 186; cited in 5 Crim. L. Mag. 621.

III. JURISDICTION OF FEDERAL COURTS.—1. United States Supreme Court.—Except in cases affecting ambassadors, other public ministers, or consuls, or those in which a State is a party, the supreme court can only issue a writ of habeas corpus under its appellate jurisdiction.¹ The supreme court, having no jurisdiction of criminal cases by writ of error or appeal, cannot, on habeas corpus, discharge a person imprisoned under the sentence of a United States circuit or district court, in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no

Appeals.—In Dakota, an appeal lies to the supreme court from an adjudication by a lower court or judge upon a petition for a habeas corpus. *U. S. v. Burdick*, 1 Dak. 142. Compare *Ex parte Scott*, 1 Dak. 140; and in the District of Columbia, an appeal may be taken from an order made by one of the justices of the supreme court discharging the prisoner on this writ. In *Matter of Taylor*, 3 McArthur (D. C.) 426. In Minnesota, an order of discharge may be reviewed on appeal, but not by *certiorari*. *State v. Buckham*, 29 Minn. 462. In Utah, no appeal lies from an order of discharge, either by the people or defendant. *In re Clasby*, 3 Utah 183. So in California. *In re Perkins*, 2 Cal. 430. An order denying a discharge is not appealable in Maryland. *Bell v. State*, 4 Gill (Md.) 301; s. c., 45 Am. Dec. 130. An order dismissing the writ is not appealable in Tennessee. *Lea v. White*, 4 Sneed (Tenn.) 73; s. c., 67 Am. Dec. 599; or in Kansas; *In re Edwards*, 35 Kan. 99. In California no appeal lies from an order admitting a party to bail on habeas corpus. *People v. Schuster*, 40 Cal. 627. In Michigan, an order of discharge is final, and no appeal or writ of error lies. *People v. Fairman*, 59 Mich. 568; *Conant's Case*, (Mich.) 26 N. W. Rep. 768. In Nebraska, an appeal upon a denial of the writ will be heard immediately; the ordinary notice of argument cannot be required. *Smith v. State*, (Neb.) 23 Rep. 695. On appeal upon habeas corpus in Indiana, the court will determine whether the evidence is sufficient to sustain the finding and decision of the court below. *Jones v. Darnall*, 103 Ind. 583. In Iowa, a finding on habeas corpus awarding the custody of an infant will not be disturbed on appeal, unless clearly contrary to the evidence. *Jenkins v. Clark*, 71 Iowa 552. In Iowa, an order of discharge cannot be superseded pending an appeal. *State v. Kirkpatrick*, 54 Iowa 373. In New

York, no stay of proceedings will be granted pending an appeal from an order dismissing the writ. *People v. Hurlburt*, 67 How. Pr. (N. Y.) 362. If, pending an appeal on habeas corpus by defendants, where they have been held to answer, an indictment is found, the appeal should be dismissed. *Wittmore v. Burgan*, 70 Iowa 161. An appeal will not lie from a refusal by the court below to set aside an order in a habeas corpus case, on motion, where it was in the discretion of the court below to grant that relief, or to leave the appellant to set up the invalidity of the order whenever an attempt should be made to enforce it. *People v. Brown*, 103 N. Y. 684; following *Foot v. Lathrop*, 41 N. Y. 358. No exceptions will lie in Utah, Massachusetts, or Maine from a decision on habeas corpus. *In re Clasby*, 3 Utah 183; *Knowlton v. Baker*, 72 Me. 202; *Wyeth v. Richardson*, 10 Gray (Mass.) 240. In Wisconsin, a discharge by a court commissioner is final. There is no appeal, but the judgment may be reviewed by *certiorari*. *In re Crow*, 60 Wis. 349; *State v. Smith*, 65 Wis. 93. As to Texas practice on appeals, see *Ex parte Cole*, 14 Tex. App. 579; *Ex parte Trader*, (Tex.) 6 S. W. Rep. 533; *Ex parte Pate*, 21 Tex. App. 190. See *State v. Miller*, 97 N. Car. 450. Compare chapter on RES JUDICATA, *post*. Unless authorized by statute, an appeal or writ of error does not lie from a final order made in proceedings upon habeas corpus, as neither was allowed at common law. See numerous authorities cited in *People v. Fairman*, 59 Mich. 565.

1. *Ex parte Hung Hang*, 108 U. S. 552; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Parks*, 93 U. S. 18; *Ex parte Lange*, 18 Wall. (U. S.) 163; *Ex parte Yerger*, 8 Wall. (U. S.) 85; *Ex parte Watkins*, 7 Pet. (U. S.) 568; *Ex parte Bollman*, 4 Cranch (U. S.) 75; *Ex parte Barry*, 2 How. (U. S.) 65; *Ex*

authority to hold him under the sentence.¹ In such cases, however, of want of authority or jurisdiction, the supreme court will discharge the prisoner from confinement on an original application for the writ of habeas corpus.² A justice of the supreme court of the United States has a right to issue the writ returnable before himself,³ but it will not be issued on an original application by either the court or a justice thereof in cases where it may as well be done in the proper circuit court, if there are no special circumstances in the case making direct action or intervention necessary or expedient.⁴ The final judgment of a state court in a habeas corpus case may be reviewed on writ of error by the supreme court of the United States, where the questions mentioned in section 709 of the United States Revised Statutes are involved.⁵ A proceeding by habeas corpus has been determined to be a civil proceeding. This is important sometimes to determine the question of jurisdiction on appeal or writ of error.⁶

parte Wilson, 114 U. S. 417; s. c., 4 Am. Crim. Rep. 283.

1. *Ex parte* Wilson, 114 U. S. 417, 421; s. c., 4 Am. Crim. Rep. 283; *Ex parte* Bigelow, 113 U. S. 328; *Ex parte* Crouch, 112 U. S. 178; *Ex parte* Yarbrough, 110 U. S. 651; s. c., 5 Crim. L. Mag. 549; *Ex parte* Carll, 106 U. S. 521; *Ex parte* Curtis, 106 U. S. 371; *Ex parte* Siebold, 100 U. S. 371; *Ex parte* Parks, 93 U. S. 18; *Ex parte* Lange, 18 Wall. (U. S.) 163; *Ex parte* Watkins, 3 Pet. U. S. 193; s. c., 7 Pet. (U. S.) 568; *Ex parte* Yerger, 8 Wall. (U. S.) 85; *Ex parte* Mason, 105 U. S. 606; *Keyes v. U. S.*, 109 U. S. 183; *Ex parte* Bigelow, 113 U. S. 328.

2. *Ex parte* Yarbrough, 110 U. S. 651; s. c., 5 Crim. L. Mag. 549; *Ex parte* Wells, 18 How. (U. S.) 307; *Ex parte* Kearney, 7 Wheat. (U. S.) 38; *Ex parte* Lange, 18 Wall. (U. S.) 143, 166; *Ex parte* Parks, 93 U. S. 18; *Ex parte* Yerger, 8 Wall. (U. S.) 85; *Ex parte* Burford, 3 Cranch (U. S.) 448; *Ex parte* Bollman, 4 Cranch (U. S.) 75; *Ex parte* Watkins, 7 Pet. (U. S.) 568; *Ex parte* Milligan, 4 Wall. (U. S.) 2; *Ex parte* Virginia, 100 U. S. 339; *Ex parte* Siebold, 100 U. S. 371; *Ex parte* Wilson, 114 U. S. 417; s. c., 4 Am. Crim. Rep. 283.

3. *Ex parte* Clarke, 100 U. S. 399; *In re* Guiteau, 10 Fed. Rep. 161. He should refer a case of grave doubt and difficulty to the whole court, but should decide upon it himself when reasonably confident of his own conclusion. See case last cited.

4. *Ex parte* Mirzan, 119 U. S. 584; *Wales v. Whitney*, 114 U. S. 564; *Ex parte* Royall, 117 U. S. 241, 254.

5. *Yick Wo v. Hopkins*, 118 U. S. 356.

6. *Ex parte* Tom Tong, 108 U. S. 556; *Robb v. Connolly*, 111 U. S. 624.

Issuance and Refusal of Writ by Supreme Court.—A person sentenced to imprisonment for an infamous crime, without having been presented or indicted by a grand jury, as required by the fifth amendment of the constitution, is entitled to be discharged on habeas corpus. *Ex parte* Wilson, 114 U. S. 417; *Ex parte* Bain, 121 U. S. 1. So, where the indictment of the grand jury, after having been filed with the court, has been changed by the prosecuting officer, with consent of the court, by striking out surplus words. *Ex parte* Bain, 121 U. S. 1. And this after the prisoner has been tried and sentenced on the changed indictment. It is not the indictment of the grand jury which presented it, and there is no jurisdiction. *Id.* A certified copy of the record of a sentence to imprisonment is sufficient to authorize the detention of the prisoner, without any warrant or *mittimus*. *Ex parte* Wilson, 114 U. S. 417; s. c., 4 Am. Crim. Rep. 283. But the prisoner is not entitled to discharge on habeas corpus simply because the record fails to designate a suitable place of imprisonment. *Id.* So the supreme court of the United States has no jurisdiction, by this writ, to discharge a person imprisoned under the sentence of a territorial court, unless that court has transgressed its jurisdiction. *Ex parte* Harding, 120 U. S. 782. Thus, in such a case, it would not discharge the prisoner, because he was denied his right to have compulsory process for obtaining witnesses in

2. District, Circuit and Territorial Courts.—Original jurisdiction to issue the writ of habeas corpus was conferred upon the district and circuit courts of the United States, in cases necessary for the exercise of their respective jurisdictions, by the judiciary act of 1789.¹ And under section 752 of the United States Revised Statutes, they have power to grant writs of habeas corpus for the purpose of inquiring into the cause of restraint of liberty.² Most, if not all, of the territorial courts have passed habeas corpus acts, and provided therein for the security of personal liberty; and section 1909 of the Revised Statutes of the United States provides that writ of error or appeal shall be allowed to the supreme court

his favor. *Id.* It is simply error made by the court acting within its jurisdiction, and this cannot be inquired into by the supreme court on habeas corpus. *Ex parte Yarbrough*, 110 U. S. 651; s. c., 5 Crim. L. Mag. 549; *Ex parte Harding*, 120 U. S. 780.

Appellate Jurisdiction.—"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make." U. S. Const., art. 3, sec. 6, subd. 2. The judiciary act of 1789, 1 Stats. at Large, 81, provided that every court of the United States should have power to issue the writ. The jurisdiction thus given in law to the circuit and district courts is original; that given by the constitution and the law to the supreme court is appellate. *Ex parte Yerger*, 8 Wall. U. S. 85. And congress has never excepted writs of habeas corpus from this appellate jurisdiction. Therefore, outside of its original jurisdiction, the supreme court limits itself to cases pending in or decided by those courts over which it has appellate or revisory power; over tribunals inferior to itself; and the writ of habeas corpus is issued by it for the purpose of revising the decisions of such tribunals. The jurisdiction is simply appellate in its nature; see, *Ex parte Bollman*, 4 Cranch (U. S.) 75, 100, 101; *Ex parte Burford*, 3 Cranch (U. S.) 448; *Ex parte Watkins*, 7 Pet. (U. S.) 568; U. S. v. Hamilton, 3 Dall. (U. S.) 17; *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Ex parte Kearney*, 7 Wheat. (U. S.) 38; *Ex parte McCordle*, 6 Wall. (U. S.) 318; s. c., 7 Wall. (U. S.) 506; *Ex parte Yerger*, 8 Wall.

(U. S.) 85; *Ex parte Barry*, 2 How. (U. S.) 65; *Ex parte Dorr*, 3 How. (U. S.) 104; *Barry v. Mercein*, 5 How. (U. S.) 103; *Matter of Metzger*, 5 How. (U. S.) 184; *In re Kaine*, 14 How. (U. S.) 119; *Ex parte Watkins*, 3 Pet. (U. S.) 193; *Ex parte Wells*, 18 How. (U. S.) 307, 328; *Ableman v. Booth*, 21 How. (U. S.) 506; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Milligan*, 4 Wall. (U. S.) 2; *Ex parte Lange*, 18 Wall. (U. S.) 163. Two especially instructive cases concerning the appellate jurisdiction of the supreme court are *Ex parte Yerger*, 8 Wall. (U. S.) 85; *Ex parte Siebold*, 100 U. S. 371. The appellate jurisdiction of the United States supreme court in habeas corpus cases is exercised by means of the original writ of habeas corpus, with the aid of a writ of *certiorari*, to bring up the record of the proceedings to be reviewed, and exists independently of any provisions made by statute for a direct appeal. *Roberts v. Reilly*, 116 U. S. 93; *Ex parte Yerger*, 8 Wall. (U. S.) 85. The United States supreme court will not issue a habeas corpus to prevent or correct possible future errors, in violation of the constitution of the United States, in a cause pending in a state court having jurisdiction of the parties and subject-matter. *Ex parte Crouch*, 112 U. S. 178.

1. Stats. at Large 81, § 14; see *Ex parte Watkins*, 3 Pet. (U. S.) 193; *Ex parte Yerger*, 8 Wall. (U. S.) 85.

2. In *Matter of McDonald*, 9 Am. L. Reg. 661; *Reardon's Case*, 2 Cranch C. 639; *In re Bryant*, 1 Deady (U. S.) 118; *In Matter of Allen*, 13 Blatchf. (U. S.) 271; *Bennett v. Bennett*, 1 Deady (U. S.) 299; U. S. v. Crook, 5 Dill. (U. S.) 453; *In Matter of Quong Woo*, 9 Pac. C. L. J. 815; *In re Buell*, 3 Dill. (U. S.) 116, note; *Matter of Winder*, 2 Cliff. (U. S.) 89; *Nelson v. Cutter*, 3 McLean (U. S.) 326.

of the United States, from the decisions of such court or the judges thereof, in habeas corpus cases.¹ The jurisdiction of the circuit and district courts is limited to their respective geographical divisions.² A writ of habeas corpus is not removable from a state court into a circuit court of the United States under the act of March 3, 1875, ch. 137, sec. 2.³

1. U. S. v. R. R. Co., 105 U. S. 263; *Ex parte Kenyon*, 5 Dill. (U. S.) 385. The United States cannot reclaim Blackfeet Indian children by habeas corpus from a person who has taken them from the Indian agency, possibly with the parents' consent. U. S. v. Imoda, 4 Mont. 38. As to when writ may issue in territory, see U. S. v. Burdick, 1 Dak. 142.

2. U. S. Rev. Stats., § 752; *Ex parte Graham*, 4 Wash. (U. S.) 211; but compare *Ex parte Kenyon*, 5 Dill. (U. S.) 385; *Ex parte Hebard*, 4 Dill. (U. S.) 380; *Ex parte Sloan*, 4 Sawy. (U. S.) 330; Collier's Case, 6 Opin. Atty. Gen. 103.

3. Kurtz v. Moffitt, 115 U. S. 487.

Issuance of Habeas Corpus by District and Circuit Courts. (a) *Chinese*.—The right of Chinese laborers to land in this country under the terms of the Restriction Acts may be tested on habeas corpus, issued by either of these courts, though such cases are generally brought in the district courts. U. S. v. Jung Ah Lung, 124 U. S. 621; affirming *In re Jung Ah Lung*, (Cal.) 25 Fed. Rep. 141; *In re Shong Toon*, (Cal.) 21 Fed. Rep. 386; *In re Ah Kee* (case of unused tag), (Cal.) 21 Fed. Rep. 701; *In re Leong Yick Dew*, (Cal.) 19 Fed. Rep. 490; *In re Chin A On*, (Cal.) 18 Fed. Rep. 506; *In re Ah Moy* (case of Chinese wife), (Cal.) 21 Fed. Rep. 785; *In re Kew Ock* (case of limited tag), (Cal.) 21 Fed. Rep. 789; *Cheen Heong* (case of former residence by Chinese laborer), (Cal.) 21 Fed. Rep. 791; *In re Ah Moy* (case of Chinese wife), (Cal.) 21 Fed. Rep. 808; *In re Look Tim Sing*, (Cal.) 21 Fed. Rep. 905; *In re Ah Quan*, 21 Fed. Rep. 182; *In re Ah Kee*, 22 Fed. Rep. 519; *In re Ho King*, (Oreg.) 14 Fed. Rep. 724; *In re Low Yam Chow* (case of Chinese merchant), 13 Fed. Rep. 605; s. c., 7 Sawy. (U. S.) 549; *In re Quong Woo*, (Cal.) 13 Fed. Rep. 229; *In re Ah Sing* (case of Chinese cabin waiter), (Cal.) 13 Fed. Rep. 286; *In re Ah Tie* (case of Chinese laborers on shipboard), (Cal.) 13 Fed. Rep. 291; *In re Ah Ping* (case of Chinese merchant), (Cal.) 23

Fed. Rep. 329; *In re Pong Ah Lung*, 16 Fed. Rep. 577; Article in 17 Cent. L. J. 261; *Chew Heong v. U. S.*, 112 U. S. 536; s. c., 21 Fed. Rep. 791; *In re Tong Ah Chee*, (Cal.) 23 Fed. Rep. 441; *In re Chin Ah Sooyee*, (Cal.) 21 Fed. Rep. 393; *In re Chow Goo Pool*, (Cal.) 25 Fed. Rep. 77; *In Matter of Tung Yeong*, 1 West C. Rep. 647. There is nothing in the restriction acts, or in the treaty on which they are based making the decision of the custom officers final, or ousting the courts of jurisdiction. U. S. v. Jung Ah Lung, 124 U. S. 621; affirming *In re Jung Ah Lung*, (Cal.) 25 Fed. Rep. 141. The refusal to allow a Chinese passenger to land is a restraint of his liberty, within the meaning of the habeas corpus act, and it is the duty of the court, justice, or judge to whom the application for a writ of habeas corpus is made to forthwith award the writ, unless it appears from the petition itself that the party is not entitled thereto; see case last cited: *In re Chow Goo Pool*, (Cal.) 25 Fed. Rep. 77. Applications of Chinese persons for their discharge from a restraint claimed to be illegal under the restriction act may be divided into three classes: 1. Applications for discharge on the ground of previous residence; 2. Applications for discharge founded on the production of Canton certificates; 3. Applications for discharge on the part of children brought to, or sent for, by their parents or guardians; *In Matter of Tung Yeong*, 1 West C. Rep. 647, where the nature and effect of the evidence usually produced by the petitioners in each of these classes is stated and discussed. The practical operations of the Chinese Restriction Act are also therein stated and commented upon. There is no right to a jury trial in such cases. *In re Chow Goo Pool*, (Cal.) 25 Fed. Rep. 77. But bail is allowed. *Id.* A remanded prisoner, however, cannot be admitted to bail for his appearance when a vessel is ready to depart, where the vessel on which he came has departed during the pendency of the habeas corpus proceedings. *In re Ah Moy*, 21 Fed. Rep. 808. Where

the person has no right to land, he should be remanded to the custody from which he was taken, if the ship be in port, and about to return to the country from which he came; but the court has no authority whatever to detain the ship. *In re* Chow Goo Pool, (Cal.) 25 Fed. Rep. 77. If the ship has sailed, he should be committed to the custody of the marshal to be held for a reasonable time to await the direction of the president. *Id.* As to what the president may do with respect to the prisoner's removal, see *Id.* But see *In re* Chinn Ah Sooy, (Cal.) 21 Fed. Rep. 393. A certificate is good only to admit the individual described in it. *In re* Ah Quan, (Cal.) 21 Fed. Rep. 182. The restriction acts are not applicable to citizens, and a person born in the United States of Chinese parents, residing therein and not engaged in any diplomatic or official capacity under the Emperor of China, is a citizen of the United States. *In re* Look Tin Sing, (Cal.) 21 Fed. Rep. 905. For Chinese Restriction Act (an act to execute certain treaty stipulations relating to Chinese, approved May 6, 1882, as amended July 5, 1884), see notes to *U. S. v. Jung Ah Lung*, 124 U. S. 627; *Chew Heong v. U. S.*, 112 U. S. 536. Congress, however, has just passed a Chinese Exclusion Act, which became a law on October, 1, 1888.

(b) *Violation of Federal Law.* Where the prisoner is held in violation of the constitution, laws or treaties of the United States, it matters not by whom he is held, the courts of the United States, within their respective territorial divisions, have power to, and on application will, issue the writ of habeas corpus to inquire into the cause of his imprisonment, though it be under the judgment of a court of another jurisdiction; and, if such imprisonment is found to be in violation of the constitution, laws or treaties of the United States, the prisoner will be discharged from custody. *In re* Broshahan, (Mo.) 18 Fed. Rep. 62; *In re* Wong Yong Quy, 6 Sawy. (U. S.) 237; *Ex parte* Kenyon, 5 Dill. (U. S.) 385; In Matter of Quong Woo, 9 Pac. C. L. J. 815; *Ex parte* Royall, 117 U. S. 241; *U. S. v. Crook*, 5 Dill. (U. S.) 453; In Matter of Titus, 8 Ben. (U. S.) 411; as where it is without authority of law; *In re* Bryant, 1 Deady (U. S.) 118; Matter of Winder, 2 Cliff. (U. S.) 89; or without jurisdiction; *In re* Buell, 3 Dill. (U. S.) 116; In Matter

of Allen, 13 Blatchf. (U. S.) 271; or under an invalid order of a board of supervisors, attempting to prevent the pursuit of a lawful occupation. In Matter of Quong Woo, 9 Pac. C. L. J. 815. So, where a prisoner is arrested under an indictment found in one State for an offence committed in another, a federal court will discharge him on habeas corpus, except in cases of undoubted flight from justice and evasion of process. *In re* Rosdeitcher, (Vt.) 33 Fed. Rep. 657.

(c) *Passing Counterfeit Money.*—A State court has no jurisdiction over the offence of passing counterfeited national bank notes or bills; and one imprisoned for such an offence by a state court will be released by a federal court on habeas corpus. *Ex parte* Houghton, (Vt.) 7 Fed. Rep. 657; *Brown v. U. S.*, 14 Am. L. Reg., N. S. 566. See U. S. Rev. Stats., § 711. This, however, does not relieve the criminal from punishment according to the laws of the United States. *Ex parte* Houghton, (Vt.) 7 Fed. Rep. 657.

(d) *Minors, Enlisted.*—Under § 1117 of the U. S. Revised Statutes, a minor cannot be legally enlisted into the military service of the United States without the consent of his parents or guardians, if he has any; and one so enlisted, or held as a deserter, will be released by a federal court on habeas corpus, issued on behalf of such parents or guardians, or on the application of the minor himself, except, possibly, where he made a false affidavit as to his age at the time of enlistment. *In re* Baker, (R. I.) 23 Fed. Rep. 30; *U. S. v. Gibbon*, (Neb.) 24 Fed. Rep. 135; *In re* Von Dieselskie, 15 Wash. L. Rep. 346, cited in 9 Crim. L. Mag. 721; *U. S. v. Hanchett*, (Ill.) 18 Fed. Rep. 26; *Seavey v. Seymour*, 3 Cliff. (U. S.) 439; *Re McNulty*, 2 Low. (U. S.) 270; *In re* Davison, (N. Y.) 21 Fed. Rep. 618; *In re* Wall, (Mass.) 8 Fed. Rep. 85; *Ex parte* Schmeid, 1 Dill. (U. S.) 587.

(e) *Slaves.*—A person held in slavery by one of the uncivilized tribes of Indians in Alaska will be released on habeas corpus. *In re* Sah Quah, (Alaska) 31 Fed. Rep. 327.

(f) *Detention of Immigrant.*—Upon habeas corpus, the proceedings of a special tribunal may be inquired into, so far as to ascertain whether it has kept within the line of its authority, and of its statutory powers. Thus,

3. Appeals.—(a) *From District to Circuit Court.*—"From the final decision of any court, justice, or judge, inferior to the circuit court, upon an application for a writ of habeas corpus, or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard; (1) In the case of any person alleged to be restrained of his liberty in violation of the constitution, or of any law or treaty of the United States; (2) In the case of any prisoner who, being a subject or citizen of a foreign State and domiciled therein, is committed or confined or in custody by or under the authority or law of the United States, or of any State, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under

the commissioners of emigration have no authority to forbid a final landing, or to detain an immigrant for return, under the act of August 3, 1882, unless they have found him to be either a "convict, lunatic, idiot, or person unable to take care of himself without becoming a public charge;" and one so detained will be released. *In re O'Sullivan* (N. Y.) 31 Fed. Rep. 447.

(g) *Custody of Children.*—Conflicting claims of parents for the custody of infant children is a question of which these courts have jurisdiction, when the petitioner is a citizen of one State, and the respondent a citizen of another.

Bennett v. Bennett, 1 Deady (U. S.) 299; Compare *Ex parte Des Rochers*, 1 McAll. (U. S.) 68; *Ex parte Everts*, 1 Bond (U. S.) 197; *U. S. v. Green*, 3 Mason (U. S.) 482; *Barry's Case*, 2 How. (U. S.) 65.

(h) *Other Cases.*—The writ applies to civil as well as criminal process. *Ex parte Randolph*, 2 Brock. (U. S.) 447; and where the detention is of a civil nature, it will be granted where the applicant and respondent are citizens of different States. *U. S. v. Williamson*, 3 Am. L. Reg. 729; s. c., 4 Am. L. Reg. 5. It will issue in all cases, where it would issue at common law, except that it cannot issue to any person in jail, unless, etc., as provided by section 753 Revised Statutes of United States; see *Ex parte Des Rochers*, 1 McAll. (U. S.) 68. A circuit court, on this writ, may inquire into the validity of its own sentence. *In re Greathouse*, 4 Sawy. 487. No formal or technical commitment need have been made that an illegal imprisonment may be heard on habeas corpus. *Matter of McDonald*, 9 Am. Law. Reg. 661—a case valuable for its references.

Refusal of Writ or Discharge by District and Circuit Court.—These courts will not issue a habeas corpus to review a decision, simply erroneous but not void. *Ex parte Shaffenburg*, 4 Dill. (U. S.) 271; *Ex parte Parks*, 93 U. S. 18; or to release a prisoner duly committed for felony or treason plainly expressed in the warrant of commitment. *Matter of Winder*, 2 Cliff. (U. S.) 89; or to release one who has been sentenced by a judge *de facto*. *Griffin's Case*, Chase Dec. (U. S.) 364; or to try the merits of an action; *In re Devoe*, 1 Low. (U. S.) 251; or where the arrest of the petitioner is distinctly and solely founded upon fraud in a civil action. *In re Whitehouse*, 1 Low. (U. S.) 429; or where the offence is exclusively cognizable by the laws of the State. *In re Taylor*, 12 Chic. Leg. News, Oct. 4, p. 17. *Ex parte Cabrera*, 1 Wash. (U. S.) 232. See *Ex parte McCann*, 5 Am. L. Reg., N. S., 158, as where the prisoner has violated a State marriage law; *Ex parte Kinney*, 3 Hughes (U. S.) 9; or where the court pronouncing a sentence had jurisdiction. *Johnson v. U. S.*, 3 McLean (U. S.) 89. Other instances in which the writ has been refused: *U. S. v. French*, 1 Gall. (U. S.) 1; *Corbett's Petition*, 9 Ben. (U. S.) 274; *Matter of Hamilton*, 1 Ben. (U. S.) 455; *Matter of Clark*, 2 Ben. (U. S.) 540; *Matter of De Puy*, 3 Ben. (U. S.) 307; *Matter of Ferrers*, 3 Ben. (U. S.) 445; *Matter of Lipman*, 3 Ben. (U. S.) 95; *Ex Parte Geary*, 2 Bliss. (U. S.) 485; *Ex parte Barnes*, 1 Sprague (U. S.) 133; *Ex parte Touchman*, 1 Hughes (U. S.) 601. As to release of soldier who has been arrested and tried after the expiration of his term of service, for a military offence committed during such term of service, see *Bird v. U. S.*, 2

the commission, order, or sanction of any foreign state or sovereignty, the validity and effect whereof depends upon the law of nations, or under the color thereof."¹

(b) *From Circuit to Supreme Court.*—An appeal may now be taken to the supreme court of the United States from the final decision of the circuit court in both classes of cases mentioned in subdivision (a), *supra*.² But under the act of March 3, 1885, an appeal to the supreme court in habeas corpus cases lies only from the final decision of a circuit court. It does not lie from an order of a United States circuit judge, sitting as a judge and not as a court.³ Section 764 of the United States Revised Statutes allowed an appeal, from the final decision of the circuit court to the supreme court, only in the cases mentioned in the second clause of subdivision (a), *supra*. No appeal under that section could be taken from the judgment of the circuit in the cases mentioned in the first clause, viz., where one was "alleged to be restrained of his liberty in violation of the constitution, or of any law or treaty of the United States."⁴

Sawy. (U. S.) 33; *In re Walker*, 3 Am. Jur. 281; U. S. v. Travers, 2 Wheel. Crim. Cas. 509; Corbett's Petition, 9 Ben. (U. S.) 274. As to pardoned criminal, and acceptance of pardon, see *Matter of De Puy*, 3 Ben. (U. S.) 307; *In re Callicot*, 8 Blatchf. (U. S.) 89.

1. U. S. Rev. Stats., § 763. And appeals in cases of habeas corpus from the final decision of a district court or judge thereof may, within the discretion of the court or judge, be sent to the appellate tribunal, at a term of the circuit court current at the time when the appeal is taken, under regulations adapted to secure justice. And the appeal may be heard by the circuit justice at chambers, for the convenience of parties, when it appears that the order therefor was made without objection; that the parties appear, taking no objection at the hearing; and that no hardship or injustice will follow. Under these circumstances it is too late to object for the first time in the supreme court of the United States. See *Roberts v. Reilly*, 116 U. S. 80; s. c., 7 Crim. L. Mag. 289; construing U. S. Rev. Stats., § 765.

2. Act of March 3, 1885, Laws 2nd Ses. 48th Cong., ch. 353, p. 437; amending U. S. Rev. Stats., § 764; see, also, *Wales v. Whitney*, 114 U. S. 564. *In re Sun Hung*, (Cal.) 24 Fed. Rep. 723; *Yick Wo v. Hopkins*, 118 U. S. 356; *Ex parte Mirzan*, 119 U. S. 584; *Wildenhuss' Case*, 120 U. S. 1. The right of appeal in habeas corpus cases is absolute. *In re Sun Hung*, (Cal.) 24

Fed. Rep. 723. This act also gives the supreme court appellate jurisdiction, in habeas corpus cases, over the decisions of the supreme court of the District of Columbia. But neither the United supreme court nor the supreme court of the District of Columbia has appellate jurisdiction over a naval court martial, nor over offences which it has power to try. *Wales v. Whitney*, 114 U. S. 564.

3. *Carper v. Fitzgerald*, 121 U. S. 87.

4. *Ex parte Royall*, 112 U. S. 181. Such an appeal was given by the act of February 5, 1867, ch. 28, 14 Stats. at Large, 385. But it was taken away again by the act of March 27, 1868, ch. 34, 15 Stats. at Large, 44, and was never restored until the act of March 3, 1885. See *Ex parte Royall*, 112 U. S. 181; *Ex parte McCardle*, 6 Wall. (U. S.) 318; *Ex parte McCardle*, 7 Wall. (U. S.) 506. Prior to 1867, there was no regulated and established practice for the guidance of parties invoking the jurisdiction of the supreme court. It was necessary to use the writ of *certiorari*, in addition to the writ of habeas corpus. *Ex parte McCardle*, 6 Wall. (U. S.) 324. The supreme court cannot take jurisdiction of a certificate of division in opinion between the judges of a circuit court in proceedings under a writ of habeas corpus until final judgment has been rendered in accordance with the opinion of the presiding justice or judge. *Ex parte Cota*, 110 U. S. 385; *Ex parte Tom Tong*, 108 U. S. 556.

(c) *From Territorial Courts to the United States Supreme Court.*—Under section 1909 of the United States Revised Statutes, appeals and writs of error are allowed from the decisions of courts of certain territories, and the judges or justices thereof, upon writs of habeas corpus, involving the question of personal freedom.¹

IV. CONFLICT OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS.—1. *State Custody in Violation of Constitution of United States.*—The circuit courts of the United States may on habeas corpus release one who is restrained of his liberty in violation of the constitution of the United States, though held under the criminal process of a state court.² That the state courts and judges do not possess equal power; that they cannot, under any authority conferred by the States, discharge from custody persons held by authority of the national courts, or by commissioners of such courts, or by officers of the general government acting under its laws; results from the supremacy of the constitution and laws of the United States.³ When, however, the applicant for a habeas corpus is in custody under process from a state court of original jurisdiction, for an alleged offence against the laws of that State, and it is claimed that he is restrained of his liberty in violation of the constitution, a United States circuit court may, in its discretion, subordinate to any circumstances requiring immediate action, refuse the writ in advance of the trial in the state court, or even after conviction, and before the case has been heard on error in the court of last resort in said State.⁴ And in such a case the supreme court of the United States will, on an original application for a habeas corpus, refuse the writ in advance of the prisoner's trial,⁵ or until a hearing has been had in the highest court of the State.⁶ And it will not act on such application, except under special circumstances, where the application might

1. See *U. S. v. Railroad Co.*, 105 U. S. 263. The order and judgment of a United States district court, in refusing to issue a habeas corpus, so far as an appeal is concerned, has been held to be equivalent to a refusal to discharge the petitioner on a hearing of the return to the writ; and that an appeal lies to the United States supreme court from the order and judgment under section 1909, Rev. Stats. U. S. *Ex parte Snow*, 120 U. S. 274. But the supreme court has no jurisdiction on habeas corpus to discharge a person imprisoned under the sentence of a territorial court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence. *Ex parte Harding*, 120 U. S. 782.

2. *Ex parte Royall*, 117 U. S. 241; *In re Ah Jow*, 29 Fed. Rep. 181; *Ex parte Davis*, (Ky.) 21 Fed. Rep. 396;

In re Brosnahan, 4 McCrary (U. S.) 1.

3. *Ex parte Royall*, 117 U. S. 241; *Ableman v. Booth*, 21 How. (U. S.) 506; *Tarble's Case*, 13 Wall. (U. S.) 397; *Robb v. Connolly*, 111 U. S. 639.

4. *Ex parte Royall*, (No. 1) 117 U. S. 241; *Ex parte Yung Jon*, (Ore.) 28 Fed. Rep. 308; *Ex parte Hanson*, (Ore.) 28 Fed. Rep. 127; *In re Ah Jow*, (Cal.) 29 Fed. Rep. 181. This discretion should be so exercised as not to disturb the relations between the courts of the Union and the State "by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution." *Ex parte Hanson*, (Ore.) 28 Fed. Rep. 131.

5. *Ex parte Royall* (No. 2), 117 U. S. 254; *Ex parte Mirzan*, 119 U. S. 584.

6. *Ex parte Fonda*, 117 U. S. 516; *Ex parte Mirzan*, 119 U. S. 584.

as well first be made in the circuit court.¹ A prisoner will not be discharged on habeas corpus by the circuit court, where the question of law though arising under the constitution, laws and treaties of the United States, is a doubtful one as between the circuit court and the supreme court of the State, there being an immediate appeal allowed to the supreme court of the United States.² And a writ of habeas corpus will not be granted by the supreme court of the United States to test the validity of a defence, under the federal constitution, to an indictment in a state court.³ The federal courts have no jurisdiction to discharge a prisoner held under a state statute, upon the ground that such statute is in violation of the constitution of the State, or in excess of the powers which the people of the State have conferred on their legislature. If it does not violate the federal constitution, the question is for the state courts.⁴

2. Custody in Violation of Federal Authority.—The circuit courts of the United States have authority to discharge a person by habeas corpus from imprisonment under the authority of a State, not only when it is contrary to the federal constitution, but also when it is in violation of a law or treaty of the United States. And if a person be imprisoned under a State statute which is in conflict with either, those courts have power to discharge him on this writ.⁵

¹ 1. *Wales v. Whitney*, 114 U. S. 564; *Ex parte Mirzan*, 119 U. S. 584; *Ex parte Royall* (No. 1), 117 U. S. 241; *Ex parte Royall* (No. 2), 117 U. S. 254.

² 2. *In re Wo Lee*, 21 Rep. 550.

³ 3. *Ex parte Crouch*, 112 U. S. 178.

⁴ 4. *In re Brosnahan*, (Mo.) 18 Fed. Rep. 62.

Imprisonment Without "Due Process of Law."—Anyone imprisoned or in custody by authority of a State, under a void or unconstitutional act thereof, is restrained of his liberty in violation of the fourteenth amendment to the constitution of the United States, which forbids any State to "deprive any person of life, liberty, or property without due process of law." *In re Lee Tong*, 9 Sawy. (U. S.) 335; s. c., 18 Fed. Rep. 253; 5 Crim. L. Mag. 67; *In re Wan Yin*, 10 Sawy. (U. S.) 538; *Ex parte Hanson*, (Oreg.) 28 Fed. Rep. 127; *Parrott's Case*, 6 Sawy. (U. S.) 349; *In re Wong Yung Quy*, 6 Sawy. (U. S.) 237; *In re Ah Lee*, 6 Sawy. (U. S.) 410; *Laundry Ordinance Case*, 7 Sawy. (U. S.) 526; *In re Wan Yin*, 5 West C. Rep. 304; note, 6 Crim. L. Mag. 407; *In re Ah Jow*, (Cal.) 29 Fed. Rep. 181; *Yick Wo v. Hopkins*, 118 U. S. 356; *Ex parte Yung Jon*, (Ore.) 28 Fed. Rep. 308. As where it

is attempted by ordinance to empower any man, or body of men, at his or their absolute and unrestrained discretion, to give or withhold permission to carry on a lawful business in any place. *Yick Wo v. Hopkins*, 118 U. S. 356; or, where one is imprisoned by State process for passing counterfeited national bank notes. *Ex parte Houghton*, (Vt.) 7 Fed. Rep. 657; *Brown v. U. S.*, 14 Am. Law Reg. N. S. 566. But the validity of a constitutional act is not affected by an amendment which is unconstitutional, because it discriminates between citizens of different States, and which does not in terms repeal the original act. The amendment is void, and does not by implication repeal the original act. And an offender, convicted under the original act, will not be discharged on habeas corpus. *Ex parte Davis*, (Ky.) 21 Fed. Rep. 396.

⁵ 5. *Ex parte Hanson*, (Oreg.) 28 Fed. Rep. 127; *In re Brosnahan*, 4 McCrary (U. S.) 1; *Ex parte Kenyon*, 5 Dill. (U. S.) 385; *In re Wong Yung Quy*, 6 Sawy. (U. S.) 237.

Various Questions as to Conflict of Jurisdiction.—The fact that at the time a person was indicted, tried, convicted, and sentenced for perjury, by a state court, he was under an indictment in the federal courts for an offence against

the United States, but released on bail, does not entitle him to a discharge on habeas corpus, on petition of his bondsmen in the federal court, where the judgment of the state court was competent and regular, and the federal court had, by its action, waived its right to a prior trial of the offence for which he was indicted in that court. *Mackin v. People*, 115 Ill. 312. Where the writ of habeas corpus from a United States court is sought against the sheriff of a state court by one imprisoned for the violation of a state law, the petitioner must clearly show an irreconcilable antagonism between the federal law and the state law under which he is in custody. *In re Hoover*, (Ga.) 30 Fed. Rep. 51; *Ex parte Thompson*, 15 Am. L. Reg. N. S. 522; *In re Bull*, 4 Dill. (U. S.) 323. A writ of habeas corpus from a federal court is the proper remedy where one is restrained of his liberty by a state court for the offence of passing counterfeited national bank bills, as a state court has no jurisdiction over such offence. *Ex parte Houghton*, (Vt.) 7 Fed. Rep. 657. A prisoner held under federal authority cannot be discharged on state habeas corpus; and a prisoner convicted under the federal law, and confined in the prison of a State with the consent of the State, is deemed to be in the custody of the federal authorities. *Ex parte Le Bur*, 49 Cal. 159. No federal court or judge can, where no federal question is involved, issue a habeas corpus to bring up a prisoner who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness. *Ex parte Dorr*, 3 How. (U. S.) 103; *U. S. v. Rector*, 5 McLean (U. S.) 174. But where a federal question is involved a federal court will issue the writ to one confined under state criminal process, and, if proper, discharge him.

As, where the petitioners, while acting under federal laws, were imprisoned for contempt by a state court. *Electoral College Case*, 1 Hughes (U. S.) 571; or where two colored persons had been tried by a state court, for a capital offence, by a jury exclusively white; *Ex parte Reynolds*, 3 Hughes (U. S.) 559; or where federal officers were committed by a state court for disobeying a subpoena *duces tecum*; *Ex parte Turner*, 3 Woods (U. S.) 603; or the order of a state court to produce the body of an enlisted soldier and make a sworn return of the cause

of his detention; *In re Neill* 8 Blatchf. (U. S.) 156; or where one is indicted for murder, under a state law, committed while executing federal process; *U. S. v. Jailer*, 2 Abb. (U. S.) 265; see *U. S. v. Morris*, 2 Am. L. Reg. 348; or where a federal officer is imprisoned under process issued by a state court for an act done in pursuance of a law of the United States; *Ex parte Robinson*, 1 Bond (U. S.) 39; *In re Farrand*, 1 Abb. (U. S.) 140; *In re Neill*, 8 Blatchf. (U. S.) 156; *Ex parte Jenkins*, 2 Wall. Jr. (U. S.) 521; *Ex parte Robinson*, 6 McLean (U. S.) 355; *Ex parte Sifford*, 5 Am. L. Reg. 659; or where one is convicted in a state court for an act done in the military service of the United States, while in a rebellious territory. *Coleman v. Tennessee*, 97 U. S. 509; or where one is convicted in a state court for perjury before a United States officer. *Ex parte Bridges*, 2 Woods (U. S.) 428; *Brown v. U. S.* (Ga.) 2 Cent. L. J. 368; or where one is imprisoned under a void or unconstitutional state law; *In re Wong Yung Quy*, (Cal.) 2 Fed. Rep. 624; *Ex parte McCready*, 4 Hughes (U. S.) 598; or where one is imprisoned by a state court for a crime committed in a place under the exclusive jurisdiction of the United States; *Ex parte Tatem*, 1 Hughes (U. S.) 588. For cases in which a discharge has been refused, see *Ex parte Touchman*, 1 Hughes (U. S.) 601; *Ex parte Forbes*, 1 Dill. (U. S.) 363; *In re Wildenhuis*, 120 U. S. 1—a case involving petitioner's rights under the treaty of 1868, between the United States and Belgium. A federal court may go behind process of a state court and inquire into the cause of commitment on this writ. *Ex parte Jenkins*, 2 Wall. Jr. (U. S.) 521; *Ex parte Sifford*, 5 Am. L. Reg. 659; The state writ of habeas corpus reaches all cases not reached by the national writ—the latter all cases not reached by the former—and thus there is no hiatus or confusion. There was formerly some conflict in the cases as to the exact line of demarcation between state and federal jurisdiction, but these cases are now only interesting as relics of the past, and are not cited. They may be found in *Church on Habeas Corpus*, §§ 81, 85, notes; *Kurtz v. Moffitt*, 115 U. S. 487. The cases settling the "authority of the United States" were those of *Ableman v. Booth*, 21 How. (U. S.) 506; and *Tarble's Case*, 13 Wall. (U. S.) 397. The latter case

V. APPLICATION FOR WRIT.—1. Who May Make Application.—

Whenever a party is restrained of his liberty, or is unlawfully detained or confined, he may make an application for a writ of habeas corpus before the proper court or judge;¹ and this whether the illegal imprisonment be under criminal or civil process.² If the prisoner be so restrained or coerced that it is impossible for him to act, the application need not proceed directly from him. It may be made on his behalf by some other person, if the court is satisfied that the prisoner is so coerced as to be unable to make it.³ The master may file a petition for the body of his appren-

settled the proposition that a state court cannot on habeas corpus pass upon the validity of an enlistment under federal authority, and its sufficiency to justify the detention of the petitioner as a soldier; see extended note on this matter; *State v. Dimick*, 12 N. H. 194; s. c., 37 Am. Dec. 200, 203. As to the power of a court to compel a person to bring before it children or other persons outside of its jurisdiction, see note to *Newton v. Bronson*, 13 N. Y. 587; s. c., 67 Am. Dec. 102, 103. A writ of habeas corpus is not removable from a state court into a circuit court of the United States under the act of March 3, 1875, ch. 137, § 2; *Kurtz v. Moffitt*, 115 U. S. 487.

1. *Territory of Kansas v. Cutler, McCahon*, (Kan.) 153.

2. *Hecker v. Jarret*, 3 Binn. (Pa.) 404; *Ex parte McCullough*, 35 Cal. 97; *Ex parte Randolph*, 2 Brock. Mar. (U. S.) 447, 476, 477; *People v. Willett*, 15 How. Pr. (N. Y.) 210. That this writ was the proper remedy in a case of arrest under civil process, was at first doubted by the supreme court of the United States. *Ex parte Wilson*, 6 Cranch (U. S.) 52. See, also, *Cable v. Cooper*, 15 Johns. (N. Y.) 152.

3. But, unless the court is so satisfied, the writ will not issue. *Parker et al.*, 5 Mees. & W. 31; s. c., 7 Dowl. 208; *Ex parte Thompson*, 30 L. J., N. S., M. C. 19 (Exch.). A mere stranger has no right to it. *In re Poole*, 2 McArthur (D. C.) 583; *Ex parte Child*, 15 Com. B. 238; *Hottentot Venus*, 13 East. 194. Compare *In re Newton*, 16 Com. B. 97; s. c., 24 L. J., N. S., C. P. 148 (1855). A parent may apply for the writ when his child is improperly detained, and the latter need not join in the application. *People v. Mercein*, 3 Hill (N. Y.) 399; s. c., 38 Am. Dec. 644.

The sister of an orphan girl under fourteen may apply for a habeas corpus to remove the orphan from an asylum where the applicant was denied access to her. *In re Daley*, 2 F. & F. 258. And it will issue on the application of the father to bring up his daughter in the custody of third persons. *Rex v. Clarke*, 1 Burr. 606. The writ may issue against a wife on the application of the husband to obtain the custody of their child. *Com. v. Briggs*, 16 Pick. (Mass.) 203. And a woman may have the writ to relieve her sister from restraint. *In re Sutor*, 2 F. & F. 267, 272. A daughter may take out a writ of habeas corpus to relieve her aged mother from restraint, where she was taken from her residence by force, against her remonstrance, and without authority of law. *Com. v. Curby*, 3 Brewst. (Pa.) 610; s. c., 8 Phila. (Pa.) 372.

Husband and Wife.—A husband may regain the custody of his wife on habeas corpus, where she is kept in custody away from him and against her will. *Ex parte Newton*, 2 Smith 617; *Queen v. Leggatt*, 18 Ad. & El. Q. B. 781; *Ex parte Sandilands*, 12 Eng. L. & Eq. 463; s. c., 21 L. J. Rep., N. S., Q. B. 342; *Rex v. Clarkson*, 1 Stra. 445; *Schouler's Dom. Rel.*, 3rd ed. 61; *Rex v. Mead*, 1 Burr. 542; *Sanders v. Rodway*, 13 Eng. L. & Eq. 463; s. c., 16 Jur. 1005; *Rex v. Gregory*, 4 Burr. 1991. So a wife may move for a habeas corpus on behalf of the husband. *Cobbett v. Hudson*, 15 Ad. & El. Q. B. 988; *Matter of Ferrens*, 3 Ben. (U. S.) 445. It may also issue at the wife's instance, and against the husband when she is improperly restrained by him. *Lister's Case*, 8 Mod. 22.

Parent for Child.—The improper detention of a child, especially one of tender years, from the person entitled to its custody, is good ground for the issuance of a habeas corpus. *Matter*

tice;¹ a tutor deprived of the custody of his ward may have a habeas corpus; and so may a debtor illegally confined in a civil

of Mitchell, R. M. Charlt. (Ga.) 489. See *post*, CUSTODY OF CHILDREN. And it is not necessary that force or restraint be exerted upon the infant. *Ex parte* McClellan, 1 Dowl. P. C. 81. The writ may issue at the instance of either parent. *Ex parte* Templer, 2 Saund. & C. 169; *Ex parte* Witte, 13 Com. B. 680; *Ex parte* Sandilands, 12 Eng. L. & Eq. 465; s. c., 21 L. J. Rep., N. S., Q. B. 342; *King v. Greenhill*, 4 Ad. & El. 644; *King v. Dobbin*, Ad. & El.; *King v. Wilson*, Ad. & El.; U. S. v. Green, 3 Mason (U. S.) 482; and not only without the privity of the child, but against its express wishes. *Com. v. Hamilton*, 6 Mass. 273; *In re* Mitchell, R. M. Charlt. (Ga.) 489; *Mayne v. Baldwin*, 5 N. J. Eq. 454; *Com. v. Taylor*, 3 Met. (Mass.) 72.

Master and Apprentice.—Habeas corpus is not an available remedy to restore an apprentice to his master when the former is illegally detained from the latter. *Lea v. White*, 4 Sneed (Tenn.) 73; s. c., 67 Am. Dec. 599. But in such a case it may always issue upon the application of the apprentice, or with his consent. But in reality it makes little difference whether the writ issues at the instance of the master or the apprentice, because, on the hearing it will be determined whether or not the apprentice is under any illegal restraint. If so, he is set at liberty. In either case he may go where he chooses, as the court will not order him into the custody of his master. *King v. Reynolds*, 6 T. R. 497; *King v. Edwards*, 7 T. R. 745; *People v. Pillow*, 1 Sandf. (N. Y.) 672; *People v. Hoster*, 14 Abb. Pr. N. S. (N. Y.) 414; *Matter of Barre*, 14 Abb. Pr. N. S. (N. Y.) 426; *Ex parte* Grotot, 2 App. from Mag. to K. B. 594; *Ballenger v. McLain*, 54 Ga. 159; *Cannon v. Stuart*, 3 Houst. (Del.) 223; *Rex v. Fenwick*, 3 Smith 369; *People v. Weissenbach*, 60 N. Y. 385; *State v. Brearly*, 2 South. (N. J.) 555; *Com. v. Harrison*, 11 Mass. 63; *Com. v. Hamilton*, 6 Mass. 273; *Matter of McDowles*, 8 Johns. (N. Y.) 328; *People v. Gates*, 39 How. Pr. (N. Y.) 74; *Com. v. Robinson*, 1 Serg. & R. (Pa.) 352; *Musgrove v. Kornegay*, 7 Jones (N. Car.) 71; *Graham v. Graham*, 1 Serg. & R. (Pa.) 330; *Fowler v. Hollenbeck*, 9 Barb. (N. Y.) 309. But compare *Com. v. Beck*, 1 Browne (Pa.) 277; *In re* Goodenough, 19 Wis.

274, as to delivery of custody. An apprentice, however, may be discharged from custody under invalid indentures on this writ. *Cannon v. Stuart*, 3 Houst. (Del.) 223; *Musgrove v. Kornegay*, 7 Jones (N. Car.) 71; *Matter of Goodenough*, 19 Wis. 274; *Com. v. Hamilton*, 6 Mass. 273; *Ballenger v. McLain*, 54 Ga. 159; *Comas v. Reddish*, 35 Ga. 236; *People v. Gates*, 39 How. Pr. (N. Y.) 74; *People v. Weissenbach*, 60 N. Y. 385. Compare *People v. Hoster*, 14 Abb. Pr. N. S. (N. Y.) 414; *Matter of Barre*, 14 Abb. Pr. N. S. (N. Y.) 426.

Guardian for Ward.—A guardian may have the writ of habeas corpus to bring up his ward where the latter is under illegal restraint; but rights of guardianship will not be tried on this writ. The court will, if necessary, exercise its discretion in awarding the custody of the ward; but when freed from illegal restraint, the court will permit an infant ward, if it have sufficient discretion to make a free and unbiased choice, to go where it pleases. *Townsend v. Kendall*, 4 Minn. 412; *King v. Smith*, 7 Mod. 234; *Villareal v. Melish*, 2 Swanst. 538; *In re* Andrews, L. R. 8 Q. B. 153; *State v. Cheeseman*, 2 South. (N. J.) 445; *McConologue's Case*, 107 Mass. 171; *In re* Poole, 2 McArthur (D. C.) 583; *Com. v. Smith*, 1 Brewst. (Pa.) 547; *Matter of Wollstonecraft*, 4 John. Ch. (N. Y.) 79; *People v. Mercein*, 8 Paige (N. Y.) 47; *State v. Clover*, 1 Harr. (N. J.) 419; *Ferguson v. Ferguson*, 36 Mo. 197; *Com. v. Barney*, 4 Brewst. (Pa.) 408; *Mathews v. Wade*, 2 W. Va. 464; *Com. v. Hammond*, 10 Pick. (Mass.) 274; *Com. v. Addicks*, 5 Binn. (Pa.) 520; s. c., 2 Serg. & R. (Pa.) 174; *Ex parte* Ralston, R. M. Charlt. (Ga.) 119; *Gamer v. Gordon*, 41 Ind. 92; *Payne v. Payne*, 39 Ga. 174; *Ward v. Roper*, 7 Humph. (Tenn.) 111; *People v. Wilcox*, 22 Barb. (N. Y.) 178; *Foster v. Alston*, 6 How. (Miss.) 406; *Wilcox v. Wilcox*, 14 N. Y. 575; *Matter of Jackson*, 15 Mich. 417; *Com. v. Reed*, 59 Pa. St. 425; *Matter of Heather Children*, 50 Mich. 261. The above cases show that the welfare and interests of the ward, both present and future, govern the court in awarding its custody, where that is done. See *post*, CUSTODY OF CHILDREN.

1. *Com. v. Beck*, 1 Browne (Pa.) 277-

case.¹ Any party who has the right to the custody of another may sue out this writ, as in special bail.² The public prosecutor of a county in which property has been stolen may apply for a habeas corpus to bring up a prisoner who has stolen property in that county and is apprehended and committed for such offence to the jail of another county, if he is indicted in the county where the property was stolen—so that he may be delivered to the sheriff of the county within which the property was stolen, and there tried.³

2. Mere Moral Restraint Insufficient.—In order to make a case for habeas corpus there must be actual confinement, or the present means of enforcing it; mere moral restraint is not sufficient.⁴

3. Time at Which Writ May be Obtained.—Application for a writ of habeas corpus may be made to the federal courts either in term time, or to any justice or judge of the district or circuit courts within their respective jurisdictions; or to any justice of the supreme court of the United States, at any time, wherever he may be within the United States.⁵ In the state courts, application may be made to officers authorized to issue the writ, or probably to the courts generally in term time; but the prisoner's constitutional right "must be exercised in a reasonable manner," and the allowance of the writ in term time rests in the sound discretion of the court.⁶

4. Requisites of Petition.—The application for a writ of habeas corpus should put before the court or judge facts enough to permit an intelligent judgment to be formed of the case. The rules of good pleading should be followed. Conclusions of law should be avoided. The petition should show in what the illegality of the imprisonment consists, and this should be done by stating the facts showing it.⁷ Where the statute exempts certain

1. *Hyde v. Jenkins*, 6 La. 436.

2. *Holsey v. Trevillo*, 6 Watts (Pa.)

403.

3. *People v. Mason*, 9 Wend. (N. Y.)

505.

4. *Wales v. Whitney*, 114 U. S. 564; s. c., 6 Crim. L. Mag. 793; 4 Mackey 38; *Ex parte Cole*, 14 Tex. App. 579; *Ex parte Mearns*, 3 Utah 50; *Dodge's Case*, 6 Mart. (La.) 569. Thus, an order directed by the secretary of the navy to a subordinate, commanding him to confine himself within certain limits, is not such a restraint of personal liberty as will be reached by a writ of habeas corpus; the party is not under restraint except so far as he chooses to obey the order. *Wales v. Whitney*, 114 (U. S.) 564. Where there is no actual restraint this writ cannot be used to test the validity of a city ordinance. *Ex parte Mearns*, 3 Utah 50. So will it be refused where no good cause of imprison-

ment is shown. *Ex parte Foley*, 62 Cal. 508. And a collusive petition for this writ will be dismissed where the alleged restraint is voluntary. *In re Dill*, 32 Kan. 668. Persons discharged on bail will not be considered as restrained of their liberty so as to be entitled to the writ of habeas corpus directed to their bail. *Territory of Kansas v. Cutler*, 1 McCahon (Kans.) 152.

5. Sec. 754 U. S. Rev. Stats.; *Ex parte Clarke*, 100 U. S. 399, 403.

6. *Ex parte Ellis*, 11 Cal. 222.

7. *Ex parte Nye*, 8 Kan. 99; *State v. Ensign*, 13 Neb. 250; *Ex parte Deny*, 10 Nev. 212. A general statement that the warrant of the committing magistrate is illegal, null and void, and that it was issued without authority of law, is a mere conclusion of law, and not a statement of any fact; see case last cited. The prisoner should state in his petition for what offence he

persons from the benefit of the habeas corpus act, the petition must show that the party detained is without the exception; and where the petition is required by statute to state "that such prisoner is not committed or detained by virtue of any process, judgment, decree or judgment specified," etc., in a given section, a detention for one of the causes specified in said section should be negatived affirmatively.¹ The omission of the name of the person imprisoned is not an irregularity, if enough appear to indicate the person intended.² Upon his petition for a habeas corpus, the relator must produce a sworn copy of the warrant of commitment, or an affidavit that the jailer refused to give him a copy.³ The same with any order or process under which he may be imprisoned, or a legal excuse shown for the omission.⁴ On a mere copy of the indictment being shown, where the prisoner is indicted for murder, accompanied by a statement that there has been a mistrial, the application will be refused.⁵ To obtain a reduction of bail, by means of habeas corpus, the petition should be especially framed to that purpose. It should allege that the bail is excessive.⁶ A guardian petitioning for a habeas corpus to obtain the custody of his ward must make his letters of guardianship a part of his petition.⁷ Where the statute confers power upon officers to issue the writ in certain specified cases, it ought to appear on the face of the writ, or else on the face of the petition, such petition being annexed to the writ and referred to therein, that the case exists in which authority has been given to such officer or magistrate to issue the writ. It tends to uniformity of practice, but does not affect the validity of the writ.⁸ A petition for the transfer of children, being addressed to the sound discretion of the court, must contain a full disclosure of all essential facts before a writ of habeas corpus will be granted upon it.⁹ In the federal courts it is said that the petitioner's proper course is to make his answer on the writ's return, and not make his allegations in full in the petition.¹⁰ Where a petition is presented for alleged want of probable cause it should set forth all the testimony taken before the examining magistrate.¹¹ In cases

was arrested, if any, and a copy of the warrant of the committing magistrate should be set out in the petition. *Ex parte* Deny, 10 Nev. 212; *People v. Burtnett*, 13 Abb. Pr. (N. Y.) 8; s. c., 5 Park. Cr. Rep. (N. Y.) 113. A petition should set forth the evidence given before the committing magistrate where any has been adduced, in order that the court may act advisedly. Where this is not done, the court will presume in favor of the conduct of the committing officer. *Ex parte* Klepper, 26 Ill. 532; *In re* Garvin, 3 Colo. 67.

1. *People v. Cowles*, 59 How. Pr. (N. Y.) 288.

2. *State v. Philpot*, Dudley (Ga.) 46.

3. *In Matter of Sweatman*, 1 Cow. (N. Y.) 144; *Harrison's Case*, 1 Cranch Cr. Ct. 159.

4. *In Matter of Beard*, 4 Ark. 9; *Ex parte* Royster, 6 Ark. 28.

5. *In Matter of Beard*, 4 Ark. 9.

6. *Hernandez v. State*, 4 Tex. App. 425.

7. *Gregg v. Wynn*, 22 Ind. 373.

8. *Com. v. Moore*, 19 Pick. (Mass.) 339.

9. *People v. Chegaray*, 18 Wend. (N. Y.) 637; *People v. Manley*, 2 How. Pr. (N. Y.) 61.

10. *Seavey v. Seymour*, 3 Cliff. (U. S.) 439.

11. *In re* Snyder, 17 Kan. 553; *In re*

other than those of controverted custody, the allegation of unlawful "restraint of liberty," or words of precisely the same import, or a statement of facts showing such restraint is essential in the application or petition, to give the court jurisdiction. Where it is defective with respect to such essential and jurisdictional allegation, no amendment will be allowed; and such a defect is not waived by the appearance of the respondent, and a trial.¹

5. Same.—Proper Court or Judge to Whom Application Should be Made.—Locality of Confinement.—An application on the ground that the prisoner has not had a speedy trial, must first be made in the trial court.² And an application generally should first be made to the local court or judge.³ The proper court or judge to whom the application should be made is not the one nearest the residence of the applicant, but the one nearest the applicant.⁴ A statutory restriction that an application for the writ must be to a judge or officer within the county where the prisoner is detained, or in an adjoining county, does not apply to the supreme court or one of its justices. An application may be made to the supreme court, or to one of its justices anywhere within the State.⁵ A petition is defective which fails to aver the locality of the confinement. This averment should be made in order that the discretion of the court or judge, as to the place of the return of the writ, may be properly exercised.⁶ The English practice in obtaining a habeas corpus *ad testificandum* is to apply for it to a judge at chambers, and not in court.⁷

6. Probable Cause Must be Shown.—While a writ of habeas corpus is a writ of right, it is not a writ of course; and the rule is that probable cause must first be shown to obtain the writ, whether it be granted at common law or under the statute.⁸ The judge has

Balcom, 12 Neb. 316; State v. Ensign, 13 Neb. 250; State v. Wiley, 64 N. C. 823.

1. *In re* Curd, 11 Week. L. Bul. 186, cited in 5 Crim. L. Mag. 621. But in *Ex parte* Champion, 52 Ala. 311, it was held that a petition containing a statement of facts as prescribed by statute, and properly verified, was not demurrable because it failed to allege that the petitioner was illegally restrained of his liberty.

2. *Ex parte* Fennesy, 4 Pac. C. L. J. 496; cited in 1 Crim. L. Mag. 532; *In re* Garvey, 7 Colo. 502.

3. *Ex parte* Ellis, 11 Cal. 222.

4. Thompson v. Oglesby, 42 Iowa 598.

5. People v. Cowles, 59 How. Pr. (N. Y.) 287.

6. People v. Cowles, 59 How. Pr. (N. Y.) 287.

7. Brown v. Gisborne, 2 A. & V. Dowl. N. S. 963.

8. Sim's Case, 7 Cush. (Mass.) 285;

Rex v. Hobhouse, 2 Chit. Q. B. 211; s. c., 2 Chit. 211; 3 Barn. & Ald. 420; *Ex parte* Watkins, 3 Pet. (U. S.) 193, 201; U. S. v. Lawrence, 4 Cranch C. C. 521; *Ex parte* Winder, 2 Cliff. (U. S.) 89; Matter of Keeler, Hempst. (U. S.) 311; *In re* Gregg, 15 Wis. 479; *In re* Griner, 16 Wis. 447; *Ex parte* Milligan, 4 Wall. (U. S.) 3; *Ex parte* Williamson, 4 Am. L. Reg. 27; *Ex parte* Campbell, 20 Ala. 89; *Ex parte* Partington, 13 Mees. & W. 682; King v. Suddis, 1 East. 314; *Ex parte* Kaine, 14 How. (U. S.) 103, 117; *Ex parte* Robinson, 6 McLean, (U. S.) 360. When it appears upon the party's own showing that there is no sufficient ground *prima facie* for his discharge, the court will not issue the writ. Sim's Case, 7 Cush. 292. The foundation upon which the writ is prayed should be laid before the court or judge who awards it. Hobhouse's Case, 3 Barn. & Ald. 422, 423. s. c., 2 Chit. Q. B. 211.

large discretion in habeas corpus cases, and his judgment on the law and facts will not be interfered with on appeal or review, except it be manifestly abused.¹

7. **Second Applications**.—See *RES JUDICATA*, *Post*.

8. **Application Must be Granted, When**.—Upon probable cause being shown, the writ of habeas corpus cannot be denied to the relator, for it then becomes a constitutional right; neither can it be denied where the granting of it is made an imperative duty by statute. The United States habeas corpus act, and that of most of the States, provides that it shall be granted without delay, upon the proper showing.²

9. **Application May be Refused, When**.—Courts of justice may refuse to grant the writ of habeas corpus where no probable ground for relief is shown in the petition, or where it appears that the petitioner is duly committed for felony or treason expressed in the warrant of commitment.³ So when it appears upon the applicant's own showing that there is no sufficient ground *prima facie* for his discharge, the court will not issue the writ. The application may be denied in the cases excepted in the habeas corpus acts of the various States; but it cannot be denied where the granting of it is made an imperative duty by statute.⁴ In the note are cases in which it has been held that the appli-

1. *Bently v. Terry*, 59 Ga. 555; *Mercein v. People*, 25 Wend. (N. Y.) 64; *U. S. v. Rouan*, (Ga.) 33 Fed. Rep. 117.

2. The existence of probable cause is shown in the following cases where courts have allowed the writ: *Ex parte Dobson*, 31 Cal. 497; *Ex parte Gibson*, 31 Cal. 619; *Republic of Texas v. Bynum*, Dallam (Tex. Dec.) 376; *Geyger v. Stoy*, 1 Dall. (Pa.) 135; *Com. v. Beck*, 1 Browne (Pa.) 277; *Devlin's Case*, 5 Abb. Pr. (N. Y.) 281; *Ex parte Des Rochers*, 1 Mc All. (U. S.) 68; *Martin's Case*, (Pa.) Purd. Dig. (10th ed.) 851; *Com. v. Curby*, 3 Brewst. (Pa.) 610; s. c., 8 Phila. (Pa.) 372; *Com. v. Atkinson*, 8 Phila. (Pa.) 375; *Linda v. Hudson*, 1 Cush. (Mass.) 385; *Lumm v. State*, 3 Port. (Ind.) 293; *Ex parte Millington*, 24 Kan. 214; *Donnelly v. State*, 2 Dutch. (N. J.) 463; *Attorney General v. Cleave*, 2 Dowl. 668; *Attorney General v. Fadden*, 1 Price 403; *Ex parte Griffith*, 5 Barn. & Ald. 730; *Clark v. Smith*, 3 C. B. 984; *Hyde v. Jenkins*, 6 La. 436; *People v. Mercein*, 8 Paige (N. Y.) 54; *In re Baker*, 29 How. Pr. (N. Y.) 485; *Respublica v. Jailer*, etc., 2 Yeates (Pa.) 258; *State v. Ward*, 3 Halst. (N. J.) 120; *Holsey v. Trevillo*, 6 Watts (Pa.) 403.

Herrick v. Smith, 1 Gray (Mass.) 50; *People v. Alexander*, 2 Am. L. Reg. 44; *People v. McLeod*, 1 Hill (N. Y.) 377; *People v. Divine*, 21 How. Pr. (N. Y.) 80; s. c., 11 Abb. Pr. (N. Y.) 90; 5 Park. Cr. (N. Y.) 62; *People v. Lomax*, 6 Abb. Pr. (N. Y.) 139; *Com. v. Sumner*, 5 Pick. (Mass.) 360; *Wood v. Neale*, 5 Gray (Mass.) 538; *Thompson's Case*, 122 Mass. 428; *May v. Shumway*, 16 Gray (Mass.) 86; *Sanborn v. Carleton*, 15 Gray (Mass.) 399; *Way v. Wright*, 5 Met. (Mass.) 380; *Com. v. Ridgway*, 2 Ashm. (Pa.) 247; *Jones v. Kelly*, 17 Mass. 116; *Com. v. Briggs*, 16 Pick. (Mass.) 203; *Ex parte Cobbett*, 3 Hurl. & N. 155; *U. S. v. Burdick*, 1 Dak. 142; *Williamson's Case*, 26 Pa. St. 9; s. c., 67 Am. Dec. 374; notes, 395.

3. *In Matter of Winder*, 2 Cliff. (U. S.) 89.

4. *Sim's Case*, 7 Cush. (Mass.) 293; *Ex parte Milligan*, 4 Wall (U. S.) 2; *Ex parte Campbell*, 20 Ala. 89; *Ex parte Kearney*, 7 Wheat. (U. S.) 38; *Com. v. Robinson*, 1 Serg. & R. (Pa.) 353; *Ex parte Pardy*, 1 L. M. & P. 26; *In re Griner*, 16 Wis. 447; *Ex parte Bushnell*, 8 Ohio St. 77; *In re Gregg*, 15 Wis. 479; note to *Williamson's Case*, 26 Pa. St. 9; s. c., 67 Am. Dec. 395, 398.

cation ought to be denied.¹

10. Petition Must be Verified.—This is generally required by statutory provisions, but was so at common law.² And it seems that the writ may be verified by an incompetent witness, as the writ will stand, not as a matter of evidence, but as a foundation for future proceedings.³

11. Mandamus to Compel Issuance of Writ.—Where one entitled to a writ of habeas corpus makes a proper application for it to one of the inferior courts, conforming to all the statutory requirements, and that court refuses to issue it, the supreme court will, by

1. *Ford v. Graham*, 10 C. B. 369; *Benns v. Mosely*, 40 Eng. L. & Eq. 342; s. c., 2 C. B. N. S. 116; *Ford v. Nassau*, 9 Mees. & W. 792; *Rex v. Parkyns*, 3 Barn. & Ald. 679, note; *Jones v. Danvers*, 5 Mees. & W. 234; *Ex parte Jones*, 4 Nev. & M. 340; *Ex parte Allen*, 3 Nev. & M. 340; *Attorney General v. Hunt*, 9 Price 147; *Ex parte Cobbett*, 3 Hurl. & N. 155; *Reg. v. Day*, 3 F. & F. 526; *Ex parte Wakely*, L. J. 1845. Com. L. Mag. Cas. 188; *Ex parte Cobbett*, 5 C. B. 418; *Com. v. Sheriff*, 16 Serg. & R. (Pa.) 304; *Ex parte Walton*, 2 Whart. (Pa.) 501; *Com. v. Supt. of Phila. Co. Prison*, 4 Brewst. (Pa.) 320; *Com. v. Jailer*, etc., 7 Watts (Pa.) 366; *Com. v. Waite*, 2 Pick. (Mass.) 445; *Ex parte Bowen*, 46 Cal. 112; *Ex parte Duncan*, 53 Cal. 410; *Ex parte Nixon*, 2 S. C. 4; *Earl of Ferrer's Case*, 2 Hawk. P. C. Curwood's Ed., ch. 44, § 18 p. 585, note 1; *Territory of Kansas v. Cutler*, McCahon (Kan.) 152; *People v. Conner*, 15 Abb. Pr. N. S. (N. Y.) 430; *Ex parte Moore*, 64 N. C. 815; *Lark v. State*, 55 Ga. 435; *Com. v. Holloway*, 42 Pa. St. 446; *Pember's Case*, 1 Whart. (Pa.) 439; *Reddill's Case*, 1 Whart. (Pa.) 445; *In re Mason*, 8 Mich. 70; *King v. Reynolds*, 6 T. R. 497; *King v. Edwards*, 7 T. R. 745; *Lea v. White*, 4 Sneed (Tenn.) 73; *Ex parte Royster*, 6 Ark. 29; *Com. v. Whitney*, 10 Pick. (Mass.) 434; *Lovejoy v. Webber*, 10 Mass. 101; *Ex parte Phillips*, 7 Kan. 48; *Denny v. Tyler*, 3 Allen (Mass.) 225; *Respublica v. Keeper of Jail*, 2 Yeates (Pa.) 349; *Com. v. Lecky*, 1 Watts (Pa.) 66; note to *Williamson's Case*, 26 Pa. St. 9; s. c., 67 Am. Dec. 395, 398.

2. See Statute 31 Car. II, § 58, subdivision 2; U. S. Rev. Stats. § 754; State Statutes; *In re Canadian Prisoners*, 7 Dowl. P. C. 208; *King v. Hobhouse*, 2 Chit. 207; s. c., 3 Barn. & Ald. 420; *Ex parte* —, 3 Dowl. 161. One making

an application for a habeas corpus must, if he apply for or on behalf of another, make an affidavit of authority or show that there is such a restraint that it cannot be given. *Ex parte Child*, 29 Eng. L. & Eq. 259; *Broomhead v. Chisolm*, 47 Ga. 390; *Com. v. Killacky*, 3 Brewst. (Pa.) 565; *Maples v. Maples*, 49 Miss. 393. But the affidavit is not of the essence of the writ, and in cases of urgent necessity, as where the party is under coercion, the writ will be allowed to issue without affidavit—in fact, to allow the prisoner to make it. *Hottentot Venus*, 13 East. 195; *State v. Philpot*, *Dudley* (Ga.) 46. Thus one prosecuting the writ in behalf of a lunatic must make an affidavit or show that the lunatic is so coerced as to be incapable of making one, and that he is duly authorized by the lunatic to promote the application. *Ex parte Child*, 15 Com. B. 238. As to children the writ may be maintained by one who is entitled to custody without the consent or privity of the child, and even against its express wishes; *People v. Mercein*, 3 Hill (N. Y.) 399; *In re Mitchell*, R. M. Charit. (Ga.) 489; *State v. Baldwin*, 5 N. J. Eq. 454; *Com. v. Taylor*, 3 Met. (Mass.) 73; but the application will be rejected unless it is authorized. The one promoting the application must either be entitled to custody, or have been duly authorized by the person detained. He must stand in the relation of parent, guardian, or some one entitled to the infant's custody, and if he does not, and has not been invited by the minor to sue out a habeas corpus, he has no right to do so. *Ex parte Child*, 29 Eng. L. & Eq. 259; *Hottentot Venus*, 13 East. 194; *Rex v. Clark*, 3 Burr. 1362; *In re Poole*, 2 Mc Arthur, (D. C.) 583.

3. *De Lacy v. Antoine*, 7 Leigh (Va.) 438.

mandamus in some jurisdictions, compel the writ to issue.¹ In others, *mandamus* lies to compel a judicial officer to hear evidence on habeas corpus, touching the guilt of a person brought before him, and to inquire into the legality of his imprisonment.² *Mandamus* also lies in some jurisdictions to compel the vacating of an order discharging the prisoner on habeas corpus.³ But *mandamus* does not lie to compel the rendition of any particular judgment.⁴ And it has been refused to compel the signing of a bill of exceptions in proceedings on habeas corpus.⁵ Neither will it issue to control the discretion of the lower court in bringing up a prisoner on habeas corpus, to testify on behalf of the defendant in a criminal case.⁶

12. Penalty for Refusing Writ.—It is doubted whether the refusal of a proper application for the writ of habeas corpus by a judge in vacation or at chambers in his discretion will subject him to the statutory penalty; but there is authority for the proposition that the chancellor and judges may refuse a proper application for the writ if applied for in term time, and the penalty will not attach.⁷

1. *Wright v. Johnson*, 5 Ark. 687; *Ex parte Allis*, 12 Ark. 101; *Ex parte Good*, 19 Ark. 410.

2. *Ex parte Mahone*, 30 Ala. 49; s. c., 68 Am. Dec. 111; *Wade v. Judge*, 5 Ala. 130; *Ex parte Champion*, 52 Ala. 311; *Ex parte Shandies*, 66 Ala. 134; *Ex parte Dunklin*, 72 Ala. 241. And to determine from the evidence whether he is or is not entitled to bail; *Ex parte Rhear*, 77 Ala. 92; also to compel the granting of an order to the sheriff compelling him to produce the prisoner's body before the judge. *Ex parte Shandies*, 66 Ala. 134.

3. *Ex parte State, In re Tate*, 76 Ala. 482; *Ex parte State, In re Mohr*, 73 Ala. 503.

4. See *Ex parte Shandies*, 66 Ala. 134; s. c., 11 Am. Rep. 832.

5. *Faust v. Judge*, 30 Mich. 266.

6. *Giboney v. Rogers, Judge, etc.*, 32 Ark. 462.

7. *Rex v. Hobhouse*, 2 Chit. 211; s. c., 3 Barn. & Ald. 420; *Yates v. Lansing*, 5 Johns. (N. Y.) 282; *Matter of Ferguson*, 9 Johns. (N. Y.) 239; *Ex parte Ellis*, 11 Cal. 226. Under the statute of 31 Car. II, officers authorized to grant the writ were subjected to a penalty for refusing it where it should have been granted. The reason for this was to obviate the former abuses, and the difficulty which was often experienced before the passage of that act in obtaining the writ in vacation time. The judges could not hear the proceedings, and they sometimes

honestly and sometimes corruptly refused all applications, whether well founded or not. Church on Habeas Corpus, § 17. This provision, however, did not destroy the discretion of the judge, either in term time or in vacation. He still had to determine whether there was probable cause, and if not, it was his duty to remand the prisoner. *Rex v. Hobhouse*, 2 Chit. 211; s. c., 3 Barn. & Ald. 420. Judicial tribunals having acquired jurisdiction of the writ had power to decide right or wrong, but they were governed by the rules of law collectible from precedent and principle. There is no penalty of this kind provided for in the habeas corpus act of the United States, but there is in the acts of most of the States. In some of them the statutes are silent as to any penalty in case of a refusal of the writ. In some the penalty applies only to a refusal of the writ by a judge in vacation or at chambers; while in others, the courts as well as the judges in vacation are not only subject to a penalty for refusing a habeas corpus, but also for unnecessarily delaying to issue it. Church on Habeas Corpus, § 96; note to *Williamson's Case*, 26 Pa. St. 9; s. c., 67 Am. Dec. 397. But of course it must be a proper application, and appear that the writ ought to issue. The order for the writ of habeas corpus to issue is a judicial act; but the issuance of the writ itself by the prothonotary or clerk is a ministerial act. *Matter of Nash*, 5 Park.

VI. ISSUANCE, DIRECTION AND SERVICE OF WRIT.—COSTS.—The writ should be directed to the person or persons having the defendant in custody,¹ and be served and returned according to the statutory directions. It may be amended like any other judicial process.² In federal practice the court may fix a reasonable fee to be paid by the petitioner in habeas corpus cases.³ And in many of the States the subject of costs and security against escape has been regulated by statute. Other state statutes are silent upon the matter.⁴ Where fees are allowed by statute, and different hearings upon a writ of habeas corpus are had, the officers are entitled to their fees for each.⁵ But a pardoned convict cannot be held in confinement in order to compel payment of costs adjudged against him.⁶ Costs in a habeas corpus proceeding for the custody of a minor child, in which the applicant fails, cannot be taxed to the county in which the application is made and heard, and where the applicant resides.⁷ Where the prisoner has been arrested by an officer under valid process, and has been committed to jail under such arrest, the officer is not liable for costs upon the prisoner being discharged from his custody upon habeas corpus.⁸ A court commissioner may issue the writ of habeas corpus, as well as judges and courts.⁹ The writ of *certiorari* is sometimes used as ancillary to that of habeas corpus.¹⁰

VII. THE RETURN.—1. Necessity of, and Rule of Action Upon.—The officer or person to whom the writ of habeas corpus is directed must, upon due service thereof, make a return thereto.¹¹ And where the return shows that the petitioner is regularly in custody, and insufficient reasons are assigned for his discharge, the writ will be dismissed and the prisoner remanded.¹² But if it shows that

Cr. (N. Y.) 473; s. c., 25 How. Pr. (N. Y.) 307; 16 Abb. Pr. (N. Y.) 281; Nash v. People, 36 N. Y. 607.

1. Com. v. Ridgway, 2 Ashm. (Pa.) 247. If this cannot readily be determined it may be addressed to anyone countenancing or consenting to the illegal detention or restraint. People v. Mercein, 3 Hill (N. Y.) 399. The supreme court of the United States, having jurisdiction in all cases affecting ambassadors, other public ministers and consuls, etc., may doubtless, in the exercise of that jurisdiction, issue the writ of habeas corpus to any part of the United States. Const. U. S., art. 3, § 6. In other cases the jurisdiction of this court is appellate.

2. Durming v. Kettle, 2 Cro. Eliz. 543; *Ex parte* Davies, 5 Scott 241; s. c., 6 Dowd. 181.

3. *In re* Moy Chee Kee, (Cal.) 33 Fed. Rep. 377.

4. See State Statutes.

5. Ware v. State, 33 Ga. 338.

6. *Ex parte* Gregory, 56 Miss. 164.

7. State v. Collins, 54 Iowa 441.

8. Hammond v. People, 32 Ill. 446. But see Mathews v. Walker, 57 Miss. 337, for circumstances under which a sheriff was charged for the cost of keeping the prisoner in jail, after refusing to give him up.

9. *In re* Crow, 60 Wis. 349; s. c., 30 Alb. L. J. 210.

10. *Ex parte* Lange, 18 Wall. (U. S.) 163; Steiner v. Fell, 1 Dall. (Pa.) 22; *Ex parte* Crews, 78 Ala. 457; State v. Niel, (Ark.) 3 S. W. Rep. 631; Mercein v. People, 25 Wend. (N. Y.) 64; 35 Am. Dec. 653; *In re* Crow, 60 Wis. 349; *In re* Snell, 31 Minn. 110; Wales v. Whitney, 114 U. S. 571; State v. Buckham, 29 Minn. 462.

11. *Ex parte* Hill, 5 Nev. 154; and this duty applies to a United States marshal in response to a writ from a state court or judge. *Id.* Ableman v. Booth, 21 How. (U. S.) 506; Robb v. Connolly, 111 U. S. 624; *In re* Robb, 64 Cal. 433.

12. *In re* Ho Quan, 8 Pac. C. L. J. 51; Ah Sing, 8 Pac. C. L. J. 213.

the imprisonment is illegal, or that there is no reasonable ground for detention, the prisoner will be discharged.¹

2. Form.—Signature and Direction.—The return should be in writing, signed by the party making it, and addressed to the court or officer before whom it is returnable. It must show by whom and for what cause the prisoner was committed.²

3. Verification.—At common law no verification of the return was necessary; and it was not the practice to verify it.³ But this is now generally required by statute, unless the return is made by a sworn public officer, and in his official capacity.⁴

4. Receiving Return and Hearing.—While the writ must be returned by the same person to whom it is directed, it is not absolutely necessary that the party to whom the writ is addressed should appear before the court or judge in all cases unless so required by statute. If the prisoner be produced, the hearing may be had in the respondent's absence, and the return will be received and acted upon.⁵ If a writ of habeas corpus is returnable at a certain day, the court will not receive the return until return day; but if it be returnable immediately, the court will not refuse to file it when it comes in.⁶

5. Return May be Enforced by Attachment.⁷—But a reasonable time should be allowed for the preparation of a return, and the

1. *In re Slater*, 9 U. C. L. J., O. S. 21. Where the detention or imprisonment is under a statute, the court or judge should discharge the prisoner, unless satisfied by unequivocal words in the statute that the statute warrants the imprisonment. *Id.* So, when the sufficiency of the warrant of commitment is doubtful; *In re Bebe*, 3 Prac. Rep. (U. C.) 270; in which cases the courts will always incline in favor of liberty. *Queen v. Boyle*, 4 Prac. Rep. (U. C.) 264. So, unless the return shows that the caption and detention are legal at the time of the service of the writ, the prisoner ought to be discharged; and a return showing a caption and detention upon valid process since such service is not sufficient. *In re Doo Woon*, (Oreg.) 18 Fed. Rep. 898.

2. *Barkham's Case*, 3 Cro. Car. 507; *Ex parte Trader*, (Tex.) 6 S. W. Rep. 533. A mere want of form, however, will not render the return invalid if it discloses a good cause of detention. *King v. Bethel*, 5 Mod. 21. A mistake in the address or direction of a return is not so material as to vitiate it. *Crosby's Case*, 2 W. Black. 754. In fact, the direction may be considered surplusage, and the return be regarded as valid, though it have no direction at all. But the return must be signed by the person to whom the writ is di-

rected, or some explanation be made why it is not done. A failure to do this is error. *Seavey v. Seymour*, 3 Cliff. (U. S.) 455. The papers and proceedings before a chancellor upon a writ of habeas corpus, should be returned to the clerk of the circuit court of the county where the writ is heard, or, if there be a prosecution pending concerning the matter, then to the clerk of the circuit court of the county in which it is pending. *Jackson Ex parte*, 45 Ark. 158.

3. *Watson's Case*, 9 Ad. & El. 794; *In re Hakewill*, 22 Eng. L. & Eq. 399.

4. *In re Neill*, 8 Blatchf. (U. S.) 165.

5. *In re Hakewill*, 22 Eng. L. & Eq. 395; s. c., 12 Com. B. 223. The return of a habeas corpus into the supreme court in term time rests in the discretion of the judge who allowed the same; and the regular business of that court will not be put aside to hear such returns where the judicial system will permit them to be heard in other courts with less delay and inconvenience. *Ex parte Shaw*, 7 Ohio St. 81; s. c., 70 Am. Dec. 55.

6. *Mash's Case*, 2 W. Black. 804.

7. *King v. Winton*, 5 T. R. 89; *Rex v. Wright*; 2 Stra. 901; *Ex parte Harrison*, 2 Smith 409; *Stacy's Case*, 10 Johns. (N. Y.) 327; *State v. Bradley*, 60 Ill. 390.

court must be satisfied that there has been a willful disobedience, or a contempt of its process before it will award an attachment.¹ But an attachment will be avoided, if possible, where it is likely to bring on a conflict between the state and federal governments.²

6. Return Should be Liberally Construed.³

7. Certainty.—While the return to a habeas corpus should be liberally construed, the law requires certainty in such return. It is meant by this that the facts should be fully, clearly, and tersely stated.⁴ Where custody is denied, a return to be full should deny the custody, power, possession, or control of the one alleged to be detained, not only at the time of the return, but also at the service of the writ.⁵ Returns to writs of habeas corpus are watched with jealous scrutiny by the courts, particularly those referring to the custody of infants. If the conscience of the court is not satisfied, in these cases, that all the material facts are disclosed, or if there be any attempt at evasion, the return will be declared insufficient.⁶

8. Detention; Authority for; Copy of Minutes of Court; Mittimus; Warrant of Commitment.—A certified copy of the minutes of court, or of the record of a sentence to imprisonment, is sufficient to authorize the detention of the prisoner, without any warrant or *mittimus*.⁷

1. *Stockdale v. Hansard*, 8 Dowl. 474; *U. S. v. Bollman*, 1 Cranch C. C. 376; *State v. Raborg*, 2 South. (N. J.) L. 545.

2. *In re Kemp*, 16 Wis. 379; *Ex parte Field*, 5 Blatchf. (U. S.) 63, 83.

3. *King v. Bethel*, 5 Mod. 19; *People v. Nevins*, 1 Hill (N. Y.) 154; *King v. Lyme Regis*, 1 Doug. 158.

4. *Rex v. Horne*, 2 Cowp. 682; *King v. Lyme Regis*, 1 Doug. 159; *Eden's Case*, 2 Maul. & Sel. 225; *Canadian Prisoner's Case*, 9 Ad. & El. 731; s. c., 36 Eng. Com. L. 254, 285; *Seeles et al.*, 3 Cro. Car. 557; *Brice's Case*, *id.* 593; *State v. Bridges*, 64 Ga. 146. A return stating a capital conviction for high treason and felony, and a commutation of the sentence is sufficient without specifying the treason or felony. See *Canadian Prisoner's Case*, *supra*. But a return showing an award to prison "to remain there until further order taken," is uncertain. *Seeles et al.*, 3 Cro. Car. 557. So, where no special cause of commitment is shown. *Brice's Case*, *supra*. A statement of the exact day when the prisoner was taken is seldom material, so it be within the statute of limitations. *Hutchins v. Player*, 1 Bridg. 275. But under a statute where the question of distance is material in a return to a writ of habeas

corpus, it should be averred with certainty; *Deybel's Case*, 4 Barn. & Ald. 243; and in setting forth an offence it should be sufficiently stated. *Souden's Case*, 4 Barn. & Ald. 294. So where a magistrate commits a party "upon due proof," etc., under statute, it is necessary to insure certainty, to state distinctly what proof was given. *Nash's Case*, 4 Barn. & Ald. 295.

5. *Regina v. McCarthy*, 2 F. & F. 272; *State v. Philpot*, *Dudley* (Ga.) 46, 58.

6. *U. S. v. Green*, 3 Mason (U. S.) 482; *Com. v. Reed*, 59 Pa. St. 425.

7. *People v. Baker*, 89 N. Y. 460; *Ex parte Wilson*, 114 U. S. 417. And no warrant of commitment need necessarily be returned unless one exists. It is simply an authority to convey the prisoner to the penitentiary, and need not necessarily be left with the keeper. *People v. Baker*, 89 N. Y. 460. A commitment under the seal of a court and signed by its clerk will justify a jailer in taking and keeping a prisoner. *Sheehan's Case*, 122 Mass. 445. Where the return shows that the petitioner has been confined under a void judgment of a court of competent jurisdiction, he cannot be legally restrained of his liberty under the warrant issued at the commencement of the proceedings

9. **Return May be Amended.**—At any time before the case is finally disposed of, the return to a writ of habeas corpus may be amended when it is deemed by the court to be subservient to the ends of justice.¹

10. **Use of Affidavits to Fortify Return; Conclusiveness of Return.**—The return to a habeas corpus, according to the later decisions, may be fortified by affidavits.² And it will be held evasive and bad if it is ambiguous upon its face, unless it is fortified by affidavit.³ The officer's return to a habeas corpus, however, is not of itself absolutely conclusive and may be contradicted. The rights of the relator are not dependent upon the officer's return; and the contradictory proof should be heard.⁴ But the prisoner must traverse the return, or its allegations will be admitted as true, thus preventing the allegations of his petition from being further considered.⁵

11. **What Return Justifies Dismissal of Writ.**—If it appears that the prisoner in whose behalf a writ of habeas corpus has been issued is detained by virtue of the final judgment or decree of a court of competent jurisdiction, either civil or criminal, the prisoner, as a general rule, will be remanded and the writ dismissed, if no fatal defect is shown in such judgment or decree.⁶

against him. *Ex parte Bernert*, 7 Pac. C. L. J. 460.

1. *Patterson v. State*, 49 N. J. L. 326; *Watson's Case*, 9 Ad. & El. 731; s. c., 36 Eng. Com. L. 285; 1 Per. & Dav. 516; *In re Clarke*, 2 Ad. & El. Q. B. 619; s. c., 2 Gale & Dav. 780; *In Matter of Hopson*, 40 Barb. (N. Y.) 40; *People v. Cavanaugh*, 2 Park. Cr. R. (N. Y.) 658; *Hutchins v. Player*, 1 Bridg. 275. But in the earlier cases the courts did not favor such amendments. 2 *Lilly's Reg.* 2 D.; *Anon.* 1 Mod. 103; *Chamber's Case*, 3 Cro. Car. 133; *Ex parte Eden*, 2 Maul. & Sel. 229; *In Matter of Power*, 2 Russ. 583; *Re Timson*, L. R. Exch. 257.

2. *In Matter of Power*, 2 Russ. 583; *Ex parte Clarke*, 2 Gale & Dav. 780; s. c., 2 Ad. & El. Q. B. 619; *People v. Baker*, 89 N. Y. 460. The return, however, imports verity. It is not necessary to prove it, and it need not be supported by affidavit or otherwise until it is impeached. *Queen v. Batchelder*, 1 Per. & Dav. 516; s. c., 9 Ad. & El. 731; 36 Eng. Com. L. 285; *In re Milburn*, 59 Wis. 24.

3. *Regina v. Roberts*, 2 F. & F. 272.

4. *In re Hardigan*, 57 Vt. 100. See SUBDIVISION 19, *infra*.

5. *Evans v. McEwen*, 19 N. Y. Week. Dig. 196; cited in 5 Crim. L. Mag. 747; *In re Milburn*, 59 Wis. 24. When the return to a writ of habeas

corpus contains the whole record of the court in the case, such return constitutes a full, complete and decisive answer to every allegation in the petition for the writ, and, being admitted as true, negatives the same. *In re Waldrip*, 1 Ariz. 482. An insufficient traverse, as one not denying the facts of the commitment, admits the return. *People v. New York, etc., Protectors*, 106 N. Y. 604. A petitioner may make a full answer to the return after the latter comes in, or he may anticipate it and thus respond in advance by a verified petition. *Seavey v. Seymour*, 3 Cliff. (U. S.) 439, 455. Where an execution against the person is returned and the body produced, it is not proper practice for the petitioner to demur. He should answer the return and show the imprisonment to be unlawful, if he can. *Mowry's Case*, 12 Wis. 52.

6. *People v. Shea*, 3 Park. Cr. Rep. (N. Y.) 562; see *infra*, as to attacking judgments. Where the return shows lawful custody under requisition proceedings the prisoner will be remanded. *Ex parte Bailey*, (Cal.) 3 Pac. Rep. 107. And the prisoner is legally in custody, as a general rule, if the offence is one over which the court had jurisdiction. *In re Davison*, (N. Y.) 21 Fed. Rep. 618. In fact, it is held that, where the return shows that

So where the return to a state court shows that the prisoner is held under federal process, the state court cannot go behind the same to make any further inquiry. It cannot continue the proceedings, and will remand the prisoner, or direct him to remain in the charge of the United States officer; and the writ of habeas corpus will be dismissed.¹

12. Contempt of Court, What Return Constitutes.—A failure to make any return to a writ of habeas, or an evasive, false or insufficient return, constitutes a contempt of court.²

13. Evidence Given in Prisoner's Absence.—Where the return to a habeas corpus fails to show that the evidence heard before the committing magistrate was given in the presence of the party charged, the court will discharge the prisoner.³

14. Documents; Return of.—The return need not specially set out documents referred to.⁴ But the court or officer hearing the return to a habeas corpus may compel the return of any warrant, order, or document which he has reason to think exists.⁵

15. Demand for Child.—Before respondent can be placed in the wrong and subjected to legal proceedings by the petitioner on account of the custody of a child which the petitioner left with respondent, as shown by the return to a habeas corpus, it must appear upon the return that the petitioner has demanded the custody of the child, and that the respondent, having the power to do so, has refused to restore the child to him.⁶

the prisoner is held by legal process, the writ of habeas corpus raises only the question of the jurisdiction of the court or officer to issue such process. *In re Eldred*, 46 Wis. 530; *In re Milburn*, 59 Wis. 24. The prisoner will be remanded if a good judgment be returned, although the return be otherwise informal and defective. *King v. Bythell*, 12 Mod. 75. A judgment by a court of competent jurisdiction, valid on its face, is an unanswerable return to a writ of habeas corpus, issued for the release of a person imprisoned by virtue of such judgment. *Smith v. Hess*, 91 Ind. 424.

1. *Ableman v. Booth*, 21 How. (U. S.) 506; *Ex parte Hill*, 5 Nev. 154; *In Matter of Hopson*, 40 Barb. (N. Y.) 34; *In re Booth*, 3 Wis. 2; *Tarble's Case*, 13 Wall. (U. S.) 397. The prisoner in such a case must resort to the federal tribunals for relief. *Tarble's Case*, 13 Wall. (U. S.) 397; *In Matter of Hopson*, 40 Barb. 34. See *infra*, as to conflict of jurisdiction between state and federal authorities.

2. *Viner's Case*, Freem. (K. B. & C. P.) 389, 401, 522; *Wyatt's Reg.* 215; *Crowley's Case*, 2 Swanst. 73; *Rex v. Winton*, 5 T. R. 89; *State v. Philpot*, *Dudley* (Ga.) 46; *Williamson's Case*,

26 Pa. St. 9; s. c., 67 Am. Dec. 374; 5 Pa. L. J. Rep. 365; 3 Am. L. Reg. 729. In cases where the party is restrained of his liberty without the authority of legal process, and where the return is usually made by a person having an interest in the question, and who has exercised the restraint upon his own personal responsibility such as a parent, husband, master, or guardian of the person imprisoned, it is very proper that the facts which they state in the return should be open to investigation, and the court will not discharge one against whom an attachment has been issued for contempt, unless the conscience of the court is satisfied that all the material facts have been disclosed, notwithstanding the return declares that the party is not in the "possession, power, or control" of defendant. 3 Hill (N. Y.) 660 (note, appendix); *People v. Cassels*, 5 Hill (N. Y.) 168; *U. S. v. Green*, 3 Mason (U. S.) 482; *In Matter of Waldron*, 13 Johns. (N. Y.) 418.

3. *Queen v. Tordoff*, 5 Ad. & El. Q. B. 933; *In re Hammond*, 9 Ad. & El. Q. B. 92.

4. *Watson's Case*, 9 Ad. & El. 731.

5. *Patterson v. State*, 48 N. J. L. 381.

6. *Speer v. Davis*, 38 Ind. 271.

16. Sufficient Reasons for Non-Production of Body.—It is not always indispensably necessary, on habeas corpus proceedings, that the body of the one in custody should be produced in order to administer justice, though the command of the writ is to produce the body.¹

17. Cause of Detention; Statement of.—The return should show an express and certain cause of commitment.² Upon the return to a writ of habeas corpus the cause of imprisonment ought to appear as specifically and certainly to the judges before whom it is returned, as it did to the court or person authorized to commit.³

1. Thus, where children have been placed out, or given up to a charitable institution, under a contract that the parent is not to seek to discover them, or to deprive a family of them, the court will not require the children to be brought into open court, nor their residence disclosed to their parents. *Dumain v. Gwynne*, 10 Allen (Mass.) 271. But where there is a contest between rival claimants for the custody of a child, nothing short of the production of the body will satisfy the exigency of the writ. *Com. v. Kirkbride*, 7 Phila. (Pa.) 1. The discharge of an insane man by his keeper, who is satisfied of his restoration to reason, and before the return day of the writ, will also excuse the non-production of the body. *Id.* So where the prisoner is a lunatic on the return day of the writ. *Rex v. Clarke*, 3 Burr. 1363. So where the prisoner is sick. *Ex parte Bryant*, 2 Tyler 269. So, if he is dead; *Dalton's Sheriff* 251; or before the return day has been discharged out of respondent's custody by competent legal authority. *King v. Bethnen*, Andr. 281. And on the return to the writ before a state court or judge that the imprisoned party is "held by an officer of the United States under what in truth purports to be the authority of the United States" the respondent is not, according to the earlier cases, bound to produce the body of the prisoner. *Ableman v. Booth*, 21 How. (U. S.) 506; *Tarble's Case*, 13 Wall (U. S.) 397; *Ex parte Sifford*, 5 Am. L. Reg. 659; *In re Neill*, 8 Blatchf. (U. S.) 156; *In Matter of Hopson*, 40 Barb. (N. Y.) 34. But in *Robb v. Connolly*, 111 U. S. 624, it is decided by the supreme court of the United States that the state court or judge has jurisdiction to inquire into the facts of the case and the alleged cause of detention, and that for this purpose it is proper that the prisoner should be brought into the presence of

the court, in obedience to the command of the writ, whereupon the prisoner has a right to traverse the return; overruling *In re Robb*, (Cal.) 19 Fed. Rep. 26, on this point. And a failure to produce a prisoner held under federal authority before a state court has been held to constitute a contempt. *In re Robb*, 64 Cal. 431.

2. Comyn's Dig., Habeas Corpus, E. 3.

3. Bacon's Abr., Habeas Corpus, § 10. Where there is a warrant in writing it must be returned. *King v. Clerk*, 1 Salk. 349. The whole commitment must be set out. *In matter of Power*, 2 Russ. 583. The return need not be confined to the officer's warrant. *Watson's Case*, 9 Ad. & El. 731. A commitment in open court, for legal cause, is valid and the officer can justify the prisoner's detention upon such a commitment, by returning a record of the commitment as the cause. *Randall v. Bridge*, 2 Mass. 549; *People v. Nevins*, 1 Hill (N. Y.) 154. So where the minutes of court imperfectly describe the crime of which the relator has been convicted, the respondent when called upon to make a return should resort to the records of the court to show what the precise crime was. *People v. Baker*, 89 N. Y. 460. Where the sheriff has, in obedience to an order of court, committed a prisoner in execution, after conviction and sentence he may make a copy of the record to return. *Randall v. Bridge*, 2 Mass. 549. The return need not be confined to the simple copy of the order of commitment, but may include copies of any other orders or proceedings referred to in the order of commitment, and showing the grounds of commitment. *Case of Yates*, 4 Johns. (N. Y.) 314. In cases of restraint, not by legal process, but by private authority, as in the custody of children the return must set forth all the facts which are relied on

18. Cause of Arrest; Statement of.—The original warrant of commitment may be irregular, but if a regular warrant of detention for the same offence, issued subsequently to the writ of habeas corpus, be returned, the prisoner will not be discharged.¹ And if on the return day the respondent shows a legal cause for the detention of the prisoner, the relator will be remanded or bailed, notwithstanding the original taking was unlawful.²

19. Answering Return.—The return to a writ of habeas corpus was not controvertible at common law, with a view to the discharge of the prisoner.³ But it could be confessed and avoided.⁴ In the United States the judicial and statutory rule is to hear allegations and evidence controverting the return.⁵

20. Returns; Good and Bad.—A return of facts which show a cause for detention will be sufficient if their truth or sufficiency are not questioned by the prisoner at the hearing.⁶ But a return not specifying for what cause or matter a party was examined is too general and insufficient.⁷ Sometimes a return is insufficient even though it be in the general form of return and denial prescribed by statute; and the court will direct the respondent to specifically answer the matters alleged in the petition.⁸

VIII. EXTENT OF INQUIRY ON RETURN.—1. *In the Federal Courts.*—(a) *Jurisdiction.*—The jurisdiction or power to hear and determine a cause may at all times be inquired into, either before or after a judgment of final conviction, but where the power or jurisdiction exists, its exercise will not be inquired into. Where the proceedings are entirely void, the party may be discharged, but not so where they are voidable only.⁹

to justify the detention U. S. v. Green, 3 Mason (U. S.) 482; Com. v. Reed, 59 Pa. St. 425.

1. *Ex parte* Cross, 2 Hurl. & N. 354; Queen v. Richards, 5 Ad. & El. Q. B. 926; s. c., 48 Eng. Com. L. 926; *Ex parte* Page, 1 Barn. & Ald. 568.

2. Dow's Case, 18 Pa. St. 37.

3. Church on Habeas Corpus, § 166.

4. Church on Habeas Corpus, § 166.

5. See SUBDIVISION 10, *supra*; Williamson's Case, 26 Pa. St. 9; s. c., 67 Am. Dec. 374; 5 Pa. L. J. Rep. 365; 3 Am. L. Reg. 729; *Ex parte* Jenkins, 2 Wall. Jr. (U. S.) 521; Nelson v. Cutler, 3 McLean (U. S.) 326; *Ex parte* Smith, 3 McLean (U. S.) 121; U. S. v. Green, 3 Mason (U. S.) 482; U. S. Rev. Stats., § 760, and State Statutes.

6. Patterson v. State, 48 N. J. L. 381. As against general exceptions, the return to a writ of habeas corpus, brought by a father to regain the custody of his child from a statutory guardian, and alleging the unfitness of the relator to have such custody, and the care, training and education of the child, will be held sufficient. Brooke

v. Logan, 112 Ind. 183. So the return of a sentence rendered by a court of competent jurisdiction is sufficient without setting out the particular circumstances necessary to warrant the sentence. King v. Suddis, 1 East. 306. For other instances of good returns, see *Ex parte* Bryant, 2 Tyler 269; Queen v. Mount, 12 Eng. Rep. Moak's Notes 181; *In re* Fell, 3 Dowl. & L. 373; *Re* Brennan, 2 Cox C. C. 193; King v. Suddis, 1 East. 306; King v. Bethnen, Andr. 281; Dom. Rex. v. Wright, 2 Stra. 901.

7. Thomlinson's Case, 6 Co. (Fraser) 340; 14 Vin. Abr. 218. For other instances of insufficient returns, see Emerton's Case, Freem. K. B. & C. P. 389. Shaw v. Smith, 8 Ind. 485; Sears v. Dessar, 28 Ind. 472; Adcock v. Fiske, 8 Scott 138. *In re* Fletcher, 1 Dowl. & L. 726; *In re* Fell, 3 Dowl. & L. 373; Taylor v. Reignolds, 12 Mod. 666.

8. In Matter of Jackson, 15 Mich. 418.

9. *Ex parte* Parks, 93 U. S. 18; *Ex parte* Curtis, 106 U. S. 371; *Ex parte* Carll, 106 U. S. 521; *Ex parte* Wat-

(b) *Conflict of Jurisdiction*.—The federal courts determine the question of their own jurisdiction, and no state court can make any inquiry into it, after the return to a habeas corpus, apprising the state court or judge that the party is in custody under the authority of the United States.¹ But where a party is in a state prison for an act done in pursuance of a law of the United States, he may obtain relief from the federal tribunals; and those courts will inquire into the jurisdiction or power of a state court to sentence a party, or to commit him to prison, under an act of the legislature creating or attempting to create the offence for which the prisoner is convicted, and for which he is held in custody, and which is in violation of any provision of the constitution of the United States, a law thereof, or the provisions of a valid treaty.² The general rule is, that if a person be imprisoned under a criminal or civil process of one jurisdiction, the other cannot take him from such custody for any purpose whatever.³

(c) *Commitment; Necessity of; and Inquiry Where None Exists*.—The question of jurisdiction does not depend upon the fact whether there has been a formal commitment or not, or whether the prisoner is in jail; but the sole inquiry is, whether he is held in unlawful restraint of his liberty "under or by color of the authority of the United States."⁴ A technical or formal commitment is not necessary where a federal judge or court issues a writ of habeas corpus in the exercise of its original jurisdiction, and this applies to the United States supreme court, as well as to

kins, 7 Pet. (U. S.) 568; *In re Bogart*, 2 Saw. (U. S.) 396, 401; *Ex parte Lange*, 18 Wall. (U. S.) 178; *Ex parte Yerger*, 8 Wall. (U. S.) 85; *Ex parte Kenyon*, 5 Dill. (U. S.) 385; *Ex parte Shaffenberg*, 4 Dill. (U. S.) 271; *Ex parte Bridges*, 2 Wood (U. S.) 428. Thus, where the question is whether an act charged is a crime against the laws of the United States, an error in the decision will not affect the jurisdiction of the court nor warrant a discharge on habeas corpus. *Ex parte Siebold*, 100 U. S. 371. So where an inferior court has committed a party for a contempt, having jurisdiction of the matter, the supreme court will not grant the writ of habeas corpus for his relief, but if either a state court or a federal court exceeds its jurisdiction or powers in making a commitment for a contempt, where the acts of alleged contempt are in the performance of a duty created by the constitution or a law or a treaty of the United States, the party will be discharged. *Ex parte Kearney*, 7 Wheat. (U. S.) 38; *Case of Electoral College*, 1 Hughes (U. S.) 571.

1. *Ableman v. Booth*, 21 How. (U.

S.) 506; *Tarble's Case*, 13 Wall. (U. S.) 397.

2. *Ableman v. Booth*, 21 How. (U. S.) 506; *Tarble's Case*, 13 Wall. (U. S.) 397. In such cases the defect is not mere error or irregularity; it is not a mere wrongful exercise of jurisdiction, but it is defective in substance. The state court has no power or jurisdiction in the premises, for the prisoner is in custody in violation of a treaty of the United States, or a law or the constitution thereof. *In re Wong Yung Qui*, 9 Rep. 366.

3. *U. S. v. Jailer, etc.*, 2 Abb. (U. S.) 267, 282. The federal courts have no power to issue a writ of habeas corpus to bring up a party serving out a life sentence passed by a state court, for a state offence, for any other purpose than to be used as a witness. *Ex parte Dorr*, 3 How. (U. S.) 103. This fact appearing in the return, the inquiry ceases. Those courts only interfere where the party is in state custody for violating some federal law, constitution or treaty. *Id.*

4. *In Matter of McDonald*, 9 Am. L. Reg. 692.

the inferior federal tribunals.¹ And where one is held by mere arbitrary will, and without any process, warrant or any other legal authority, the cause of detention, restraint or imprisonment will be examined into as well without a commitment as where it exists.² But outside of its original jurisdiction "affecting ambassadors, other public ministers, consuls," etc.,³ the supreme court of the United States has authority to issue the writ only in the exercise of its appellate jurisdiction, and a decision that the individual shall be imprisoned must always precede the application for a writ of habeas corpus;⁴ and, therefore, can make no inquiry, in the exercise of such appellate jurisdiction, where there has been no commitment by any magistrate, court or judge; for there would then be no action of a court over which it has appellate or revisory power, and which could come before it for revision.⁵ Outside of its original jurisdiction, the supreme court limits itself to cases pending in or decided by those courts over which it has appellate or revisory power—over tribunals inferior to itself, or from whose decisions an appeal might ultimately be taken to that court.⁶

(d) *Inquiry Into and Behind Commitment*.—Before a final judgment given by a court of competent jurisdiction, the federal courts will openly and freely investigate into the warrant of commitment by which a party is imprisoned, or go behind it and inquire into the facts upon which it is based.⁷ Or inquire into the regularity of the warrant of arrest.⁸

(e) *Commitment by United States Commissioner*.—Where there is some evidence tending to show that a party who has been committed by a United States commissioner for an offence against the laws of the United States is guilty, the sufficiency of such evidence is not open to review on a proceeding by habeas corpus and *certiorari*. The commissioner is to judge of the sufficiency of the evidence, and while the relator is held according to his judgment upon any competent evidence he is not held in custody contrary to law.⁹ Where a party has been committed by a United States

1. In Matter of McDonald, 9 Am. L. Reg. 675.

2. *Id.*

3. Constitution of U. S., art. 3, (Judicial Power).

4. *Ex parte McCardle*, 7 Wall. (U. S.) 506; *Ex parte McCardle*, 6 Wall. (U. S.) 318; *Ex parte Yerger*, 8 Wall. 85; *Ex parte Bollman*, 4 Cranch (U. S.) 75; *Ex parte Burford*, 3 Cranch (U. S.) 448; *Ex parte Watkins*, 7 Pet. (U. S.) 568; *U. S. v. Hamilton*, 3 Dall. (U. S.) 17; *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Ex parte Kearney*, 7 Wheat. (U. S.) 38.

5. Cases cited in preceding note.

6. *Ex parte Bollman*, 4 Cranch (U. S.) 75; *Ex parte Watkins*, 3 Pet. (U. S.) 193; *Ex parte Barry*, 2 How. (U.

S.) 65; *Ex parte Dorr*, 3 How. (U. S.) 104; *Barry v. Mercein*, 5 How. (U. S.) 103; In Matter of Metzger, 5 How. (U. S.) 184; *In re Kaine*, 14 How. (U. S.) 110; and authorities there cited.

7. *Ex parte Burford*, 3 Cranch (U. S.) 448; *Ex parte Watkins*, 3 Pet. (U. S.) 193; *Ex parte Bollman*, 4 Cranch (U. S.) 75; *Bennett's Case*, 2 Cranch Cr. Ct. 612; 1 U. S. Stats. at Large, 81.

8. *Ex parte Jenkins*, 2 Wall. Jr. (U. S.) 528.

9. *In re Stupp*, 12 Blatchf. (U. S.) 501, 529; *In re Byron*, (N. Y.) 18 Fed. Rep. 722. But in the earlier case of *In re Martin*, 5 Blatchf. (U. S.) 303, it was held on the contrary that the court on a habeas corpus, was not concluded

commissioner to await the action of the grand jury, and no indictment or information is filed against him after they meet, he is entitled to be discharged.¹

2. In State Courts Before Indictment.—(a) *Practice Not Uniform.*—As to the extent of inquiry on habeas corpus, in state courts before indictment, there are two lines of cases: 1. Those which hold that, upon a commitment made by a committing magistrate, regular and valid upon its face, the only open question before a court or judge on the hearing of a return to the writ of habeas corpus is the jurisdiction of the committing magistrate.² 2. Those

by the finding of the committing magistrate, but might go behind his order of commitment, and, by a *certiorari*, look into the evidence taken before him, and would not be concluded by the finding of the committing magistrate. This was not, however, an extradition proceeding as in the two first cases cited *supra*.

1. *In re Esselborn*, 20 Blatchf. (U. S.) 1.

2. *State v. Asselin*, T. U. P. Charl. (Ga.) 184; *Ex parte Jackson*, 45 Ark. 158; *Merriman v. Morgan*, 7 Oreg. 68; *State v. Bloom*, 17 Wis. 521; *In re Eldred*, 46 Wis. 530; *In re Booth*, 3 Wis. 1; *In re Booth*, 3 Wis. 157; *In re Blair*, 4 Wis. 522; *In re O'Connor*, 6 Wis. 288; *In re Falvey*, 7 Wis. 630; *In re Boyle*, 9 Wis. 264; *In re Tarble*, 25 Wis. 390; *In re Perry*, 30 Wis. 268; *In re Crandall*, 34 Wis. 177; *In re Semler*, 41 Wis. 517; *In re Pierce*, 44 Wis. 411; *Com. v. Carlisle*, Bright. (Pa.) 36; *Com. v. Taylor*, 11 Phila. (Pa.) 386; *Schofield v. Root*, 12 Phila. (Pa.) 333; *Hathaway v. Holmes*, 1 Vt. 405, 417; *Ex parte Kellogg*, 6 Vt. 509; *In re Powers*, 25 Vt. 261; *In re Tracy*, 25 Vt. 96; *In re Hosley*, 22 Vt. 363; *In re Hackett*, 53 Vt. 354; *In Matter of Harris*, 47 Mo. 164; *Phinney's Case*, 32 Me. 440; *Robb v. McDonald*, 29 Iowa 330; *Ex parte Parker*, 11 Neb. 309; *In re Balcom*, 12 Neb. 316; *Peltier v. Pennington*, 2 Green (N. J.) 312; *In Matter of Corryell*, 22 Cal. 178; *People v. Cassels*, 5 Hill (N. Y.) 165; *Ex parte McCullough*, 35 Cal. 101; *People v. Tompkins*, 1 Park. Cr. R. (N. Y.) 224; *People v. Supt.*, etc., 8 Abb. Pr. (N. Y.) N. S. 112; *People v. McCormack*, 4 Park. Cr. R. (N. Y.) 9; *In re Milburn*, 59 Wis. 24; *Matter of Wright*, 65 How. Pr. (N. Y.) 119, affirming s. c., 63 How. Pr. (N. Y.) 345; *Sheehan's Case*, 122 Mass. 445; *State v. Persdorf*, 33 La. Ann. 1411. Of course, if no jurisdiction exists in

the committing court or magistrate to issue the process by which the prisoner is held, he will be discharged; but if jurisdiction did exist he will be either bailed or remanded; see cases cited *supra*. Jurisdiction is always an open question and may be inquired into by any court or judge competent to issue the writ. *In re Dill*, 32 Kan. 668; *U. S. v. Rogers*, (Ark.) 23 Fed. Rep. 658; *People v. Warden*, etc., 22 Week. Dig. 234, cited in 7 Crim. L. Mag. 386; *People v. Warden*, etc., 7 Crim. L. Mag. 534. The proceedings of a special tribunal may be inquired into upon habeas corpus, so far as to ascertain whether it has kept within the line of its authority, and of its statutory powers. *In re O'Sullivan*, (N. Y.) 31 Fed. Rep. 447. But the question of title to an office cannot be so raised. *State v. Persdorf*, 33 La. Ann. 1411; *Sheehan's Case*, 122 Mass. 445. So, if the affidavits upon which an order for bail is made fairly present the question whether the case is one proper for a *capias*, the determination of the judge or commissioner upon their sufficiency cannot be reviewed on habeas corpus. *Selz v. Presburger*, 49 N. J. 396; *Ex parte Davis*, 17 Neb. 436. If he has jurisdiction, and there is evidence reasonably tending to support his determination, his ruling should not be disturbed; *State v. Hadon*, 35 Minn. 283; *Ex parte Davis*, 17 Neb. 436. So, in such case, the sufficiency of the affidavit for the prisoner's arrest cannot be examined; see case last cited; nor mere defects in the commitment, where it is determined that he should be held. *Jackson v. Boyd*, 53 Iowa 536.

The question of jurisdiction may be inquired into, notwithstanding the necessary jurisdictional facts are recited in the commitment. *People v. Cassels*, 5 Hill (N. Y.) 165. The jurisdiction of courts of special or limited jurisdiction should always affirmatively appear.

which hold that not only the proceedings but the evidence taken before the committing magistrate may be examined, and the commitment revised if necessary, or a commitment made *de novo* by the court hearing the matter; and that the prisoner may be discharged or admitted to bail where flagrant defects in process exist, or where no probable cause of guilt is shown.¹ The rigor of the first rule above is sometimes relaxed by statutes allowing a full inquiry into the proceedings and evidence before the committing magistrate.²

(b) *Guilt or Innocence*.—In accordance with the second rule laid down in the preceding section it has been held that the accused has a right to offer evidence on habeas corpus touching his guilt,

The commitment should state some act constituting a crime. Unless such an act is charged, there is a failure of jurisdiction. *Ex parte Kearney*, 55 Cal. 212. So, should it appear on the face of the process that there was no jurisdiction of the person, the process is void; or if the arrest was made without the territorial jurisdiction of the court; or if the prisoner was carried before a remote justice when there was one nearer before whom he ought to have been carried. *People v. Tompkins*, 1 Park. Cr. R. (N. Y.) 235.

1. *People v. Martin*, 1 Park. Cr. R. (N. Y.) 187; *People v. Tompkins*, 1 Park. Cr. R. (N. Y.) 225, 235; *Squire's Case*, 12 Abb. Pr. (N. Y.) 38; *People v. Richardson*, 18 How. Pr. (N. Y.) 92; s. c., 4 Park. Cr. R. (N. Y.) 656; *People v. Stanley*, 18 How. Pr. (N. Y.) 179; *In Matter of Stephen*, 1 Wheel. Cr. Cas. 323; *Schofield v. Root*, 12 Phila. (Pa.) 333; *Gerdeman v. Com.*, 11 Phila. (Pa.) 374; *Cowell v. Patterson*, 49 Iowa 514; *In re Snell*, 31 Minn. 110; *U. S. v. Johns*, 4 Dall. (U. S.) 412; *Jones v. Darnall*, 103 Ind. 569; *In re Hardigan*, 57 Vt. 100; *Ex parte Mohr*, 73 Ala. 503; *In re Wales*, 114 U. S. 364; s. c., 4 Mackey (D. C.) 38; *Willis v. Bayles*, 105 Ind. 363.

Thus it has been held that the evidence upon which a prisoner is bound over and committed by a magistrate, may be examined by a court or judge on habeas corpus for the purpose: 1. Of determining whether it fairly and reasonably tends to show the commission of the offence charged. 2. Whether it fairly and reasonably tends to make out probable cause for charging the prisoner with its commission. But the judgment of the committing magistrate should not be rejudged by an inquiry into the weight

of the evidence, further than is necessary to determine these two propositions. *In re Snell*, 31 Minn. 110. Same principle: *U. S. v. Johns*, 4 Dall. (Cr. Ct.) 412; *In re Hardigan*, 57 Vt. 100; *Ex parte Mohr*, 73 Ala. 503. The warrant of arrest may be looked into. *In re Wales*, 4 Mackey 38. And on habeas corpus an extradited prisoner may show that he is not a fugitive from justice. *Ex parte Mohr*, 73 Ala. 503. The sufficiency of the complaint may, on such a proceeding be tested by a motion to quash the writ. *Willis v. Bayles*, 105 Ind. 363. When a case is before the supreme court on the evidence, it is their duty to examine and pass upon its sufficiency to sustain the finding and decision below. *Jones v. Darnall*, 103 Ind. 569. And it is held that an appellate court is authorized, without reversing, to reject inculpatory evidence improperly admitted below on a habeas corpus trial, because *res inter alios acta*, and to affirm the judgment refusing bail upon the legal evidence admitted. *Ex parte Smith*, 23 Tex. App. 100. The provisions of the Iowa code permitting decisions of committing magistrates to be reviewed upon habeas corpus refer only to preliminary examinations, and not to convictions by such magistrates. *Platt v. Harrison*, 6 Iowa 79; s. c., 71 Am. Dec. 389.

As to inquiry upon validity of pardons, see note to *State v. McIntire*, 59 Am. Dec. 575; s. c., 1 Jones L. (N. Car.) 1.

2. See 2 Fay's N. Y. Dig., title Habeas Corpus, §§ 43, 23; Gen. Stats. Kansas, 1868, p. 763. As to construction of such statutes, see *People v. Tompkins*, 1 Park. Cr. R. (N. Y.) 224; *In re Snyder*, 17 Kan. 542; *Ex parte Mahone*, 30 Ala. 49; *Ex parte Cham-*

when he is in custody on a warrant of commitment, after preliminary examination and before indictment.¹

(c) *Examination*.—Where a person suspected of crime is detained on reasonable grounds of suspicion therefor to await examination, etc., he will not be released upon habeas corpus.² And the prisoner's waiver of a preliminary examination, though irregular and erroneous, is no ground for his discharge on that writ.³

3. *After Indictment and Before Conviction*.—(a) *Sufficiency of Indictment or Information*.—A court or judge can, upon habeas corpus, grant relief to a prisoner who has been indicted upon the ground that the facts stated in the indictment, information or complaint, do not constitute a crime, for this goes to the question of jurisdiction.⁴ But the inquiry can go no further.⁵ The question of the prisoner's guilt or innocence must, after indictment, be submitted to a jury. It cannot be tried on habeas corpus.⁶ It has not been unusual for courts, however, even after indictment, to hear affidavits and other evidence for the purpose of determining whether the prisoner ought to be admitted to bail.⁷

IX. EVIDENCE.—1. *Oral and Written*.—Oral testimony, as well as written, will be heard in habeas corpus proceedings, where it is

pion, 52 Ala. 311; *Ex parte* Harfourd, 16 Fla. 283.

1. *Ex parte* Mahone, 30 Ala. 49; s. c., 68 Am. Dec. 111; *People v. McLeod*, 1 Hill (N. Y.) 377; s. c., 25 Wend. (N. Y.) 483; 37 Am. Dec. 328; *People v. Martin*, 1 Park. Cr. R. (N. Y.) 191; *Ex parte* Champion, 52 Ala. 311. But in Indiana a prisoner can have no inquiry as to his guilt or innocence on habeas corpus. *Farmer v. Lewis*, 92 Ind. 444; s. c., 47 Am. Rep. 153.

2. *Matter of Peoples*, 47 Mich. 626.

3. *Ex parte* Ah Bau, 10 Nev. 264.

4. In *Matter of Corryell*, 22 Cal. 178; *Ex parte* Kearney, 55 Cal. 212; *Ex parte* Boland, 11 Tex. App. 159.

5. *State v. Brewster*, 35 La. Ann. 605; *Davis' Case*, 122 Mass. 324. Thus mere defects in the indictment cannot be inquired into. *Ex parte* Whitaker, 43 Ala. 323; *Ex parte* Boland, 11 Tex. App. 159; *In re* Kowalsky, 73 Cal. 120; *Davis' Case*, 122 Mass. 324; *Emanuel v. State*, 36 Miss. 627. But see *In re* Buell, 3 Dill. (U. S.) 116.

A court is not authorized upon a writ of habeas corpus, to inquire into the question of fact as to whether or not an indictment, regular upon its face, was ever found by the grand jury. *Ex parte* Twohig, 13 Nev. 302. But continuing an indictment does not divest the court of its jurisdiction. *People v. Ruloff*, 5 Park. Cr. Rep. (N. Y.) 84.

The illegality of a grand jury that found the indictment cannot be considered upon habeas corpus. *Ex parte* Springer, 1 Utah 214. An order arresting judgment after indictment, trial and verdict of guilty, cannot be inquired into on this proceeding, where the court had jurisdiction. *Ex parte* Hartman, 44 Cal. 32. The reversal of a former conviction and the granting of a new trial does not entitle the prisoner to a discharge. *People v. Ruloff*, 5 Park. Cr. R. (N. Y.) 77, nor mere delay in bringing him to trial, unless aggravated circumstances are shown. *People v. Ruloff*, 5 Park Cr. R. (N. Y.) 77; *Clark v. Com.*, 29 Pa. St. 129.

The discharge of the jury, after a prisoner has been arraigned and put upon his trial, and in the absence of the defendant, cannot avail the defendant upon a habeas corpus. *Tweed v. Liscomb*, 60 N. Y. 559; *State v. Sheriff*, 24 Minn. 87; *Wright v. State*, 5 Ind. 290.

6. *People v. McLeod*, 1 Hill (N. Y.) 377; s. c., 25 Wend. (N. Y.) 483; 37 Am. Dec. 328; note 364; *Cancemi v. People*, 18 N. Y. 120; *People v. Ruloff*, 5 Park. Cr. R. (N. Y.) 77; *People v. Richardson*, 18 How. Pr. (N. Y.) 93; s. c., 4 Park. Cr. R. (N. Y.) 656; though he may be able to clearly prove his innocence. See last two cases cited.

7. See note to *People v. McLeod*,

competent.¹ But oral evidence cannot be admitted to contradict the record or to show error in the court rendering a judgment.² A return may be traversed orally.³ Where a certified copy of the minutes of the court gives an imperfect description of the crime of which the prisoner was convicted, the keeper can, upon the return to a writ of habeas corpus, show by the records of the court what the precise crime was. But this cannot be done by parol evidence.⁴

2. Weighing Evidence.—In those States where the inquiry on habeas corpus does not extend beyond the jurisdiction of the committing magistrate, the sufficiency of the evidence before such magistrate cannot be examined.⁵ But it may be weighed to see if there is probable cause, or evidence of guilt, in those States permitting an inquiry into matters beyond the jurisdiction of the court.⁶

3. Statement of, In Petition and Judgment.—A petition for a writ of habeas corpus should set forth the evidence before the examining officer, so that the court may act advisedly before the writ is granted;⁷ especially where the petition is presented for alleged want of probable cause.⁸ The commitment of a court of special and limited jurisdiction, after trial and conviction, is sufficient if it contains a brief statement of the offence charged, and the conviction and judgment thereon. It is not necessary that the commitment should contain a recital of the names of the witnesses examined, or of the testimony given by them.⁹

4. Evidence on Second Application.—A party may under the statute in some States, obtain a habeas corpus a second time upon the ground of newly discovered evidence,¹⁰ or upon evidence of facts

37 Am. Dec. 328; s. c., 1 Hill (N. Y.) 377, and numerous cases there cited.

1. *State v. Lyon*, 1 Coxe (N. J.) 403; *Ex parte Jenkins*, 2 Wall., Jr. (U. S.) 546; *Seavey v. Seymour*, 3 Cliff. (U. S.) 439, 445.

2. *Ex parte Smith*, 2 Nev. 338.

3. *U. S. v. Williamson*, 3 Am. L. Reg. 730.

4. *People v. Baker*, 89 (N. Y.) 460.

5. See EXTENT OF INQUIRY ON RETURN, *supra*, division 3, part 2, subdivision 1, and notes; *Ex parte Allen*, 12 Nev. 87; *In Matter of Baker*, 11 How. Pr. (N. Y.) 418; *Bennac v. People*, 4 Barb. (N. Y.) 35; *In Matter of Prime*, 1 Barb. (N. Y.) 340; *In re Balcom*, 12 Nev. 316.

6. See EXTENT OF INQUIRY ON RETURN, *supra*, division 3, part 2, subdivision 1, and notes; *Ex parte Mahone*, 30 Ala. 49; *Ex parte Champion*, 52 Ala. 311; *Gerdeman v. Com.*, 11 Phila. (Pa.) 374; *Com. v. Kirkbride*, 11 Phila. (Pa.) 427; *Ex parte Willoughby*, 14 Nev. 451, and evi-

dence *de novo* may be heard. Thus, where a committing magistrate fails to reduce the testimony to writing, an examination of evidence *de novo* is absolutely necessary, and the court will, on habeas corpus, summon witnesses and receive their evidence orally. *In re Snyder*, 17 Kan. 542. And the court may discharge, admit to bail, or remand to custody, as the law and the evidence shall require. *Ex parte Harfourd*, 16 Fla. 287; *In re McIntyre*, 5 Gilm. (Ill.) 422.

7. *Ex parte Klepper*, 26 Ill. 532; *In re Garvin*, 3 Col. 67.

8. *In re Snyder*, 17 Kan. 553; *In re Balcom*, 12 Neb. 316; *State v. Ensign*, 13 Neb. 250.

9. *People v. Neilson*, 16 Hun. (N. Y.) 214.

10. *Ex parte Foster*, 5 Tex. App. 625; *Ex parte Pattison*, 56 Miss. 161. But the writ cannot be based upon a claim of newly discovered testimony as to old facts, and the recognized rules with reference to newly discovered testimony

which have actually occurred since the hearing of the original writ.¹

5. Commitment Without Testimony.—Where the prisoner waives a preliminary examination, and is committed without the introduction of any testimony, he cannot be discharged on habeas corpus.²

6. Several Indictments on Same Evidence.—One cannot be discharged on habeas corpus because he is held to answer upon several indictments found on the same evidence.³

7. Postponement for Further Testimony.—Where a party is surprised by the case proved, or where there is reason to believe that witnesses have given incorrect testimony, and the like, time should be allowed to produce new testimony.⁴

8. Competency.—All testimony received on the hearing of a habeas corpus should be competent, material, relevant and pertinent to all the issues of fact involved.⁵

9. Witnesses.—A defendant has a right to be confronted by the witnesses against him;⁶ but he cannot have a habeas corpus for the sole purpose of impeaching the witnesses who testified against him at his examination.⁷ And if a convict, who sues out the writ to obtain his release from the penitentiary, escapes before the hearing thereof, the proceeding should be dismissed, and no fine against a defaulting witness, in such a case, should be imposed for the relator's benefit.⁸ Officers may be examined as witnesses.⁹ But a relator cannot, on habeas corpus, introduce his defence by

on motions for new trials must be applied; see same cases. A court may, however, when it deems it expedient, issue a habeas corpus according to the common law, and hear it upon the same evidence which has been produced before another court, on a former application. The prisoner is not really limited as to the number of courts to which he may apply. He is entitled to the opinion of each court. *Ex parte* Lawrence, 5 Binn. (Pa.) 304; *Ex parte* Partington, 2 Dowl. & L. 653; In Matter of Perkins, 2 Cal. 424; *Ex parte* Ellis, 11 Cal. 222; *Bell v. State*, 4 Gill (Md.) 301; *In re Blair*, 4 Wis. 522; *Ex parte* Kaine, 3 Blatchf. (U. S.) 1. But the statute in some States changes the rule that the refusal of one writ is no bar to another application. Mississippi Code, 1871, § 1413.

1. *Ex parte* Pattison, 56 Miss. 161.

2. *Ex parte* Ah Bau, 10 Nev. 264.

3. *Perry v. State*, 41 Tex. 488.

4. *Ex parte* Robinson, 6 McLean (U. S.) 360; *State v. Lyon*, 1 Cox (N. J.) 403; *Hamilton v. Flowers*, 57 Miss. 14.

5. *Broomhead v. Chisolm*, 47 Ga. 390; *Am. Ex. Co. v. Patterson*, 73 Ind. 430; *In re Snyder*, 17 Kan. 542; *People v.*

McCormack, 4 Park. Cr. R. (N. Y.) 9; Conversations had in defendant's absence should not be admitted. *Garner v. Gordon*, 41 Ind. 92. But hearsay evidence may be admitted under some circumstances, after an offence has otherwise been clearly proved. *In re Carleton*, 11 Neb. 99. Where a court has acted within its jurisdiction, the question as to whether other than legal evidence was admitted in its proceedings will not be considered by a higher court. *Matter of Mason*, 8 Mich. 70; *Street v. State*, 43 Miss. 1; *People v. Hessing*, 28 Ill. 410; *Ex parte* Brown, 63 Ala. 187; *Ex parte* Croom, 19 Ala. 561.

6. *U. S. v. Almeida*, 2 Wheel. C. C. (N. Y.) 577; but see *State v. Wolcott*, 21 Conn. 272; *Ex parte* Bollman, 4 Cranch (U. S.) 75, 129.

7. *Ex parte* Allen, 12 Nev. 87.

8. *Hamilton v. Flowers*, 57 Miss. 14; *Ex parte* Walker, 53 Miss. 366.

9. Thus the justice and police clerk may be called to prove upon what complaint or other papers the prisoner was arrested and committed. *Matter of Heyward*, 1 Sandf. (N. Y.) 701; *Matter of Baker*, 11 How. Pr. (N. Y.) 425.

witnesses. That is for the jury. But he may show up his case as far as possible on cross-examination.¹

10. Evidence of Service.—Where the primary court has jurisdiction its determination as to the service of a habeas corpus, and disobedience of its command, is conclusive.² And an acknowledgment of service of a bill of exceptions will be construed as evidence of service on all of the respondents, where the record fails to show that any of the respondents were represented by different counsel in the primary court.³

11. Commenting on Testimony.—In advance of a trial, courts will abstain from commenting upon the evidence in habeas corpus cases.⁴

12. Contradicting Return.—Where the statute allows a prisoner to deny the truth of the return, or to establish his right to a discharge by proof of certain facts, the return is admitted to be true and will prevail, if it shows a sufficient cause of detention, until he introduces testimony to traverse it.⁵ But where the return to a habeas corpus shows a regular execution issued upon the judgment of a court of competent jurisdiction, and it is not traversed or denied in the manner required by law, evidence to contradict it is, nevertheless, admissible if no objection is made that no traverse has been interposed at the proper time.⁶

13. Affidavits.—An affidavit used as evidence must state facts,⁷ and be properly authenticated.⁸ It cannot be used, on a proceeding by habeas corpus, to show that a statement in the warrant of commitment is untrue.⁹ But it may be used to enlarge the time of the return;¹⁰ or to fortify the return.¹¹ On some occasions the court has allowed the return to be contradicted by affidavit,¹² but

1. *Gerdeman v. Com.*, 11 Phila. (Pa.) 374.

Examination of Witnesses.—The prisoner ought not to be discharged, on habeas corpus, after a preliminary examination, until all the witnesses who have previously been examined against him, if still living and attainable, have been produced and examined. But the absence of a material witness who testified at such examination does not preclude an inquiry into the question of bail, which the court will fix according to the circumstances of the case. *Ex parte Champion*, 52 Ala. 311.

2. *People v. Bradley*, 60 Ill. 390.

3. *State v. Bridges*, 64 Ga. 146.

4. *Street v. State*, 43 Miss. 1; *Ex parte Foster*, 5 Tex. App. 625.

5. *Street v. State*, 43 Miss. 1; *Matter of Mason*, 8 Mich. 70.

6. *People v. Carpenter*, 46 Barb. (N. Y.) 619.

7. *Wells v. Sisson*, 14 Hun. (N. Y.) 267; *Nelson v. Cutler*, 3 McLean (U. S.) 326.

8. *Burr's Case*, 4 Cranch 75; s. c., 1 Burr's Trial 21; *Bollman's Case*, 4 Cranch (U. S.) 75. *Marshall on Federal Constitution*, 33, 53.

9. *Re Rea*, 14 Cox C. C. 256.

10. *Rex v. Clarke*, 3 Burr. 1363.

11. *Regina v. Roberts*, 2 F. & F. 272.

12. *Watson's Case*, 9 Ad. & El. 731; s. c., 1 Per. & Dav. 516; 1 Tidd's Prac. 347; *Ex parte Beeching*, 4 Barn. & Cres. 136; *Ex parte Lampon*, 3 Deac. & Ch. 751; *Ex parte Beeching*, 3 App. from Mag. to K. B. 174; s. c., 4 Barn. & Cres. 136; *Ex parte Dakins*, 29 Eng. L. & Eq. 331; s. c., 16 Com. B. 77; *Eggington's Case*, 2 El. & Bl. 717. It has been allowed to show facts which did not appear upon the face of the return. *In re Martin*, 4 Dowl. & L. 768. It may also be used to show a want of jurisdiction. *Bailey's Case*, 3 El. & Bl. 607; s. c., 25 Eng. L. & Eq. 240; but see, *contra*. *In re Smith*, 3 Hurl. & N. 234. *In re Baker*, 2 Hurl. & N. 239.

this has been denied in other cases.¹ The court will sometimes examine, by affidavit, the facts upon which an indictment has been found to see whether or not bail should be granted.²

X. TRIAL AND CUSTODY OF PRISONER.—1. Issues of Law and Fact.—Where the facts stated in the return to a habeas corpus are not controverted, the issue raised is one of law simply,³ and no fact *dichors* the record can be legally considered.⁴ When any of the material allegations of the return are denied or controverted, a question of fact is raised; but only those matters which have a necessary connection with the question of the validity of the detention or imprisonment will be considered.⁵ And the main question is, whether the complaining party is illegally deprived of his liberty; and any fact which he relies upon to show the illegality of his imprisonment may be put in issue by an answer or reply to the return.⁶ An issue of fact may also be formed upon the

1. *Brenan's Case*, 10 Ad. & El. Q. B. 492. *Matter of Clarke*, 2 Ad. & El. Q. B. 619; s. c., 2 Gale & Dav. 780; *Brittain v. Kinnaird*, 1 Brod. & B. 432; *King v. Rogers*, 3 Dowl. & Ry. 607; *Reg. v. Douglas*, 7 Jur. pt. 1, 39; *Regina v. Roberts*, 2 F. & F. 272.

2. 2 Hawk. P. C., ch. 15, § 79; 2 W. Black 1208, note.

Admissibility and Value of Affidavits as Evidence, under proceedings by habeas corpus, will be found discussed in *Burr's Case*, 4 Cranch 75; s. c., 1 Burr's Trial; *Bollman's Case*, 4 Cranch (U. S.) 75. *Marshall on Federal Constitution*, 33, 53.

Arrest on State Process.—Where an officer of the United States has been arrested on State process for an alleged abuse of his powers or authority, the federal courts will not only hear the evidence which the officer wishes to offer to dispel or disprove the affidavits upon which the State authorities proceeded, but will consider those affidavits independently of such proof; and if in the opinion of the court, those affidavits do not contain a *prima facie* ground for arrest, will discharge the officer, on habeas corpus, without hearing any counter-evidence. The general rule is to discharge such officers, unless there be a positive oath of merits from the plaintiff, or a sworn detail of circumstances from others to supply its place. *Ex parte Jenkins*, 2 Wall. Jr. (U. S.) 521.

Irregular Evidence.—Effect of no Objection.—If the minutes of the court furnished to the keeper imperfectly describe the crime of which the relator was convicted, the district attorney

must produce or prove the records of the court by a certified copy thereof, if insisted upon by the relator; but if this form of proof is not required by the relator, the attorney may show by his affidavit that the relator was actually convicted and sentenced. The affidavit is sufficient to act upon unless the objection is interposed. *People v. Baker*, 89 N. Y. 460.

3. *Wilmot's Opinions*, (Eng.) 106.

4. *Campfield v. Patterson*, 33 Ga. 561.

5. **Practice and Pleading.**—On a motion to discharge the prisoner the sufficiency of the return alone is examined. *Watson's Case*, 36 Eng. Com. L. 254; s. c., 9 Ad. & El. 731; 1 Per. & Dav. 516. A demurrer to the petition is not good practice, though it has been allowed. *Hovey v. Morris*, 7 Blackf. 559. So a demurrer to the return is not the proper method of testing the sufficiency of the return; *Cunningham v. Thomas*, 25 Ind. 171; though such a demurrer has been allowed; *In re Booth*, 3 Wis. 12; and see *Ableman v. Booth*, 21 How. (U. S.) 506. Exceptions will not lie to the return. It should be met by reply or answer. *Nichols v. Cornelius*, 7 Port. (Ind.) 611. When the return to a habeas corpus is traversed, no further pleading is required to put its affirmance in issue, as the averments of the answer are to be taken as denied by the respondent. *Leary's Case*, 6 Abb. N. C. (N. Y.) 43; *U. S. v. Williamson*, 3 Am. L. Reg. 729. See *U. S. Reg. Stats.*, § 760.

6. In *Matter of Ferrens*, 3 Ben. (U. S.) 442.

return by a denial of its averments; or by alleging new facts, legally admissible, to avoid the effect of such averments.¹

2. Mode of Trial.—While courts have the undoubted power to have the truth of facts on habeas corpus determined by a jury, they have appropriated this province themselves, and the practice is to have all issues of fact raised on the return tried by the court or judge.²

3. Custody of Prisoner.—During the examination or hearing on habeas corpus, the prisoner, in all cases, on the return of the writ is detained, not on the original warrant, but under the authority of the writ of habeas corpus. He may be bailed on the return, or be remanded to the same jail whence he came, or to any other place of safe keeping under the control of the court or officer issuing the writ, and by its order be brought up from time to time, till the court or officer determines whether it is proper to discharge or remand him absolutely.³

1. *Roth v. House of Refuge*, 31 Md. 329; *Leary's Case*, 6 Abb. (U. S.) 43; *U. S. v. Williamson*, 3 Am. L. Reg. 729. The question of identity may be tried on habeas corpus; *Leary's Case*, 6 Abb. (U. S.) 43; *Young v. State*, 15 Ind. 480; *In Matter of Hamilton*, 1 Ben. (U. S.) 455. If the return contain an averment of insanity, and the relator traverses this averment, the issue is directly raised, whether the relator is of unsound mind or not. *Com. v. Kirkbride*, 11 Phila. (Pa.) 427.

Questions Which Cannot Be Tried on Habeas Corpus.—1. *The right of guardianship.* *Rex v. Smith*, 2 Stra. 982; s. c., *Ridgw. Rep.* 200; *Rex v. Johnson*, 1 Stra. 579; s. c., 2 Ld. Raym. 1333; *In re Taylor*, L. R. 4 Ch. Div. 157; *Rex v. Delaval*, 3 Burr. 1436; *State v. Banks*, 25 Ind. 495; *People v. Wilcox*, 22 Barb. (N. Y.) 186; *People v. Mercein*, 8 Paige (N. Y.) 47; *Ferguson v. Ferguson*, 36 Mo. 197; *Com. v. Hamilton*, 6 Mass. 273; *Fitts v. Fitts*, 21 Tex. 511; *Mathews v. Wade*, 2 W. Va. 464.

2. *Rights of Property.*—*Clark v. Gantier*, 8 Fla. 360; *Ruddle v. Ben*, 10 Leigh (Va.) 468; *De Lacy v. Antoine*, 7 Leigh (Va.) 438; *Shue v. Turk*, 15 Gratt. (Va.) 256; *State v. Fraser*, *Dudley* (Ga.) 42; *Foster v. Alston*, 6 How. (Miss.) 406.

3. *Title to Office.*—In other words the writ of habeas corpus cannot be used as a writ of *quo warranto*. *Russell v. Whiting*, 1 Winst. (N. Car.) L. 465; *Ex parte Strahl*, 16 Iowa 369; *State v. Bloom*, 17 Wis. 521; *Clark v. Com.*, 29 Pa. St. 129; *In Matter of Wakker*, 3 Barb. (N. Y.) 162; *Ex parte Call*, 2 Tex. App. 497; *People v.*

Stephens, 5 Hill (N. Y.) 616; *In Matter of Whiting*, 2 Barb. (N. Y.) 513; *Com. v. Burrell*, 7 Pa. St. 34. Even sentences imposed by officers *de facto* are valid, where they act under color of office, and cannot be attacked on this writ. *Griffin's Case*, Chase Dec. (U. S.) 364; *Sheehan's Case*, 122 Mass. 445; *State v. Bloom*, 17 Wis. 521. But a court will relieve one on habeas corpus from arrest or imprisonment caused by the acts of a mere usurper. *Ex parte Strahl*, 16 Iowa 369; *In Matter of Baker*, 11 How. Pr. (N. Y.) 418; *Devlin's Case*, 5 Abb. Pr. (N. Y.) 281. A mistake in the age of one committed to the house of refuge will not be investigated on this writ. *People v. Supt.*, etc., 8 Abb. Pr. N. S. (N. Y.) 112; *In Matter of Mason*, 8 Mich. 70.

2. *In re Hakewill*, 22 Eng. L. & Eq. 395; *Baker v. Gordon*, 23 Ind. 204.

Jury Trial.—Was denied in habeas corpus proceedings in *State v. Farlee*, 1 Cox (N. J.) 41, 82; *State v. Beaver*, 1 Cox (N. J.) 80. But it has been held that where it is doubtful whether the right person has been arrested, a jury must decide the fact. *Republica v. Jailer*, 2 Yeates (Pa.) 258. But where a court has directed an issue for the trial of facts, it retains a supervisory authority over the verdict, and may order a new trial. *Graham v. Graham*, 1 Serg. & R. (Pa.) 330.

3. *In re Kaine*, 14 How. (U. S.) 103; *Barth v. Clise*, 12 Wall. (U. S.) 401; *King v. Bethel*, 5 Mod. 22. Where a prisoner is committed by a judge to the custody of a sheriff, the latter is not responsible for the escape of the prisoner. *Barth v. Clise*, 12 Wall. (U.

XI. POWER AND PRACTICE OF COURTS AT HEARING.—1. Recommitment Where Warrant is Defective.—If the commitment under which a prisoner is held is found to be informal, insufficient or otherwise materially defective, upon the hearing of a habeas corpus, the court has power to, and will, discharge from that commitment, and recommit him in proper form, if there be sufficient cause.¹ The prisoner may be guilty of a different crime from that specified in the warrant. If so, it is the duty of the court to commit him for trial for the offence of which he appears to be guilty.² And witnesses may be subpoenaed for his examination *de novo*.³ If the court or judge does not order a recommitment for a different crime, where it appears to have been committed, the prosecutor should move for a new commitment.⁴ It must, however, be distinctly understood, that if the court or judge granting the habeas corpus does not have the power of a committing magistrate

S.) 401. On the remanding of Chinese seeking to land on our shores, they will be returned to the ship from which they were taken. In *Matter of Pong Ah Lung*, 12 Pac. C. L. J. 67. The custody of a child will not be changed from the guardian to the mother, pending an appeal, on habeas corpus, taken by the guardian. *Garner v. Gordon*, 41 Ind. 93.

1. *Rex v. Marks*, 3 East. 157; *Bethell's Case*, 1 Salk. 347; *Ex parte Keans*, 1 Barn. & Cres. 258; s. c., 2 Dowl. & Ry. 411; 1 Chit. Crim. L. 132. In *Matter of Shuttleworth*, 9 Ad. & El. Q. B. 651; *King v. Judd*, 2 T. R. 255; *Case of Canadian Prisoners*, 5 Mees. & W. 31; *Queen v. Mount*, 12 Eng. Rep., Moak's notes, 181; *Ex parte Bennett*, 2 Cranch (C. C.) 612; *Ex parte Tayloe*, 5 Cow. (N. Y.) 39; *Ex parte Smith*, 5 Cow. (N. Y.) 273; *Ex parte Percy*, 2 Daly (N. Y.) 530; *Rust v. Van Vacter*, 9 W. Va. 600; *People v. Smith*, 1 Cal. 9; *State v. Bloom*, 17 Wis. 521; *Ex parte Branigan*, 19 Cal. 133; *People v. Rhoner*, 4 Park. Crim. Rep. (N. Y.) 166; *State v. Best*, 7 Blackf. (Ind.) 611; *Com. v. Crans*, 2 Pa. L. J. 75; *Ex parte Ricord*, 11 Nev. 287; *U. S. v. Johns*, 4 Dall. (U. S.) 363; s. c., 1 Wash. (U. S.) 363; *Ex parte Burford*, 3 Cranch (U. S.) 448; *Com. v. Carlisle, Bright* (Pa.) 36; *Ex parte Harfourd*, 16 Fla. 283; s. c., 13 Am. L. Rev. 543; *In re Balcom*, 12 Neb. 316; *In re Smith*, 4 Col. 532. 1 *Burr's Trial*, 79; *Parrish v. State*, 14 Md. 238, and see *Kelley v. Thomas*, 15 Gray (Mass.) 192; *Nicholls v. State*, 5 N. J. L. 539; *Peter v. State*, 3 How. (Miss.) 422. 1 *Bish. Crim. Proc.* (3rd ed.), § 229.

Defective Warrants.—If the court or judge is satisfied that an offence has been committed within the jurisdiction of the court, the prisoner should not be discharged on habeas corpus, although the process by which the prisoner was arrested and committed was informal and not in compliance with the law. *Rex v. Marks*, 3 East. 157; *State v. Plants*, 25 W. Va. 122; *Ex parte Keans*, 1 Barn. & Cres. 258; *People v. Rowe*, 4 Park. Crim. Rep. (N. Y.) 254. And it has been held that technical defects in a justice's warrant of commitment are not reviewable on habeas corpus. *Hamilton's Case*, 51 Mich. 174; and that, if a second good warrant of commitment is received subsequent to the service of the habeas corpus, the prisoner should be remanded, though the first warrant is defective. *Regina v. House*, 2 Manitoba L. J. 58, cited in 6 *Crim. L. Mag.* 430. But of course if the warrant of commitment is so defective as to render the process void, and no other is substituted, the prisoner is entitled to a discharge. See *In Matter of Prime*, 1 Barb. (N. Y.) 340; *People v. Richardson*, 4 Park. Crim. Rep. (N. Y.) 657. The validity of the affidavit and warrant of arrest may also be examined in habeas corpus. But this should be done before pleading, and cannot be done after judgment. *Miller v. Rosier*, 31 Mich. 475; *Nelson v. Cutter*, 3 McLean (U. S.) 326; *People v. Smith*, 1 Cal. 9; *In Matter of Prime*, 1 Barb. (N. Y.) 340.

2. *People v. Smith*, 1 Cal. 9.

3. *Ex parte Branigan*, 19 Cal. 133; *State v. Best*, 7 Blackf. (Ind.) 611.

4. *People v. Conner*, 15 Abb. Pr., N. S. (N. Y.) 430.

over the offence shown in the depositions, the prisoner must be discharged absolutely if the commitment cannot be sustained.¹ The prisoner should not be absolutely discharged on habeas corpus by a court or judge having the powers of a committing magistrate, where probable cause of crime exists.² If an indictment is pronounced bad, it is not absolutely necessary to let the defendant go; he may be committed or held to bail to answer to a fresh indictment, or be ordered before a justice of the peace to be proceeded against on fresh complaint.³

2. Discharge or Bail on Perfect Warrant.—On the other hand where the inquiry on habeas corpus is not limited to the commitment alone, and where a full hearing is had upon the facts of the case, the practice is to absolutely discharge the prisoner, though the warrant be perfect, if the evidence is insufficient to sustain any charge against the prisoner. If doubtful, he may be bailed. In such cases it is unimportant whether the commitment is regular or irregular in point of form.⁴ The court, having gone into an examination of the evidence on which the commitment is grounded will proceed to do that which the court below ought to have done.⁵

3. Miscellaneous Matters of Practice.⁶

1. *Ex parte* Bessett, 51 Eng. Com. L. 480. In Florida, the supreme court may, on hearing a habeas corpus, hold a preliminary examination, and discharge, commit to bail, or remand; but the general rule is to deliver to the magistrate who issued the warrant. *Ex parte* Eagan, 18 Fla. 104.

2. *In re* Herres, (Minn.) 33 Fed. Rep. 165; an extradition case; but in this respect such cases are like preliminary examinations. *Id.*

3. Bish. Crim. Proc., (3rd ed.), § 229; *People v. Smith*, 1 Cal. 9; *U. S. v. Smith*, 2 Cranch (C. C.) 111; *Gorden v. State*, 35 Ala. 432; *Nicholls v. State*, 5 N. J. L. 539; *Peter v. State*, 3 How. (Miss.) 422. As to remanding to another jurisdiction, see *Parrish v. State*, 14 Md. 238; *In re* Cross, (Md.) 20 Fed. Rep. 824.

4. *Ex parte* Bollman, 4 Cranch (U. S.) 75; *Ex parte* Bennett, 2 Cranch (C. C.) 612.

5. See cases last cited.

6. (a) **Jurisdictional Facts.**—In pleading the judgment of a court of general jurisdiction, it is unnecessary to aver the facts showing that the court had jurisdiction. *Lucas v. Hawkins*, 102 Ind. 64; but the judgments of courts of limited and inferior jurisdiction may be impeached by extrinsic evidence showing want of jurisdiction, whether the record recites the jurisdic-

tional facts or not. *People v. Warden*, 34 Hun (N. Y.) 393.

(b) **Sufficiency of Complaint.**—In habeas corpus proceedings, the sufficiency of the complaint may be tested by a motion to quash the writ. *Willis v. Bayles*, 105 Ind. 363; *Milligan v. State*, 97 Ind. 355.

(c) **Time of Hearing.—Re-Hearing.**—The case will be heard as soon as practicable after the petitioner's brief is filed, where it is heard on error. The ordinary rules as to the time of filing briefs will not be adhered to. *Smith v. State*, 20 Neb. 284. A judge will hear the writ in vacation. *In re Garvey*, 7 Col. 384. A reasonable adjournment of the case may be had. *In re Ludwig*, (N. Y.) 32 Fed. Rep. 774; and long enough for proof of material facts to be supplied, where necessary, as in cases involving the custody of children. *State v. Reuff*, 29 W. Va. 751; but a petition for re-hearing in a habeas corpus case will not be allowed. *Ex parte Robinson*, 71 Cal. 608.

(d) **Appearance, Effect of and When Unnecessary.**—A party to a habeas corpus case who appears and does not object to any of the proceedings, cannot afterwards object, as on appeal. *Roberts v. Reilly*, 116 U. S. 92; s. c., 7 Crim. L. Mag. 289. Under the practice of the United States supreme court, upon service of a rule to show

4. **Effect of Discharge.**—A discharge on habeas corpus upon the merits or for want of jurisdiction being conclusive and not appealable, the prisoner cannot be lawfully arrested again for the same offence.¹ But the judge or court may issue a second and valid warrant to detain the prisoner if the first warrant is defective;² and it has been held that a discharge upon habeas corpus for defect of proof, as provided by statute, merely terminates the proceeding under which the party was held, so that he cannot be further prosecuted, except by a new proceeding instituted on sufficient evidence given in that proceeding; and that a complaint and warrant for his rearrest need not be any different from what

cause why the writ should not issue, if the return contains all the essentials of a return on the writ itself, the court may hear and determine the matter as fully as if the prisoners were before it. *Ex parte Yarbrough* ("The Ku-Klux Cases"), 110 U. S. 651.

(e) **Jury Trial.**—The petitioner for a habeas corpus has no right to a trial by jury. *In re Chow Goo Pooi*, (Cal.) 25 Fed. Rep. 77. A statute permitting the defendant in a criminal action to waive a trial by jury is not unconstitutional. *In re Staff*, 63 Wis. 285; s. c., 6 Am. Crim. Rep. 140. Compare *In re Cross*, (Md.) 20 Fed. Rep. 824.

(f) **"Speedy Trial."**—The prisoner has a constitutional right to a "speedy public trial," and, if denied this right, will be discharged on habeas corpus; *Ex parte State*; *In re Tate*, 76 Ala. 482; as where he is not brought to trial within the statutory time; *In re Garvey*, 7 Colo. 502; s. c., 23 Am. L. Reg. 733. But this right does not preclude the State from a reasonable opportunity to examine and prosecute the charge, either by indictment or otherwise; and it does not entitle the accused to a discharge on account of the failure of the law, while reasonably adapted to secure a speedy trial, to provide against every contingency which may occasion delay in any particular case, or on account of any delay made necessary by the law itself. *Ex parte Jefferson*, 62 Miss. 223; *Ex parte State*, *In re Tate*, 76 Ala. 482; *Patterson v. State*, 49 N. J. 326; *In re Edwards*, 35 Kan. 99; *State v. Sheriff*, 37 La. Ann. 618; *McGuire v. Wallace*, 109 Ind. 284.

(g) **Other Matters.**—A refusal to produce the prisoner is a contempt. *In re Robb*, 64 Cal. 431. The court trying a habeas corpus case is judge of law and fact. *Ex parte Mosby*, 31 Tex. 566;

s. c., 98 Am. Dec. 547. The prisoner can waive the incompetency of the judge, and consent to his trying the case. *Ex parte State*, *In re Tate*, 76 Ala. 482. Neither is he entitled to have his case examined on this writ, after waiving a preliminary examination, unless he was afraid of being lynched. *In re Secrest*, (Kan.) 14 Pac. Rep. 144. A court acquires jurisdiction in a habeas corpus cause, to make a final order therein, by the service of the writ upon the prisoner's custodian, and such jurisdiction cannot be ousted without the consent of the court. *Pomeroy v. Lappens*, 9 Oreg. 363. On a habeas corpus, the decision should be made upon the actual status of the case at the time of the decision, and not according to the state of things when the writ was allowed; *U. S. v. Patterson*, (N. J.) 29 Fed. Rep. 775; and the proceedings cannot be stayed until the costs of a prior proceeding have been paid. *People v. Mercein*, 3 Hill (N. Y.) 399; s. c., 38 Am. Dec. 644. The prisoner may be discharged on habeas corpus from imprisonment under an illegal *causa*, after the time for an appeal or *certiorari* has elapsed. *Com. v. Keeper*, 14 Phila. (Pa.) 396. As to *res judicata*, see *Selz v. Presburger*, 49 N. J. 396.

1. *Ex parte Jilz*, 64 Mo. 205; s. c., 27 Am. Rep. 218; *In re Crow*, 60 Wis. 349; *People v. Fairman*, 59 Mich. 568; but compare *State v. Fley*, 2 Brev. (S. Car.) 338; s. c., 4 Am. Dec. 583. *contra*. The statutory penalty for rearresting, etc., does not, however, extend to proceedings between parents for the custody of an infant child, who may be retaken. *Beyer v. Vanderkuhlen*, 48 Wis. 320. Compare *Ex parte Powell*, 20 Fla. 806.

2. *Fergus, Petitioner*, (Mass.) 30 Fed. Rep. 607.

they would be if there had been no prior arrest and discharge.¹

XII. BAIL.—1. Power to Bail, Bailable Offences, Etc.—The right to admit to bail existed at the ancient common law,² and though the prisoner could not demand bail as a matter of right, he might, and still may, except where the matter is otherwise regulated by statute, be admitted to bail for any offence,³ and this he may procure on habeas corpus.⁴ Bail has been greatly regulated by statute, and the right to bail has been the subject of constitutional protection in this country.⁵

2. Before Indictment.—(a) *Discretion of Court.*—Application for bail is addressed to the sound discretion of the court, except where it is a matter of right. Thus, admission to bail where the "proof is evident or presumption great" of a capital offence, is not a constitutional right, but a matter resting in the sound judicial discretion of the court, who will not grant it except under extraordinary circumstances.⁶

1. *State v. Holm*, 37 Minn. 405; *State v. Koevner*, (Minn.) 34 N. W. Rep. 748.

2. Comyn's Dig., Bail; 2 Hale P. C., c. 15; Hawk. P. C., B. 2, c. 15; Bacon's Abr., Bail in Criminal Cases, A.; 3 Reeves' Hist. Eng. Law, 195.

3. Comyn's Dig., Bail; Hawk. P. C., B. 2, c. 15; 2 Hale P. C., c. 15; Bacon's Abr., Bail in Criminal Cases, A.; *Rex v. Rudd*, 1 Cowp. 331; *Rex v. Griffenburgh*, 4 Burr. 2179; *Ex parte Bridewell*, 57 Miss. 39; *Ex parte Hay*, 23 Tex. App. 585; *Ex parte Smith*, 23 Tex. App. 100; *In re Secrest*, (Kan.) 14 Pac. R. 144. A prisoner charged with murder by a coroner's inquest may be admitted to bail on habeas corpus. *People v. McLeod*, 1 Hill (N. Y.) 377; 25 Wend. (N. Y.) 483; s. c., 37 Am. Dec. 328.

4. *Ex parte Hay*, 23 Tex. App. 585; *Ex parte Smith*, 23 Tex. App. 100; *In re Secrest*, (Kan.) 14 Pac. R. 144.

Remanded Chinese Prisoner.—A Chinese person, prohibited by the restriction act from coming into the United States, and who has been remanded to the custody of the marshal to be deported therefrom, cannot be permitted to land upon giving bail for his appearance at the time of the sailing of the vessel upon which he is ordered to be deported. *In re Ah Moy*, 21 Fed. Rep. 808.

5. Excepted Crimes.—There is in most of the States a constitutional right to bail except for "capital offences," "treason and murder," where the "proof is evident, or the presumption great." See constitutions of the States. In In-

diana, however, the right to bail for murder or treason is expressly prohibited by the constitution. Where a crime is charged which is short of a capital felony, the prisoner must be admitted to bail; but where a capital felony is charged, and the proof of it is evident or the presumption great, no power exists anywhere to admit to bail. *Com. v. Keeper*, 2 Ashm. (Pa.) 227. *Compare People v. Tinder*, 19 Cal. 539; *Ex parte Croom*, 19 Ala. 561.

Excessive Bail.—In all of the State constitutions, excepting that of Illinois, it is declared that excessive bail shall not be required, and this is the provision in the constitution of the United States. See Amendments, art. 8; *Com. v. Hitchings*, 5 Gray (Mass.) 482, and the various State constitutions.

6. *Ex parte Bridewell*, 57 Miss. 39; *Wray's Case*, 30 Miss. 673; *Com. v. Keeper*, etc., 2 Ashm. (Pa.) 227; *Moore v. State*, 36 Miss. 142; *Beall v. State*, 39 Miss. 715; *Street v. State*, 43 Miss. 1.

Bail for Capital Offences.—A defendant charged with a capital crime may be admitted to bail in the discretion of the court, even where the proof is evident and the presumption great. *Ex parte Bridewell*, 57 Miss. 39. And a person charged with murder in the first degree has a constitutional right to be let to bail where the proof is not evident, nor the presumption great. *In re Secrest*, (Kan.) 14 Pac. R. 144; *In Ex parte Hay*, 23 Tex. App. 585, the relator was charged with murder, and on habeas corpus, the facts of that case were held insufficient to authorize the

Each case must stand upon its own merits.¹

(b) *Excessive Bail*.—Shall not be required. To require larger bail than the prisoner can give is, in some cases, to require excessive bail. The guide to the court's discretion in taking bail is the compound consideration of the ability of the prisoner to give bail and the atrocity of the offence.²

(c) *Reduction of Bail*.—Excessive bail may be reduced on habeas corpus proceedings, if, under all the circumstances, it is thought to be too large.³ So, a prisoner committed for a failure to procure bail which appears excessive, may, on habeas corpus, have the sum reduced, if proper under all the circumstances of the case.⁴

(d) *Examination of Evidence*.—The examinations before the justice or coroner should be examined, on a habeas corpus for bail, to ascertain whether a crime has been committed, and if so, the strength of the proofs in regard to it. The prisoner must then be admitted to bail, if he is entitled to it.⁵ His guilt may be examined. When guilt is past dispute, he ought not to be bailed.⁶ The court, on habeas corpus, should, if required by

refusal of bail. See, also, *Ex parte McDowell*, 23 Tex. App. 585, for another illustration of the same kind.

1. *People v. Tinder*, 19 Cal. 539; *People v. Van Horne*, 8 Barb. (N. Y.) 158; *Ex parte Dyson*, 25 Miss. 356; *McConnell v. State*, 13 Tex. App. 390; *People v. Dixon*, 4 Park. Cr. R. (N. Y.) 651; *People v. Cole*, 6 Park. Cr. R. (N. Y.) 695; *People v. Hyler*, 2 Park. Cr. R. (N. Y.) 570; *Com. v. Rutherford*, 5 Rand. (Va.) 646; *Ex parte Harford*, 16 Fla. 283; *U. S. v. Lawrence*, 4 Cranch (C. C.) 518; *People v. Bowe*, 58 How. Pr. (N. Y.) 393; *Ex parte Jones*, 20 Ark. 9; *Ex parte Tayloe*, 5 Cow. (N. Y.) 39; *Ex parte Banks*, 28 Ala. 89; *Ex parte Finch*, 15 Fla. 630; *Finch v. State*, 15 Fla. 633; *Ex parte Wray*, 30 Miss. 673; *Ex parte Hay*, 23 Tex. App. 585.

2. *U. S. v. Lawrence*, 4 Cranch (C. C.) 518; *U. S. v. Brawner* (Tenn.) 7 Fed. Rep. 86. Where excessive bail is required in an action for a mere tort, the revisory court may discharge the defendant upon habeas corpus if he give bail in a reasonable amount. *Jones v. Kelly*, 17 Mass. 116. See *Bethuram v. Black*, 11 Bush (Ky.) 628; *McConnell v. State*, 13 Tex. App. 390. As to English doctrines on excessive bail, see *Evans v. Foster*, 1 N. H. 374.

3. *Miller v. State*, 43 Tex. 579; *Evans v. Foster*, 1 N. H. 378; *Ex parte Ryan*, 44 Cal. 555; *Bethuram v. Black*, 11 Bush (Ky.) 628. But when, under all the circumstances of the case, it

clearly appears from the evidence that the defendant is unable to give such bail as the court believes sufficient to insure his appearance, the court will not, merely for the sake of reduction, reduce the amount of bail. *People v. Town*, 3 Scam. (Ill.) 19.

Appeals.—In California no appeal lies from the order of a judge of a lower court admitting a prisoner to bail on habeas corpus; *People v. Schuster*, 40 Cal. 627; and in Texas no appeal lies from the order of a lower court dismissing a motion to reduce the amount of bail, as it is not a final judgment from which an appeal will lie. *Miller v. State*, 43 Tex. 579.

4. *Evans v. Foster*, 1 N. H. 378.

5. *People v. Beigler*, 3 Park. Crim. R. (N. Y.) 316, and cases cited; *Ex parte Foster*, 5 Tex. App. 625; *People v. Dixon*, 4 Park. Crim. R. (N. Y.) 651; *People v. Van Horne*, 8 Barb. (N. Y.) 163; *Ex parte Tayloe*, 5 Cow. (N. Y.) 39; *People v. McLeod*, 1 Hill (N. Y.) 377; s. c., 37 Am. Dec. 328.

6. *People v. Bowe*, 58 How. Pr. (N. Y.) 393; *People v. Lohman*, 2 Barb. (N. Y.) 450.

Examination of Evidence.—To make inquiry into the guilt of the prisoner witnesses may be called. *State v. Best*, 7 Blackf. 611. The court is not concluded by the finding of a coroner's inquest. *Ex parte Tayloe*, 5 Cow. (N. Y.) 39. Evidence having no weight on motion to discharge will sometimes be considered to regulate the bail deemed

the accused, hear and examine into the evidence for the purpose of determining what criminal act has been committed, and the probable cause shown against the accused, and this whether the warrant of commitment was regular or irregular.¹

(e) *Rules for Bail*.—"It is a safe rule, where malicious homicide is charged, to refuse bail in all cases where a judge would sustain a capital conviction, if pronounced by a jury, on such evidence of guilt as was exhibited to him on the hearing of the application to admit to bail." And to admit to bail where the evidence would not sustain such conviction.²

(f) *No Discharge after Bail*.—Where a party charged with a criminal offence is held to bail after examination by a magistrate, he ought not to be discharged upon habeas corpus, if the magistrate had jurisdiction, and there is evidence reasonably tending to support his determination.³

3. After Indictment.—(a) *Court's Discretion, How Guided*.—1.

necessary. *State v. Asselin*, T. U. P. Charl't. (Ga.) 184, 190. Where a court of general jurisdiction in a prosecution for murder has personally examined witnesses and refused to admit to bail, the credibility of the witnesses will not be considered by a reviewing court; but where the application for bail is made and denied, upon testimony taken before a committing magistrate, the court of review will give to the prisoner the benefit of all reasonable doubts arising from a conflict of testimony. *Ex parte Jones*, 20 Ark. 9. Where a petitioner has been committed by a magistrate to answer a charge of murder, the court will not anticipate the action of the jury by discharging the prisoner from actual custody, with or without bail, upon evidence which may sustain a capital conviction. In *Matter of Troia*, 64 Cal. 152.

1. *Ex parte Harfourd*, 16 Fla. 283; see *Ex parte Champion*, 52 Ala. 311; *Hight v. U. S.*, 1 Morr. (Iowa) 407; *People v. Lohman*, 2 Barb. (N. Y.) 454; *People v. McLeod*, 1 Hill (N. Y.) 377; s. c., 25 Wend. (N. Y.) 483; 37 Am. Dec. 328; *People v. Smith*, 1 Cal. 9; *People v. Willett*, 6 Abb. Pr. (N. Y.) 37; s. c., 26 Barb. (N. Y.) 78. A defendant charged with murder, and whose case has been resubmitted to another grand jury, may have testimony heard on habeas corpus, in the court in which his case is pending, and that court should determine whether the proof of defendant's guilt is evident or the presumption great. But when this judge has acted, no other court can discharge or admit to bail, unless

it clearly appears that the presiding judge has acted arbitrarily in the matter. *Ex parte Isbell*, 11 Nev. 295.

2. *Com. v. Keeper*, 2 Ashm. (Pa.) 227; *State v. Summons*, 19 Ohio 139; In *Matter of Troia*, 64 Cal. 152; *Ex parte Foster*, 5 Tex. App. 625. These are the Pennsylvania rules and have been often followed.

Criticism of Pennsylvania Rule.—In Texas and Mississippi the earlier rules were the same as the Pennsylvania rules. *Street v. State*, 43 Miss. 1; *Moore v. State*, 36 Miss. 142; *Ex parte Foster*, 5 Tex. App. 625; *Ex parte Beacom*, 12 Tex. App. 318. But they have been changed. In Texas, the rule laid down in *Ex parte McAnally*, 53 Ala. 495, is adopted, viz.: "If the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offence has been committed, that the accused is the guilty agent, and that he will probably be punished capitally if the law be administered, bail is not a matter of right." *Ex parte Smith*, 23 Tex. App. 100. In Mississippi, the officer hearing the habeas corpus for bail should require the production of all the available testimony for the prosecution, and should, if necessary, postpone the hearing until it can be obtained. If, upon the whole testimony adduced before him, he entertains a reasonable doubt whether the relator committed the act or whether in so doing he was guilty of a capital crime, he should admit him to bail. *Ex parte Bridewell*, 57 Miss. 39.

3. *State v. Hayden*, 35 Minn. 283.

Bail should be put high enough to give a reasonable assurance of the defendant's presence. If the probability of conviction is so strong as to warrant the belief that he will not appear, he should not be bailed.¹ 2. Excessive or oppressive bail should not be exacted in a case clearly bailable by law, for that would be in effect to refuse bail.² 3. The nature of the offence and the circumstances under which it was committed are to be considered. After an indictment for murder, as in other cases, the question as to whether bail shall be taken is one resting entirely in the sound discretion of the court.³ 4. The pecuniary circumstances of the accused are to be regarded, and proof may be taken upon this point.⁴

(b) *Presumptions*.—The indictment creates a presumption of guilt.⁵ The term "proof is evident or presumption great" is intended to indicate the same degree of certainty, whether the evidence be direct or circumstantial. The design is to secure the right of bail in all cases, except where the facts show with reasonable certainty that the prisoner is guilty of a capital offence.⁶ The prisoner should be bailed in all cases where the presumptions are decidedly in favor of his innocence, and the strength of the presumption of guilt is to be determined from an examination of the testimony under which the accused is held.⁷

(c) *When "Proof is Evident or Presumption Great."*—The prisoner, if indicted for a capital offence, should not be admitted to bail, except under special and extraordinary circumstances, or other causes making it reasonable that he should be bailed.⁸ But

1. *People v. Dixon*, 4 Park. Crim. R. (N. Y.) 651; *Ex parte Tayloe*, 5 Cow. (N. Y.) 54.

2. *U. S. v. Lawrence*, 4 Cranch (C. C.) 518.

3. *People v. Cole*, 6 Park. Crim. R. (N. Y.) 695.

4. *Ex parte Banks*, 28 Ala. 89.

No Review of Court's Discretion.—The above rules are a part of the code of criminal procedure in Texas, and the discretion of the court or officer in fixing bail under them will not be revised by the court of appeals, unless it clearly appears to have been abused and the constitution violated. *McConnell v. State*, 13 Tex. App. 390.

5. *People v. Tinder*, 19 Cal. 539; *People v. Van Horne*, 8 Barb. (N. Y.) 158; *Hight v. U. S.*, 1 Morr. (Iowa) 407; *People v. Hyler*, 2 Park. Cr. R. (N. Y.) 570; *People v. Dixon*, 4 Park. Cr. R. (N. Y.) 651; *Ex parte Tayloe*, 5 Cow. (N. Y.) 56; *State v. Mills*, 2 Dev. (N. Car.) L. 555; *U. S. v. Jones*, 3 Wash. (U. S.) 224; *Territory v. Benoit*, 1 Mart. (La.) 142; *U. S. v. Burr*, 1 Burr's Trial 312. But for departures from this rule, see *Yarbrough v. State*, 2 Tex. 523; *Lumm v. State*,

3 Port. (Ind.) 294; *State v. Hill*, 3 Brev. (S. Car.) 89; *Street v. State*, 43 Miss. 1.

6. *McCoy v. State*, 25 Tex. 33.

7. *People v. Hyler*, 2 Park. Crim. R. (N. Y.) 570.

8. *Ex parte Smith*, 23 Tex. App. 100; *Ex parte Richards*, 102 Ind. 639; *Ex parte Springer*, 1 Utah 214.

"Proof is Evident," When.—Conflict of evidence on a habeas corpus trial for bail does not necessarily imply the failure of the evidence to make the "proof evident." Evidence is to be considered in its entirety, and if, when so considered, a reasonable doubt of the applicant's guilt of a capital offence is not engendered, the "proof is evident," and bail should be refused. *Ex parte Smith*, 23 Tex. App. 100. As to when proof is not evident, see facts of *Ex parte Hay*, 23 Tex. App. 585; *Ex parte McDowell*, 23 Tex. App. 585; *In re Secrest*, (Kan.) 14 Pac. Rep. 144.

"Special and Extraordinary Circumstances."—It is difficult to state in general terms what circumstances will be deemed of such a character as to justify, on the application for bail, the consideration of evidence offered against

the presumption of guilt created by the indictment. But the following may be named: The existence, at the time the indictment was found, of great popular excitement with reference to the prisoner, or the offence charged against him, likely to bias and warp the judgment of the grand jurors. See *People v. Tinder*, 19 Cal. 549. The existence of the party charged to have been murdered, or a clear confession by another of the commission of the offence for which the defendant is indicted. *Id.*, the non-existence of a secure place to confine the prisoners until the day of trial. *People v. Smith*, 1 Cal. 9. Or where the prisoner has been tried and acquitted of the same offence, or where the supposed murder was a homicide committed in a war between two nations. *Finch v. State*, 15 Fla. 633; *People v. McLeod*, 1 Hill (N. Y.) 328; s. c., 37 Am. Dec. 328; App. to 26 Wend. (N. Y.) 697.

Disagreement of Jury.—New Trial, Etc.—So bail may sometimes be taken after indictment found in capital cases where the public prosecutor admits that the evidence which he can produce will not warrant a conviction for a capital offence, or where he admits facts from which it is evident that no such conviction can take place. So where upon trial the evidence for the prosecution and defence has been produced, and the jury have disagreed; or where, after verdict, a new trial has been granted for the insufficiency of the evidence to warrant a conviction. In such cases the court may allow bail, in its discretion, without hearing other evidence as to the guilt or innocence of the accused. *People v. Tinder*, 19 Cal. 539; *People v. Cole*, 6 Park. Cr. R. (N. Y.) 695. But the court will not as a matter of course admit to bail because the jury in a trial for murder have not agreed upon a verdict. *State v. Summons*, 19 Ohio 139; *Ex parte Pattison*, 56 Miss. 161. The jury's discharge, when they are unable to agree upon a verdict; the fact that they have disagreed twice upon the question of guilt; the fact that the prisoner refused to escape when the jail was broken, having had an opportunity to do so; and that he had at first voluntarily surrendered himself, are facts to be considered on an application for bail, and are strong circumstances going to show that the proof is not evident or the presumption great. *Ex parte McLaughlin*, 41 Cal.

211; In *Matter of Alexander*, 59 Mo. 599; see, also, *People v. Van Horne*, 8 Barb. (N. Y.) 158; *People v. Cole*, 6 Park. Cr. R. (N. Y.) 695. On a habeas corpus for bail, the affidavits of jurors are competent evidence to show the disagreement of the jury on a former trial. The applicant is not confined to the record, and he may show extraneous facts, such as those relating to the presentation of the indictment, the payment or discharge of a fine, etc. *People v. Cole*, 6 Park. Cr. R. (N. Y.) 695. When the prisoner is under indictment for a capital offence, he is entitled, on habeas corpus, to produce such evidence as may operate to convince the court that the offence is of such grade, or that there are such strong doubts in the case that a jury should not, upon the case as presented, convict of a capital offence, for the purpose of being discharged on bail. *Finch v. State*, 15 Fla. 633; *Holley v. State*, 15 Fla. 688. After a first refusal to admit to bail, a subsequent mistrial before a jury will give jurisdiction on a second habeas corpus, and authorize the production of newly developed exculpatory evidence, which may warrant the enlargement of the petitioner on bail. *Ex parte Pattison*, 56 Miss. 161; *People v. Perry*, 8 Abb. Pr. N. S. (N. Y.) 27.

Delay in Being Brought to Trial, etc.—So, where the trial of the prisoner has been unreasonably delayed; where the trial is postponed, even upon sufficient reasons, from term to term; or where any event has happened indefinitely postponing the further prosecution of the action, bail may properly be allowed after indictment for a capital offence. *In re Peoples*, 47 Mich. 626; *Street v. State*, 43 Miss. 1, 20; Cal. Crim. Prac. Act, §§ 594, 595; *People v. Tinder*, 19 Cal. 539. But the court must do what is right between the prisoner and the State, and bail will not be allowed for every postponement. *Regina v. Andrews*, 2 Dowl. & L. 10; *Logan v. State*, 3 Brev. (S. Car.) 415.

Sickness of Prisoner.—So, a prisoner indicted for a felony will be let out on bail when continued confinement endangers his life. *Archer's Case*, 6 Gratt. (Va.) 705; *Com. v. Semmes*, 11 Leigh (Va.) 665; *Street v. State*, 43 Miss. 1, 20; *Rex v. Earl*, etc., Comb. 422; *Rex v. Bishop*, 1 Stra. 9; *Kirk's Case*, 5 Mod. 455; *U. S. v. Jones*, 3 Wash. (U. S.) 224. But bail will be

if the proof is not evident or the presumption great he is entitled to bail as a matter of right.¹

(d) *Burden of Proof*.—On an application for bail on habeas corpus, where the prisoner is under indictment for a capital offence, he must take the initiative. The production of the indictment makes out a *prima facie* case against him, and casts on him the burden of adducing exculpatory evidence. He is presumed to be guilty until that presumption is overcome by the evidence adduced.²

(e) *Evidence and Inquiry into Indictment*.—As the indictment creates a great presumption of guilt against the defendant, it is held in some States, that the finding of the grand jury cannot be reviewed on an application for bail; and that its effect in creating such presumption cannot be repelled by affidavits or oral testimony as to the guilt or innocence of the prisoner, unless special and extraordinary circumstances exist.³ But in other States this rule is departed from and the courts will receive testimony *aliunde* the indictment. The indictment, however, is not placed entirely out of the question on the hearing of the habeas corpus, because it would then simply become a question of guilty or not guilty on the evidence.⁴ If the extrinsic evidence thus received shows that the prisoner is entitled to bail he will be admitted to bail; otherwise not. And the same rule prevails where the evidence has

refused unless it is shown by the evidence that confinement has produced, or is likely to produce fatal or serious results. *Ex parte Pattison*, 56 Miss. 161; *Ex parte Bridewell*, 57 Miss. 39. This may be shown like other extraneous facts. *People v. Cole*, 6 Park. Cr. R. (N. Y.) 695.

1. *Ex parte Randon*, 12 Tex. App. 146; *Ex parte Scoggin*, 6 Tex. App. 546; *Zenbrod v. State*, 25 Tex. 519; *Ex parte Bomar*, 9 Tex. App. 610; *Ex parte B. yant*, 34 Ala. 270; *Ex parte Strange*, 59 Cal. 416; *Ex parte Banks*, 28 Ala. 89.

2. *Ex parte Smith*, 23 Tex. App. 100; *Ex parte Rhear*, 77 Ala. 92; *Ex parte Hammock*, 78 Ala. 414; *Church on Habeas Corpus*, § 404; *Ex parte Vaughan*, 44 Ala. 417; *Ex parte Strange*, 59 Cal. 416; *Ex parte Springer*, 1 Utah 214; *Ex parte Heffren*, 27 Ind. 87; *Ex parte Jones*, 55 Ind. 176; *Ex parte Kendall*, 100 Ind. 599; *Street v. State*, 43 Miss. 1; *Ex parte Bridewell*, 57 Miss. 39; *Ex parte McGlawn*, 75 Ala. 38; *Lynch v. People*, 38 Ill. 494; *People v. Tinder*, 19 Cal. 539; *State v. Mills*, 2 Dev. (N. Car.) L. 420; *Hight v. U. S.*, 1 Morr. (Iowa) 407; *Holley v. State*, 15 Fla. 688; *Ex parte Scoggin*, 6 Tex. App. 546; *Ex parte Randon*,

12 Tex. App. 146; *Zenbrod v. State*, 25 Tex. 519; *Ex parte Bomar*, 9 Tex. App. 610.

3. *Territory v. Benolt*, 1 Mart. (La.) 142; *Finch v. State*, 15 Fla. 633; *Ex parte Harfourd*, 16 Fla. 283; *Hight v. U. S.*, 1 Morr. (Iowa) 407; *State v. Mills*, 2 Dev. (N. Car.) L. 420; *People v. McLeod*, 1 Hill (N. Y.) 377; s. c., 25 Wend. (N. Y.) 483; 37 Am. Dec. 328; *Ex parte Tayloe*, 5 Cow. (N. Y.) 56; *People v. Dixon*, 4 Park. Cr. R. (N. Y.) 651; *People v. Cole*, 6 Park. Cr. R. (N. Y.) 695; *People v. Tinder*, 19 Cal. 539; *U. S. v. Jones*, 3 Wash. 224; *U. S. v. Burr*, 1 Burr's Trial 312; *People v. Hyler*, 2 Park. Cr. R. (N. Y.) 571. Thus, after indictment, evidence is inadmissible to show that the prosecution was instituted from malice or mistake. *People v. Tinder*, 19 Cal. 539.

4. *Com. v. Rutherford*, 5 Rand. (Va.) 646; *Lumm v. State*, 3 Port. (Ind.) 293; *Ex parte Halpine*, 30 Ind. 254; *Street v. State*, 43 Miss. 1. Thus, in South Carolina the indicted may be admitted, and the court may hear and consider affidavits tending to show that the prosecution was instituted from malice or mistake. *State v. Hill*, 3 Brev. (S. Car.) 89.

become a part of the record on appeal.¹

(f) *Continuance.—Term.*—In a capital case, the officer hearing an application for bail by the writ of habeas corpus, should require the production of all the available testimony for the prosecution, and should, if necessary, postpone the hearing until it can be obtained.² If the application cannot be disposed of during the term, from business, indisposition or other cause, the judge should fix the hearing for a day in vacation, and as early as possible.³ Where the venue of a murder case has been changed from one county to another, and has been twice continued in the latter on the application of the State, the defendants may apply to the latter court for bail without having made a formal demand for trial. And notwithstanding the continuance of the cause, they are authorized to make their application at the same term of the court in which the second continuance was granted to the State. While a habeas corpus for bail is a correct procedure in such a case, a motion in the court below will do.⁴

(g) *Arrest on Bench-Warrant.*—While under such an arrest, the defendant cannot be let to bail before he has been taken to the county where he has been indicted.⁵ Neither can a defendant admitted to bail, taken before indictment for a felony, be discharged by habeas corpus from arrest on a bench-warrant issued after an indictment for the same felony. The court may permit the original bail to stand, or order the defendant into custody for the purpose of procuring additional bail, in a bailable case.⁶

(h) *Increasing and Reducing Bail.*—The court in which an indictment is pending has power, notwithstanding any action taken by the committing magistrate, to fix the amount of bail, and to exercise its discretion in admitting to bail and increasing or reduc-

1. *Ex parte Randon*, 12 Tex. App. 145; *Ex parte Wolff*, 57 Cal. 94; *Ex parte Foster*, 5 Tex. App. 625.

Practice on Appeal.—But the credibility of conflicting witnesses in the court below will not be considered on appeal. *Ex parte Beacom*, 12 Tex. App. 318; *Drury v. State*, 25 Tex. 45; *Ex parte Bomar*, 9 Tex. App. 610. Purely incidental questions which arose on the hearing below will not be reviewed or revised. *Ex parte Rothschild*, 2 Tex. App. 560, 587. On an appeal from the judgment of the lower court refusing bail, the record should bring up evidence of the ability of the applicant to give or procure bail, so as to enable the appellate court, if bail be allowed to determine the proper amount. *Ex parte Walker*, 5 Tex. App. 668. Unless the record does show the prisoner's circumstances the court of appeals cannot consider that question. *McConnell v. State*, 13 Tex. App. 390.

The practice on appeals on habeas corpus proceedings refusing bail is for the appellate court to determine the case exclusively on the facts and the law arising upon the record, but neither the facts nor the law, in affirming a judgment refusing bail, will ordinarily be discussed lest it prejudice the rights of the applicant on his final trial. *Ex parte Rothschild*, 2 Tex. App. 560, 587.

2. *Ex parte Bridewell*, 57 Miss. 44.

3. *Ex parte Kittrel*, 20 Ark. 499.

4. *Ex parte Walker*, 3 Tex. App. 668. The word "term" means the period of time prescribed by law during which the court is required to be held, unless the business is sooner disposed of, and not the time during which the court may actually be in session. *Ex parte Croom*, 19 Ala. 561.

5. In *Matter of Gorsline*, 21 How. Pr. (N. Y.) 85.

6. *Ex parte Cook*, 35 Cal. 107.

ing bail, etc. The facts of each case will be looked into, but the records should give the necessary information where an appellate court is asked to fix bail. In a proceeding to increase or diminish bail, the prisoner will be assumed to be guilty after indictment.¹

(i) *Insane Prisoner*.—A prisoner should neither be let to bail on habeas corpus, nor absolutely discharged, if it is dangerous to permit him to be at large while under mental delusion, although he has been acquitted on the issue of insanity.² But, if not dangerous, and the evidence does not show that the "proof is evident or presumption great" he is, after indictment found for a capital offence, entitled to bail.³

(j) *Appeal, Error, Etc., From Judgment Refusing*.—In some of the States an appeal or writ of error may be prosecuted from a judgment refusing bail on habeas corpus.⁴ In Indiana the defendant may do either.⁵ In Arkansas a *certiorari* may be awarded to revise the proceedings.⁶ In Alabama the prisoner may, after such judgment, petition the supreme court for a habeas corpus and such other remedial process as may be necessary to render its control effectual and complete.⁷ But the presumptions are in favor of the rulings of the court below, where bail is refused, when the testimony is conflicting, or where the credibility of witnesses is involved.⁸ And the decision of the lower court will not be reviewed unless all the evidence heard below is incorporated in the record.⁹ The case in the appellate court must be determined exclusively on the facts and the law arising upon the record.¹⁰ An appeal may also be taken from a judgment in chambers.¹¹

1. *Ex parte Ryan*, 44 Cal. 555; *Ex parte Duncan*, 53 Cal. 410; s. c., 54 Cal. 75; *Ex parte Walker*, 3 Tex. App. 674.

Excessive Bail, Etc.—To constitute excessive bail, it must *per se* be unreasonably great and clearly disproportionate to the offence involved, or the peculiar circumstances appearing must show it to be so in the particular case. *Ex parte Ryan*, 44 Cal. 555; *Ex parte Duncan*, 53 Cal. 410; s. c., 54 Cal. 75. A showing of the prisoner's poverty may be considered in fixing the amount of bail. *Ex parte Bridewell*, 57 Miss. 39, 54. If an appeal be prosecuted to secure a reduction of bail averred to be excessive, the judgment will be affirmed, unless the record discloses the pecuniary circumstances of the defendant. *McConnell v. State*, 13 Tex. App. 401.

2. *U. S. v. Lawrence*, 4 Cranch (C. C.) 518.

3. *Zenbrod v. State*, 25 Tex. 519.

4. As to appeals, see *Ex parte Walker*, 3 Tex. App. 669; *Ex parte Randon*, 12 Tex. App. 145; *Ex parte Beacom*,

Tex. App. 318; *McConnell v. State*, 13 Tex. App. 390; *Yarbrough v. State*, 2 Tex. 519; *Ex parte Erwin*, 7 Tex. App. 292; *Ex parte Rucker*, 6 Tex. App. 81; *Ex parte McKinney*, 5 Tex. App. 500; *Ex parte Bridewell*, 57 Miss. 39.

As to writs of error, see *Moore v. State*, 36 Miss. 137; *Lynch v. State*, 38 Ill. 494; *Ex parte Finch*, 15 Fla. 630; *Ex parte Harfourd*, 16 Fla. 283; *Finch v. State*, 15 Fla. 633.

5. *Lumm v. State*, 3 Port. (Ind.) 293; *Ex parte Halpine*, 30 Ind. 254.

6. *Ex parte Good*, 19 Ark. 410.

7. *Ex parte Croom*, 19 Ala. 561; *Ex parte Chaney*, 8 Ala. 424.

8. *Ex parte Jones*, 20 Ark. 9; *People v. Hessing*, 28 Ill. 410; *Street v. State*, 43 Miss. 1; *Drury v. State*, 25 Tex. 45.

9. *People v. Hessing*, 28 Ill. 410.

10. *Ex parte Rothschild*, 2 Tex. App. 560; *Ex parte Scoggin*, 6 Tex. App. 546; *Ex parte Jones*, 7 Tex. App. 365.

11. *Ex parte Rothschild*, 2 Tex. App. 560.

No Appeal.—However, lies from the refusal of the lower court to issue the

3. After Conviction.—(a) *But Before Final Judgment.*—A conviction at common law did not deprive the judges of the power to bail,¹ and where the conviction appeared to be erroneous, this would be done.² But after conviction for an infamous crime, or a felony, a prisoner cannot insist upon bail as a matter of right, pending steps to reverse the sentence.³ In minor offences, however, bail pending steps to reverse the sentence may be taken, to have the prisoner abide final judgment.⁴ In cases not capital, and after conviction, the courts will exercise a sound discretion, and allow bail wherever the circumstances warrant it. It is given of course to secure the appearance of the prisoner to abide the sentence of the court.⁵

(b) *Pending Appeal or Error.*—In cases not capital, and after conviction, an application for bail, especially if made to a judge at chambers, will be very cautiously entertained, and bail be granted only where circumstances of an extraordinary character have intervened. It is entirely a matter of discretion,⁶ and should not be allowed except by a judge of the court in which the conviction was had, or by a justice of the supreme court.⁷

(c) *After Sentence or Commitment in Execution.*—The prisoner cannot ordinarily be bailed; for then the punishment itself would fail,⁸ as in a commitment for contempt.⁹ And this is the common law rule pending steps to have the sentence reversed.¹⁰ But in cases not capital statutes have worked great changes in favor of allowing bail pending proceedings to have the judgment reversed.

XIII. ATTACKING JUDGMENTS.—1. **Summary Convictions.**—(a) *Definition.*—The judgments of justices of the peace, without the intervention of a jury, upon offenders for minor and statutory

habeas corpus; *Ex parte* Foster, 5 Tex. App. 625; nor from an order dismissing a motion to reduce the amount of bail; *Miller v. State*, 43 Tex. 579; nor from a refusal of the lower court to hear evidence upon an application for bail by a party indicted for murder; *Lynch v. State*, 38 Ill. 494; as the judgment in such cases is not such a final judgment as may be reviewed by the supreme court, or from which an appeal will lie. See cases cited *supra*. No appeal, on the part of the State, lies from an order admitting a party to bail on habeas corpus. *State v. Schuster*, 40 Cal. 627. Neither can one who has been admitted to bail, given bond, and been released, prosecute an appeal on the ground that he should have been discharged. *Ex parte* Walker, 53 Miss. 366.

1. *Armstrong v. Lisle*, 1 Salk. 60; *King v. Mayor, etc.*, 2 Show. 96; *Rex v. Bishop*, 1 Stra. 9.

2. 2 Hawk. P. C. 175; 1 Bac. Abr. Bail in Criminal Cases, 581.

3. *State v. Connor*, 2 Bay. (S. Car.)

34; *Ex parte* Brown, 68 Cal. 176; s. c., 6 Am. Crim. R. 55.

4. *Reg. v. Harris*, 4 Cox C. C. 21; *State v. Connor*, 2 Bay. (S. Car.) 34.

5. *Davis v. State*, 6 How. (Miss.) 399; *Ex parte* Dyson, 25 Miss. 356; *Longworth's Case*, 7 La. Ann. 247.

6. *Armstrong v. Lisle*, 1 Salk. 60; *People v. Lohman*, 2 Barb. (N. Y.) 454; *People v. Bowe*, 58 How. Pr. (N. Y.) 393; *Ex parte* Smallman, 54 Cal. 35; *Ex parte* Marks, 49 (Cal.) 680; *State v. Ward*, 2 Hawk. 443; *Ex parte* Walker, 3 Tex. App. 668. But for cases tending to show a constitutional right to demand bail in such cases, see *Longworth's Case*, 7 La. Ann. 247; *Ex parte* Schwartz, 2 Tex. App. 74.

7. *Ex parte* Marks, 49 Cal. 680.

8. *Corbett v. State*, 24 Ga. 391.

9. In *Matter of Percy*, 2 Daly (N. Y.) 530.

10. *Ex parte* Lees, 1 El. B. & El. 828; *Anon.* 3 Cro. Car. 579; *Anon.* 11 Mod. 45; *Armstrong v. Lisle*, 1 Salk. 60; *King v. Mayor*, 2 Show. 96.

police offences are called summary convictions. Among such offences are common swearing, drunkenness, vagrancy, idleness, etc. Summary proceedings of this kind are statutory, however, and were unknown at common law.¹

(b) *Constitutionality and Construction*.—Statutes authorizing summary convictions are constitutional;² and while such statutes are in themselves to be strictly construed,³ the construction of commitments made under them must be liberal in support of the lawfulness of the exercise of the jurisdiction, when considered on returns to the writ of habeas corpus.⁴

(c) *Jurisdiction, Errors and Irregularity*.—The prisoner may on habeas corpus, show that there has been no conviction in fact, or that it is simply void for want of jurisdiction in the magistrate to make it.⁵ Where the justice has jurisdiction of the offence, with the power to try, convict, and commit therefor, and the commitment recites the conviction, the conviction will be presumed lawful until the contrary is shown.⁶ Mere errors and irregularities in these judgments cannot be attacked collaterally on habeas corpus any more than in other judgments.⁷

(d) *Recitals in Commitment*.—All the facts necessary to constitute the offence in summary convictions should be proved, but it

1. See Church on Habeas Corpus, § 294, 295, where the English statutes are referred to. For authorities showing in what States justices of the peace have summary jurisdiction to try persons for petty offences, see *In re Glenn*, 54 Md. 572.

2. *In re Glenn*, 54 Md. 572; *People v. McCarthy*, 45 How. Pr. (N. Y.) 97; *People v. Warner*, 45 How. Pr. (N. Y.) 97; *Duffy v. People*, 6 Hill (N. Y.) 75; *People v. Phillips*, 1 Park. Cr. R. (N. Y.) 95; *State v. Maxcy*, 1 McMull. (S. Car.) 501; *Byers v. Com.*, 42 Pa. St. 89; *Beers v. Beers*, 4 Conn. 535; *Murphy v. People*, 2 Cow. (N. Y.) 815; *Tims v. State*, 26 Ala. 165; *State v. Conlin*, 27 Vt. 318; *McGear v. Woodruff*, 33 N. J. L. 213; *Wharton's Crim. Pl. & Pr.*, (8th ed.), 1880, § 80; *Shafer v. Mumma*, 17 Md. 331; *People v. Forbes*, 4 Park. Cr. R. (N. Y.) 611.

3. *People v. Phillips*, 1 Park. Cr. R. (N. Y.) 95; *People v. Forbes*, 4 Park. Cr. R. (N. Y.) 611.

4. *In re Glenn*, 54 Md. 572.

5. *In re Glenn*, 54 Md. 572. An imprisonment under a sentence by a court or magistrate of competent jurisdiction is not unlawful unless the sentence, for some cause to be made apparent, be not merely erroneous, but an absolute nullity; though if shown to be void the prisoner is entitled to his immediate discharge on habeas corpus.

In re Glenn, 54 Md. 572; *Ex parte Reed*, 100 U. S. 23; *Com. v. Leckey*, 1 Watts (Pa.) 66; *Ex parte Watkins*, 3 Pet. (U. S.) 193; *Bell v. State*, 4 Gill (Md.) 305. Jurisdiction may at all times, be inquired into on habeas corpus, though mere informality, error and irregularity cannot be. *People v. Liscomb*, 60 N. Y. 559. A judgment under an unconstitutional law is void and may be impeached on habeas corpus. *Id.*; *Ex parte Siebold*, 100 U. S. 371; compare, *Matter of Donohue*, 1 Abb. N. C. (N. Y.) 1; s. c., 52 How. Pr. (N. Y.) 251.

6. *People v. Gray*, 4 Park. Cr. R. (N. Y.) 616.

7. *Bell v. State*, 4 Gill (Md.) 301, 305; *Rex v. Suddis*, 1 East. 306; *Ex parte Watkins*, 3 Pet. (U. S.) 193; *Ex parte Reed*, 100 U. S. 13, 23; *O'Malia v. Wentworth*, 65 Me. 129; *State v. Shattuck*, 45 N. H. 205; *People v. Gray*, 4 Park. Cr. R. (N. Y.) 616. If the prisoner desires to go behind the conviction recited in the warrant of commitment to question the regularity of the proceedings upon which the conviction is founded, or to impeach the conviction itself for errors therein, other than the want of jurisdiction in the premises, he should bring up the record of conviction by *certiorari* for examination on the return of the habeas corpus. *In re Glenn*, 54 Md. 572.

is not necessary to recite them all in the commitment.¹ The commitment is sufficient if it follows the record.²

(e) *Conviction Without Authority of Law.*—Is unwarranted and will justify a discharge on habeas corpus. Thus, under the New York statute, evidence that a female is a common prostitute and idle person will not authorize her conviction as a vagrant under the statute.³

(f) *Commitment of Witness.*—A court is not authorized to extract from a witness, who was not examined before the committing magistrate an undertaking that he will appear and testify at the court to which the depositions and statements are sent. It is only in case of a failure to give an undertaking, when legally required to do so, that the court can commit a witness to prison.⁴

2. **Judgments for Contempt.**—(a) *Definitions.*—Contempts are by the authorities divided into two classes: 1. Criminal contempts, which are committed in the immediate view and presence of the court. 2. Constructive or consequential contempts, which arise from matters not transpiring in court, but relating to a failure to comply with the orders and decrees issued by the court, and to be performed elsewhere.⁵ What constitutes a direct or criminal contempt is generally defined by statute, and its punishment prescribed. But indirect, constructive or consequential contempts are a part of the common law.⁶ Any violation of the privileges of either house of parliament,⁷ or of either house of congress,⁸ or of either house of a State legislature, is a contempt.⁹ Contempts

1. *People v. Gray*, 4 Park. Cr. R. (N. Y.) 616; *People v. Moore*, 3 Park. Cr. R. (N. Y.) 465; *People v. Cavanaugh*, 2 Park. Cr. R. (N. Y.) 660; *O'Malia v. Wentworth*, 65 Me. 130; *Byers v. Com.*, 42 Pa. St. 89; *Bennac v. People*, 4 Barb. (N. Y.) 31; *contra*, *People v. Forbes*, 4 Park. Cr. R. (N. Y.) 611; *People v. Phillips*, 1 Park. Cr. R. (N. Y.) 95.

2. See cases last cited. The commitment will be considered a true recital of the conviction, although the commitment may be defective, unless the conviction be removed either by appeal or *certiorari* for the inspection of the court exercising a supervisory revision by habeas corpus. *Reg. v. Chaney*, 6 Dowl. P. C. 281.

3. *People v. Forbes*, 4 Park. Cr. R. (N. Y.) 611; *People v. Phillips*, 1 Park. Cr. R. (N. Y.) 95. The statute does not declare common prostitutes as a class, or by name, to be vagrants, nor does it declare all idle persons to be vagrants, but only such idle persons as live without employment and yet have no means to maintain themselves. *Id.* There was no such common-law offence or crime as vagrancy and idle-

ness, and to commit one for such an offence who does not come within the description of the statute is without authority of law, and void, and the prisoner will be discharged on habeas corpus. *Id.* *Geter v. Comrs.*, etc., 1 Bay. (S. Car.) 354; *Gurney v. Tufts*, 37 Me. 130.

4. *Ex parte Shaw*, 61 Cal. 58. The power to require undertakings in such cases appears to be confined to witnesses who were examined before the committing magistrate. And where one is committed to prison for not complying with an order, even of a court of general jurisdiction, requiring him to give such an undertaking with sureties, he will be released on habeas corpus. *Ex parte Shaw*, 61 Cal. 58.

5. *Androscoggin, etc., R. R. v. Androscoggin, etc., R. R. Co.*, 49 Me. 400.

6. *Stuart v. People*, 3 Scam. (Ill.) 404, 405.

7. *Burdett v. Abbott*, 14 East. 158; *Stockdale v. Hansard*, 9 Ad. & El. 1; s. c., 11 Ad. & El. 253.

8. *Matter of Irwin*, 9 Cong. Rec. 615.

9. *Burnham v. Morrissey*, 14 Gray (Mass.) 226; s. c., 74 Am. Dec. 676.

are public wrongs. The offence is a wrong to the public, and not to the person of the functionary to whom it is offered, considered merely as an individual.¹ Contempt of court is "a specific criminal offence,"² and the fine imposed is a judgment in a criminal case.³ The adjudication is a conviction, and the commitment in consequence thereof is execution.⁴ An act, however, necessarily innocent or justifiable is not a contempt, and is no cause for imprisonment.⁵ (See CONTEMPT, vol. 3, p. 777.)

(b) *Power of Courts to Punish Contempts*, is inherent.⁶ But, while an inferior court may peremptorily punish a contempt committed in its presence, its power does not extend to commit for a contempt committed out of court.⁷

(c) *Jurisdiction*.—On a habeas corpus in a case of commitment for contempt, the court can go no further, and the prisoner will be remanded if jurisdiction of the person and subject-matter existed

1. *Ex parte* Hickey, 4 Smed. & M. (Miss.) 783, 778; *State v. Sauvinet*, 24 La. Ann. 119.

2. *New Orleans v. Steamship Company*, 20 Wall. (U. S.) 392; *Ex parte* Crittenden, 7 Pac. C. L. J. 483; *Fischer v. Hayes* (N. Y.) 6 Fed. Rep. 63; *Williamson's Case*, 26 Pa. St. 9; s. c., 67 Am. Dec. 374.

3. *Burnham v. Morrissey*, 14 Gray (Mass.) 226; s. c., 74 Am. Dec. 676.

4. *Ex parte* Kearney, 7 Wheat. (U. S.) 39; *Crosby's Case*, 3 Wils. 188; s. c., 2 W. Black. 756.

5. *People v. Hackley*, 24 N. Y. 78.

6. *Ex parte* Lange, 18 Wall. (U. S.) 163, 167; *Fischer v. Hayes* (N. Y.) 6 Fed. Rep. 63; *Androskoggin, etc., R. R. Co. v. Androskoggin, etc., R. R. Co.*, 49 Me. 392; *Watson v. Williams*, 36 Miss. 331; *Stuart v. People*, 3 Scam. (Ill.) 405; *State v. Matthews*, 37 N. H. 451; *King v. Hobhouse*, 2 Ch. Q. B. 207; *State v. Sauvinet*, 24 La. Ann. 119; *Clark v. People*, 1 Breese (Ill.) 340; s. c., 12 Am. Dec. 178, 186; Appendix to 13 Md. 634; *Queen v. Lefroy*, 8 L. R. Q. B. 134. *Ex parte* Grace, 12 Iowa 208; s. c., 79 Am. Dec. 529, notes 536; *Ex parte* Adams, 25 Miss. 883; s. c., 59 Am. Dec. 234; *In re Cheeseman* 49 N. J. 115; s. c., 5 Crim. L. Mag. 151, 153.

Power to Commit for Contempt.—And the power to commit for contempt is incident to all legislative bodies. *Burnham v. Morrissey*, 14 Gray (Mass.) 226; s. c., 74 Am. Dec. 676; *Anderson v. Dunn*, 6 Wheat. (U. S.) 204; *King v. Hobhouse*, 2 Ch. Q. B. 207; *Burdett v. Abbott*, 14 East. 1. By statute, in some States, justices of the peace, and other inferior courts, may commit for con-

tempt. *State v. Towle*, 42 N. H. 540. And so may a notary public, for a refusal to answer questions in the taking of depositions. *Ex parte* McKee, 18 Mo. 599; *Ex parte* Krieger, 7 Mo. App. 367; *In matter of Abeles*, 12 Kan. 451; *Ex parte* Priest, 76 Mo. 229; s. c., 4 Am. Crim. R. 134. But justices of the peace, as well as the superior courts, must confine themselves to jurisdiction of the person and of the subject-matter, and act within the exercise of that jurisdiction, or the one committed may be released on habeas corpus. *Clarke's Case*, 12 Cush. (Mass.) 320. And where a notary commits for a refusal to answer a question, where the courts will not compel an answer, the courts will review the judgment upon habeas corpus. *Ex parte* Krieger, 7 Mo. App. 367; *People v. Hackley*, 24 N. Y. 78.

7. *Queen v. Lefroy*, 8 L. R. Q. B. 134; *State v. Galloway*, 5 Coldw. (Tenn.) 326; s. c., 98 Am. Dec. 404; note to *Clark v. People*, Breese (Ill.) 340; s. c., 12 Am. Dec. 178, 186; *Ex parte* Adams, 25 Miss. 883; s. c., 59 Am. Dec. 234; *State v. Woodfin*, 5 Ired. (N. Car.) L. 109; *Ex parte* Summers, 5 Ired. (N. Car.) L. 149; *Ex parte* Alexander, 2 Am. L. Reg. 44. Upon a judgment imposing a fine for contempt, it is competent for the court to direct that the party stand committed until the fine be paid. *Ex parte* Crittenden, 62 Cal. 534; s. c., 7 Pac. C. L. J. 483. Contempts at common law, not falling within the five clauses prescribed by the Tennessee code, or other statutory enactments, are not punishable by the inferior courts of that State. *State v. Galloway*, 5 Coldw. (Tenn.) 326; s. c., 98 Am. Dec. 404.

to make the commitment;¹ but if there was a want of such jurisdiction to make it, the prisoner is entitled to a discharge.²

1. In *Matter of Percy*, 2 Daly (N. Y.) 530; *Anon.*, 18 Abb. N. C. (N. Y.) 216; *Ex parte McDonald*, 1 Low (U. S.) 100; *Ex parte Smith*, 117 Ill. 63; *Ex parte Adams*, 25 Miss. 883; s. c., 59 Am. Dec. 234; *In re Lowenthal* (Cal.) 15 Pac. R. 359; *Ex parte Henshaw*, 73 Cal. 486; *In re Smith*, 117 Ill. 63; *Williamson's Case*, 26 Pa. St. 9; s. c., 67 Am. Dec. 374; *In re Robb*, 64 Cal. 431; *Ex parte Harris*, (Utah) 5 Pac. R. 129.

2. *Ex parte Adams*, 55 Miss. 883; s. c., 59 Am. Dec. 234; *Williamson's Case*, 26 Pa. St. 9; s. c., 67 Am. Dec. 374; *In Matter of Dill*, 32 Kan. 668; *Ex parte Fisk*, 113 U. S. 713; *Dudley v. McCord*, 65 Iowa 671; note to *Com. v. Lecky*, 1 Watts (Pa.) 60; s. c., 26 Am. Dec. 49; note to *Ex parte Grace*, 12 Iowa 208; s. c., 79 Am. Dec. 536; *Ex parte Perkins*, (Ind.) 29 Fed. R. 900; *In re Ayres*, 123 U. S. 443; *Ex parte Rowland*, 104 U. S. 604; s. c., 3 Morr. Trans. 668; *Tyler v. Connolly*, 65 Cal. 28.

Illustrations—Answering Questions.

—The refusal of a witness to answer a legal and proper question about a matter over which the court has jurisdiction is a decided contempt, and if he is committed for such refusal he cannot obtain relief on habeas corpus. *Holman v. Mayor*, 34 Tex. 668; *People v. Hackley*, 24 N. Y. 74; *Ex parte McDonald*, (Cal.) 17 Pac. Rep. 234; *People v. Kelly*, 21 How. Pr. (N. Y.) 54; *Ex parte Rowe*, 7 Cal. 175; *S. P. Ex parte Perkins*, 18 Cal. 60; *People v. Sheriff*, 7 Abb. Pr. (N. Y.) 96; s. c., 29 Barb. (N. Y.) 622; *State v. Towle*, 42 N. H. 540; *Ex parte Adams*, 25 Miss. 883; s. c., 59 Am. Dec. 234; *compare Ex parte Kearney*, 7 Wheat. (U. S.) 39. So with a refusal to answer proper questions before a grand jury. *People v. Hackley*, 24 N. Y. 74; *Ex parte Harris*, (Utah) 5 West C. Rep. 60; s. c., 5 Pac. R. 129; *Ex parte Smith*, 117 Ill. 63. Or to take the proper oath before such jury. *Lockwood v. State*, 1 Ind. (Cart.) 161. But it is no contempt to answer an impertinent question, or one which cannot be properly asked; that is, one not pertinent to the issues involved, and if committed for such refusal, habeas corpus will lie. *Ex parte Zeehandelaar*, 71 Cal. 238; *Holman v. Mayor*, 34 Tex. 668; *Ex parte Rowe*, 7 Cal. 175; *People v. Cassels*, 5 Hill (N. Y.) 164; *Ex parte Fisk*, 113

U. S. 713. One committed by a justice of the peace for a refusal to make an affidavit on which to base a civil action may be released on habeas corpus. *Dudley v. McCord*, 65 Iowa 671.

Orders, Judgments and Decrees.—

No matter how erroneous the order, judgment or decree of a court may be, the prisoner, committed under a commitment for contempt in refusing to comply with it, cannot attack it on habeas corpus. *Ex parte Grace*, 12 Iowa 208; s. c., 79 Am. Dec. 529, notes 536; *Gilliam v. McJunkin*, 2 Rich. (S. Car.) 442; *In re Blair*, 4 Wis. 522; *Watson v. Williams*, 36 Miss. 331; *In re Cooper*, 32 Vt. 253, 265. As where the court orders alimony, counsel fees and other legal expenses to be paid by the husband to the wife pending divorce proceedings. *Ex parte Cottrell*, 59 Cal. 417; *In re Wilson*, (Cal.) 17 Pac. R. 698; *Ex parte Perkins*, 18 Cal. 60; *In Matter of Bissell*, 40 Mich. 63. Or orders money to be paid over under a decree of distribution in a probate court. *Ex parte Cohn*, 55 Cal. 193. Or directs the execution of a conveyance. *Davison's Case*, 13 Abb. Pr. (N. Y.) 129. So where the prisoner has disobeyed orders supplementary to execution. *Wicker v. Dresser*, 13 How. Pr. (N. Y.) 331; *Kearney's Case*, 13 Abb. Pr. (N. Y.) 459; s. c., 22 How. Pr. (N. Y.) 309. But *compare Shepherd v. Dean*, 13 How. Pr. (N. Y.) 173. So where defendant has violated an order of injunction. *People v. Jacobs*, 66 N. Y. 8; *Phillips v. Welch*, 11 Nev. 187; *Phillips v. Sweeney*, 12 Nev. 158. Or refuses or neglects to pay a tax ordered by the court. *Kahn's Case*, 11 Abb. Pr. (N. Y.) 147. Or disobeys a subpoena. *Robb v. McDonald*, 29 Iowa 330; s. c., 6 Am. L. Rev. 320. Or being a firewarden refuses to serve as a juror, although the record shows upon its face that he is exempt by law from jury duty, and that he claimed his exemption. *Ex parte Goodin*, 67 Mo. 637. But see dissenting opinions and cases cited therein; also, *State v. Towle*, 42 N. H. 540.

But when a court undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the original order being void for want of jurisdiction, the order punish-

ing for contempt is equally void; and if the proceeding for contempt result in imprisonment, the prisoner may be discharged by another court on habeas corpus. *In re Ayres*, 123 U. S. 443; *Ex parte Grace*, 12 Iowa 208; s. c., 79 Am. Dec. 529; *Gilliam v. McJunkin*, 2 Rich. (S. Car.) 442; *In re Blair*, 4 Wis. 522; *People v. Society*, etc., 26 Hun. (N. Y.) 1; *Ex parte Rowland*, 104 U. S. 604; s. c., 3 Morr. Trans. 608; *Ex parte Lange*, 18 Wall. (U. S.) 165; *Ex parte Parks*, 93 U. S. 22; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Virginia*, 100 U. S. 339. And the prisoner must have had notice of the order and have had an opportunity to show cause why he should not be imprisoned for his disobedience. *Ex parte Rush*, 60 Cal. 5. It has, therefore, been held that a lawyer may be released on habeas corpus, where he has been suspended from his profession, instead of being fined, for neglecting to appear and testify. *Com. v. Newton*, 1 Grant Cas. (Pa.) 453. Or that one may be so released from a judgment for contempt under an unconstitutional law. *Ex parte Hardy*, 68 Ala. 303; s. c., 13 Cent. L. J. 50. Or where the command of a writ of *mandamus* is in excess of the jurisdiction of the court. *Ex parte Rowland*, 104 U. S. 604; s. c., 3 Morr. Trans. 608. Or where the prisoner refused to give evidence in a case over which the court had no jurisdiction. In *Matter of Morton*, 10 Mich. 208; In *Matter of Hall*, 10 Mich. 210; or where he has been committed for a longer period than that fixed by statute. *Shank's Case*, 15 Abb. Pr. N. S. (N. Y.) 38. Compare *People v. Sheriff*, 29 Barb. (N. Y.) 622; s. c., 7 Abb. Pr. (N. Y.) 96; *People v. Kelly*, 12 Abb. Pr. (N. Y.) 150; *Hackley's Case*, 21 How. Pr. (N. Y.) 103; s. c., 24 N. Y. 74. The prisoner is also entitled to a discharge on habeas corpus where he has been committed for a contempt under conditions which are impossible of performance. *Ex parte Maulsby*, 13 Md. 641, App.; *People v. Conner*, 15 Abb. Pr. N. S. (N. Y.) 430. And it is always competent to inquire whether anything has arisen since the commitment to put an end to the imprisonment, as a pardon, or an expiration of the term fixed by the commitment. *People v. Casels*, 5 Hill (N. Y.) 164.

English Rules.—In England, a commitment for a contempt generally, by a superior court, is sufficient, and is not examinable by any other court of co-

ordinate jurisdiction. *Rex v. Flower*, 8 T. R. 325; *Earl of Shaftsbury's Case*, 5 Howell's State Trials 1269; s. c., 1 Mod. 144; *Crosby's Case*, 3 Wils. 188; s. c., 2 W. Black. 754; *Rex v. Davison*, 4 Barn. & Ald. 336, 340; *Burdett v. Abbott*, 14 East. 150; *Bushell's Case*, K. B. & C. P. 1, note *a*. But if the grounds from which the contempt was deduced be stated, in accordance with the general modern practice; *Stockdale v. Hansard*, 9 Ad. & El. 228, and they appear on the face of the return to a writ of habeas corpus to be clearly contrary to law, the prisoner will be entitled to his discharge, although the commitment be made by the house of commons. *Burdett v. Abbott*, 14 East. 1; *Bushell's Case*, Vaughan 156, 157; *Stockdale v. Hansard*, 9 Ad. & El. 1; *Case of Sheriff of Middlesex*, 11 Ad. & El. 273; see, also, *Regina v. Paty*, 2 Ld. Raym. 1105; s. c., 2 Salk. 504; *Contra*, see *Rex v. Hobbhouse*, 2 Ch. Q. B. 210.

Modifying Judgments.—A court has general power over its own judgments, orders and decrees, in both civil and criminal cases, during the existence of the term at which they were first made; but after final judgment has been rendered in a matter, the court cannot vacate one sentence after the expiration of the term and substitute another, and cause it to be carried into execution. Neither can the judgment of the court, rendered and carried into execution before the expiration of the term, be vacated and another substituted for it, even before the close of the term. "No man can be twice lawfully punished for the same offence." *Ex parte Lange*, 18 Wall. (U. S.) 163; *Bank of U. S. v. Moss*, 6 How. (U. S.) 31; *Bank v. Labitut*, 1 Woods (U. S.) 11. But a supposed want of jurisdiction may be tested on habeas corpus. *Ex parte Lange*, 18 Wall. (U. S.) 163; *Bank of U. S. v. Moss*, 6 How. (U. S.) 31; *Shank's Case*, 15 Abb. Pr. N. S. (N. Y.) 38. In proceedings for contempt in a court of equity, that court has no power to vary a judgment rendered in such proceedings, after the expiration of the term in which it was imposed. *Fischer v. Hayes*, (N. Y.) 6 Fed. R. 63.

"Superior" and "Inferior" Courts; Judgments of.—In the "superior" courts every presumption is intended in their favor, even that of jurisdiction, and it must be assumed that such a court has passed upon the jurisdictional facts, and thus its judgment can-

(d) *No Authority.—Acts not Constituting Contempt.*—If it appears that the court rendering a judgment for contempt was without authority to render it, or if the acts alleged to be a contempt do not constitute a contempt, or that the court exceeded its authority, the prisoner may be discharged by another court on habeas corpus.¹

(e) *Commitments for Indefinite Time*, as, “until discharged by due course of law,” or “until further order of the court,” and the like, are generally bad, and the prisoner will usually be discharged on habeas corpus, unless the “due course of law,” or other good reason for his detention is shown to exist.²

not be affected by matters *dehors* the record in a collateral proceeding like habeas corpus. But in the case of a court of limited jurisdiction, and still more in the case of a mere notary, or other officer to whom the power to take depositions is given, there is no similar presumption. In each case, however, if there was no competent court to render the judgment or decree to be questioned, the judgment and process is equally void. *People v. Nevins*, 1 Hill (N. Y.) 154; *Ex parte Page*, 49 Mo. 291; *People v. Liscomb*, 60 N. Y. 559; *Ex parte Toney*, 11 Mo. 661; *Ex parte Goodin*, 67 Mo. 641; *Ex parte Krieger*, 7 Mo. App. 367; *Holman v. Mayor*, 34 Tex. 668.

Conflict of Authority, State and Federal.—If a State board of canvassers are committed by a state court for contempt, in not complying with the order of the state court directing them to canvass the vote of the State, cast at a general election at which electors and members of congress were to be elected, they may be discharged on habeas corpus as being restrained of their liberty, etc., “for an act done or omitted in pursuance of a law of the United States, or an order, process or decree of a court or judge thereof.” *Electoral College*, 1 Hughes (U. S.) 571; § 753 U. S. Rev. Stats.; *Ex parte Turner*, 3 Woods (U. S.) 603. Federal courts may commit for contempt, and state courts will not interfere with their sentences by means of habeas corpus. *Williamson's Case*, 26 Pa. St. 9; s. c., 67 Am. Dec. 374; *Ex parte Hollman*, 28 Iowa 88; although it is alleged that the federal court had no jurisdiction in the proceeding to adjudge the petitioner guilty of contempt. *Id.* If the state court imprison a United States officer for contempt in not making a verified return, or for refusing to produce the body of a soldier held to service in the

United States army, a federal court will discharge him from confinement, because of a want of jurisdiction in the state court to render the judgment. *In re Neill*, 8 Blatchf. (U. S.) 156; *Ex parte Robinson*, 4 Am. L. Reg. 617. But compare *Robb v. Connolly*, 111 U. S. 624.

Parliamentary Bodies.—The legality of an imprisonment for contempt by legislative bodies may be inquired into on habeas corpus by a court of competent jurisdiction. *Burnham v. Morrissey*, 14 Gray (Mass.) 226; s. c., 74 Am. Dec. 676, notes 681; *Emery's Case*, 107 Mass. 180; *Kilbourn v. Thompson*, 103 U. S. 199; s. c., 2 Morr. Trans. 81; *In re Falvey*, 7 Wis. 630. But compare *Stockdale v. Hansard*, 9 Ad. & El. 1; *Burdett v. Abbott*, 14 East. 1; *Case of Sheriff of Middlesex*, 11 Ad. & El. 273.

1. *In Matter of Dill*, 32 Kan. 668; note to *Com. v. Lecky*, 1 Watts (Pa.) 66; s. c., 26 Am. Dec. 49; *People v. Hackley*, 24 N. Y. 75; *Ex parte Perkins*, (Ind.) 29 Fed. R. 900; *In re Ayres*, 123 U. S. 443; *Ex parte Grace*, 12 Iowa 208; s. c., 79 Am. Dec. 529; *Ex parte Summers*, 5 Ired. (N. Car.) L. 149; *State v. Woodfin*, 5 Ired. (N. Car.) 199. Jurisdiction is not obtained by a mere assertion of it. *Holman v. Mayor*, 34 Tex. 668. And an act cannot be made a contempt by a court or judge simply styling it as such. *Ex parte Grace*, 12 Iowa 208; s. c., 79 Am. Dec. 529. But it is not competent on habeas corpus to review and reverse an order of imprisonment for contempt, unless it can be determined, as a matter of law, that the act constituting the alleged contempt was not a contempt. *State v. Seaton*, 61 Iowa 563. As to jurisdictional facts, see *In re Cheese-man* 49 N. J. 115.

2. *King v. James*, 1 Dowl. & Ry. 559; s. c., 5 Barn. & Ald. 804; *Hollingshead's Case*, 1 Salk. 351; *Bracy's Case*,

(f) *Publications During Trial*.—It has been held on habeas corpus that courts have power to prevent the publication of testimony and other proceedings, during the progress of a trial, and that a violation of such an order is a contempt of court. But a judgment for contempt in violating such an order is, from its very nature, one that can seldom be reviewed on habeas corpus.¹

(g) *Fine and Costs*.—The judgment for contempt, as in not answering questions or for disobeying the orders of a judgment, may impose a fine and imprisonment until the "further order of the court," or until the said fine is paid, or the order complied with, if that can be done.² If the power to commit or fine for contempt is exercised tyrannically, the case may generally be remedied by habeas corpus or *certiorari*.³

(h) *Statement of Facts*.—The facts constituting an alleged contempt need not be stated in the order of commitment, unless a statute requires it.⁴ The commitment, therefore, cannot be attacked on habeas corpus for a failure to set out the facts on which the contempt arose, unless a statute requires them to be set forth.⁵ The facts constituting a contempt should, however, always be set out, whether required by statute or not.⁶ But, where that is required by statute, it is sufficient if the cause be substantially stated without entire precision.⁷ All the preliminaries to warrant the imprisonment need not be set out.⁸ Where the warrant

1 Ld. Raym. 100; *Rex v. Hall*, 3 Burr. 1636; *Goff's Case*, 3 Maul. & Sel. 202; *Crawford's Case*, 13 Ad. & El. Q. B. 629; *King v. Hobhouse*, 2 Ch. Q. B. 207; *Case of Sheriff of Middlesex*, 11 Ad. & El. 273; *Burdett v. Abbott*, 14 East. 1; *Regina v. Paty*, 2 Ld. Raym. 1108; *Ex parte Alexander*, 2 Am. L. Reg. 44; *People v. Pirfenbrink*, 96 Ill. 68; *In Matter of Hammel*, 9 R. I. 248; *In re Brown*, 4 Col. 438; *In re Leach*, 51 Vt. 630 App. Compare *Case of Yates*, 4 Johns. (N. Y.) 318; *Yates v. People*, 6 Johns. (N. Y.) 337; *Yates v. Lansing*, 9 Johns. (N. Y.) 395, commented upon in *Ex parte Alexander*, 2 Am. L. Reg. 44.

1. *State v. Galloway*, 5 Coldw. (Tenn.) 326; s. c., 98 Am. Dec. 404. Compare *Ex parte Hickey*, 4 Smed. & M. (Miss.) 751, App.

2. *Ex parte Harris*, (Utah) 5 West. C. Rep. 60; *Ex parte Henshaw*, 73 Cal. 486. Compare *In re Smith*, 117 Ill. 63; *Ex parte Hollis*, 59 Cal. 406.

3. *Tyler v. Connolly*, 65 Cal. 28.

4. *Burdett v. Abbott*, 14 East. 1; *Hobhouse's Case*, 3 Barn. & Ald. 420; *Stockdale v. Hansard*, 9 Ad. & El. 1; s. c., 3 Per. & Dav. 349; *Case of Sheriff of Middlesex*, 11 Ad. & El. 273; *Bushell's Case*, *Freeman K. B. & C. P.* 1; *Matter of Cobbett*, 7 Ad. & El. Q. B. 187.

5. See same cases; *Queen v. Gossett*, 3 Per. & Dav. 349.

6. *Case of Sheriff of Middlesex*, 11 Ad. & El. 273; *Ex parte Summers*, 5 Ired. (N. Car.) L. 154; *Ex parte Maulsby*, 13 Md. 625, App.; *Davison's Case*, 13 Abb. Pr. (N. Y.) 129.

7. *People v. Nevins*, 1 Hill (N. Y.) 154.

8. *People v. Cassels*, 5 Hill (N. Y.) 164; *People v. Sheriff*, 7 Abb. Pr. (N. Y.) 96; *People v. Hicks*, 15 Barb. (N. Y.) 153; *Kahn's Case*, 11 Abb. Pr. (N. Y.) 147; s. c., 19 How. Pr. (N. Y.) 475; *Davison's Case*, 13 Abb. Pr. (N. Y.) 129; especially where the offence is set forth with sufficient particularity in the affidavits and reports filed in the proceedings. *Ex parte Fernandez*, 10 Com. B., N. S. 3; *Davison's Case*, 13 Abb. Pr. (N. Y.) 139; *Fischer v. Hayes*, (N. Y.) 6 Fed. R. 63; *People v. Nevins*, 1 Hill (N. Y.) 154.

Form of Commitment in New York.—The requirement of section 2285 of the New York Code of Civil Procedure that the commitment for contempt "must specify the duration of the imprisonment" does not apply to the class of contempts named in the first part of that section, viz: "Where the misconduct proved consists of an omission to perform an act or duty, which it is in

of commitment omits to state the facts, they cannot be inquired into on habeas corpus.¹ But the question of jurisdiction is always open, and if it appear that that has been adjudged a contempt which is not a contempt, the prisoner may be released on habeas corpus.²

(i) *No Review of Evidence, etc.*—In attacking a judgment for contempt, it is not competent to re-examine the evidence with a view of trying the case *de novo*, or to ascertain whether the judgment can be sustained. The record must be relied on; and to bring up a complete record the writ of *certiorari* may be used as ancillary to the habeas corpus. The record should be set out in the return to the habeas corpus as well as in the return to the *certiorari*.³ And the record must show a conviction.⁴

3. *Judgments of Inferior Courts.*—(a) *Statement.*—There is a large class of cases triable before courts of special or limited jurisdiction, where the defendant has the right to claim a trial by jury. But if he waives a jury the case is tried by the magistrate or inferior court. In attacking these judgments by habeas corpus,

(b) *Errors and Irregularities not Reviewable.*⁵—The judgment can only be attacked for such illegalities as render it void.⁶ Illegality denotes a complete defect in the proceedings.⁷

(c) *Jurisdiction.*—May always be impeached by showing the fact that it does not exist, but ordinarily neither error nor irregularity in the judgments of inferior courts can be assailed on habeas corpus. The want of power to hear and determine, and not error

the power of the offender to perform;" but the commitment in such a case need specify only "the act or duty to be performed, and the sum to be paid." Anon., 18 Abb. N. C. (N. Y.) 216.

1. *Ex parte* Summers, 5 Ired. (N. Car.) L. 154; *Ex parte* Maulsby, 13 Md. 625 App. Burdett v. Abbott, 14 East. 1; Regina v. Paty, 2 Ld. Raym. 1105; Rex v. Hobhouse, 2 Ch. Q. B. 307; Stockdale v. Hansard, 9 Ad. & El. 1; Case of Sheriff of Middlesex, 11 Ad. & El. 285; Bushell's Case, Vaugh. 135.

2. People v. Liscomb, 60 N. Y. 559; Burdett v. Abbott, 14 East. 1; Regina v. Paty, 2 Ld. Raym. 1105.

3. People v. Hackley, 24 N. Y. 75; In re Glenn, 54 Md. 572; Williamson's Case, 26 Pa. St. 9; s. c., 67 Am. Dec. 374; State v. Galloway, 5 Coldw. (Tenn.) 337; s. c., 98 Am. Dec. 404; People v. Bradley, 60 Ill. 390; *Ex parte* Krieger, 7 Mo. App. 367; *Ex parte* Summers, 5 Ired. (N. Car.) L. 149; Smith v. McLendon, 59 Ga. 528. Error in rendering the judgment cannot be reviewed on habeas corpus; Anon., 18 Abb. N. C. (N. Y.) 216; In re Glenn, 54 Md. 572; and a conviction for contempt may be sustained, although there

was no affidavit preliminary to the rule to show cause, and no writ of attachment issued, or interrogatories presented. In re Cheeseman, 49 N. J. 115.

4. *Ex parte* Adams, 25 Miss. 883; s. c., 59 Am. Dec. 234; Williamson's Case, 26 Pa. St. 9; s. c., 67 Am. Dec. 374.

5. *Ex parte* Hubbard, 65 Ala. 473; *Ex parte* Brown, 63 Ala. 187; *Ex parte* Schwartz, 2 Tex. App. 74; *Ex parte* Sam, 51 Ala. 34; Darrah v. Westerlage, 44 Tex. 388; *Ex parte* Winston, 9 Nev. 71; *Ex parte* McGill, 6 Tex. App. 498, and cases cited; *Ex parte* Gibson, 31 Cal. 619; People v. Keeper, etc., 37 How. Pr. (N. Y.) 404; Sennott's Case, 146 Mass. 489; In Matter of O'Conner, 6 Wis. 288.

6. *Id.* Thus, where a defective complaint failed to charge in terms a sale of intoxicating liquors without a license, but did contain a general charge of unlawful selling, it was held not to be such an absolute nullity as to entitle the defendant to discharge on habeas corpus, after he had pleaded not guilty, gone to trial, and had been convicted and sentenced. Prohibitory Amendment Cases, 24 Kan. 700.

7. *Ex parte* Gibson, 31 Cal. 619.

or irregularity in the exercise of that power, renders a judgment void.¹

(d) *No Retrial of Issues of Fact* can be had upon habeas corpus to review the proceedings of a legal trial.²

(e) *Unauthorized Sentences* rendered by courts of special or limited jurisdiction may be successfully attacked by habeas corpus.³ The jurisdiction of such courts extends to such matters as

1. *Ex parte* Sam, 51 Ala. 34; *Ex parte* Winston, 9 Nev. 71; *Ex parte* Nye, 8 Kan. 99. It may be shown that the court was not legally constituted. *Divine's Case*, 11 Abb. Pr. (N. Y.) 90; s. c., 5 Park. Crim. R. (N. Y.) 62; 21 How. Pr. (N. Y.) 80.

2. *Ex parte* Bird, 19 Cal. 130; *Stoner v. State*, 4 Mo. 614; *Darrah v. Westerlage*, 44 Tex. 388. Thus, the defendant cannot disprove the charge on which he was found guilty. See case last cited. And where the court has determined the age of an offender, designated the place of his imprisonment, and passed sentence upon him, the judgment cannot be annulled on habeas corpus. *People v. Keeper*, 37 How. Pr. (N. Y.) 494. So, where a hotel-keeper was convicted on the sole charge of violating a "Sunday law," by keeping open a bar for the sale of liquors on Sunday contrary to statute, but made no defence on his trial that he kept a bar in the hotel as a part of the business of the hotel, he was not allowed to relitigate the matter on habeas corpus, the complaint not showing that the bar was kept as a part of the business of the hotel. *Ex parte* Bird, 19 Cal. 130.

3. *Feeley's Case*, 12 Cush. (Mass.) 598; *Ex parte* Mason, 8 Mich. 70; In *Matter of Sweatman*, 1 Cow. (N. Y.) 144; In *re* Jackson, 3 McArthur, (D. C.) 24; In *Matter of Corryell*, 22 Cal. 178; *Ex parte* Kearney, 55 Cal. 212, s. c., commented upon, 5 Pac. C. L. J. 549; 14 Am. L. Rev. 675.

Unauthorized Sentences.—Thus, where a primary court has sentenced an offender to pay a fine, and imprisonment is imposed after the fine has been paid, the prisoner will be discharged on habeas corpus. *Feeley's Case*, 12 Cush. (Mass.) 598. So, two separate and distinct punishments of the same offender need not necessarily stand or fall together. Thus, where one was sentenced to imprisonment for thirty days, and a fine imposed of fifteen dollars, and it was also adjudged that unless the fine should be paid, he would be imprisoned

for the term of four months, where the statute prohibited the imprisonment for a longer term than thirty days for the non-payment of a fine, the sentence of thirty days' imprisonment was held valid, but the award of the four months' imprisonment was held to clearly exceed the jurisdiction of the committing justice, and consequently void, and was inoperative even for thirty days of the additional term. In *Matter of Sweatman*, 1 Cow. (N. Y.) 144. There is no error in a judgment making one term of imprisonment commence when another terminates, when this forms part of the sentence the judgment is then considered sufficiently certain as to the time when the successive sentences are to be carried into execution. In *re* Jackson, 3 McArthur (D. C.) 24; *Rex v. Wilkes*, 4 Burr. 2577, 2578; *Kite v. Com.*, 11 Met. (Mass.) 582; *Com. v. Leath*, 1 Va. Cas. 151. But where several consecutive sentences do not provide that the period of imprisonment under the several convictions are to commence at any future period, or after the expiration of the period mentioned in the former judgment; this omission is fatal to any imprisonment which exceeds that of a single sentence. In *re* Jackson, 3 McArthur (D. C.) 24. If a committing magistrate has sentenced and committed a prisoner to the reform school, as under sixteen years of age, he cannot, on the ground of a mistake as to the prisoner's age, proceed to give a new sentence. The first sentence is not made void by a such mistake, and the magistrate has no right to take a prisoner from the reform school, to which he has been lawfully sentenced, unless to testify as a witness. *Ex parte* Mason, 8 Mich. 70. The principle is that when a court has once imposed a sentence, whether in accordance with law or not, which has been served or performed, in whole or in part, it has no jurisdiction to impose another, either in addition to, or in substitution for, the first. *Sennott v. Swan*, (Mass.) 16 N. E. Rep. 451, (a sentence to a reform-

the law declares to be criminal, and none other; and when it undertakes to imprison for an offence to which no criminality is attached, it acts beyond its jurisdiction.¹

(f) *Erroneous Sentences* rendered by inferior courts having jurisdiction of the person and subject-matter cannot be successfully attacked upon habeas corpus, unless they are so far erroneous as to be absolutely void. A writ of error to reverse the proceedings or sentence is the proper remedy.²

atory.) But a prisoner cannot be discharged on habeas corpus, or have his sentence remitted because the keepers of one prison have been remiss in not having sooner removed him to another prison as provided by law. *Pember's Case*, 1 Whart. (Pa.) 439; nor because he has been removed to one prison, when by law he should have been removed to another. *Reddill's Case*, 1 Whart. (Pa.) 445.

1. In *Matter of Corryell*, 22 Cal. 178; *Ex parte Kearney*, 55 Cal. 212; S. C. reviewed in 5 Pac. C. L. J. 549; 14 Am. L. Rev. 675.

2. *Sennott's Case*, 146 Mass. 489; *Ex parte Shaw*, 7 Ohio St. 81; s. c., 70 Am. Dec. 55; *Ex parte Van Hagan*, 25 Ohio St. 432; *Ex parte Hollwedell*, 74 Mo. 403, citing *In re Truman*, 44 Mo. 181; *In re Harris*, 47 Mo. 164; *Ex parte Toney*, 11 Mo. 661; and distinguishing *City of Kansas v. Flanagan*, 69 Mo. 22.

Erroneous Sentences.—Thus, where the statute required a sentence for a period of not less than three years for horse stealing, and the actual sentence was for one year only, the sentence on habeas corpus was pronounced not void, but simply erroneous. *Ex parte Shaw*, 7 Ohio St. 81; s. c., 70 Am. Dec. 55. So with a sentence in excess of that authorized. *Ex parte Van Hagan*, 25 Ohio St. 432. So where a statute limits the period of imprisonment in any given case, the judgment of a justice of the peace which fails to direct the time the defendant shall be imprisoned, where he is committed to prison until the payment of a fine imposed, is not void. This provision is simply directory, and not mandatory. *Jackson v. Boyd*, 53 Iowa 536; *People v. Markham*, 7 Cal. 208. But in Michigan such a judgment is void, as adjudging an indefinite term of imprisonment, where the fine or imprisonment, for a limited time or both, are prescribed by law as the penalty for an offence. *Howard v. People*, 3 Mich. 207. Where the judgment of the court does not

specify the length of time of imprisonment, the prisoner will be released after serving the statutory time at the rate fixed by law in order to cancel his fine, when a fine is imposed. But on habeas corpus before that time, the prisoner will be remanded until that period expires. *People v. Markham*, 7 Cal. 208. See opinions of Attorney General, N. Y. 1796-1872, p. 518. As to sentence void in part and valid in part, see *Ex parte Hunter*, 16 Fla. 575; cases cited in *Sennott's Case*, 146 Mass. 489. As to when an erroneous sentence may be void, compare *Ex parte Lange*, 18 Wall. (U. S.) 163; *People v. Liscomb*, 60 N. Y. 559, commented upon in *Sennott's Case*, 146 Mass. 489. See, also, *Ex parte Bernert*, 7 Pac. C. L. J. 460.

Sentence for Misdemeanor Begins to Run. When.—**Practice as to Sentences.**—The sentence of imprisonment after conviction of a misdemeanor begins to run from the day it was pronounced, and the sentence is being endured when in custody after the sentence has been pronounced. *People v. Lincoln*, 25 Hun. (N. Y.) 306. The court, however, will not credit upon a sentence the period of imprisonment before trial, conviction and sentence. *People v. Warden*, 66 N. Y. 342; nor give credit upon a sentence for felony commencing before the offender becomes an inmate of the state prison, except in the exercise of its discretion. *People v. Warden*, 66 N. Y. 342; *People v. Lincoln*, 25 Hun. (N. Y.) 306; *Ex parte Simmons*, 62 Ala. 416. A prisoner convicted and sentenced to perform hard labor for the county for a specified term cannot be punished by a confinement in jail for such a period. *Ex parte Pearson*, 59 Ala. 654.

Where an alternative sentence is passed of fine and imprisonment, the better practice is for the judge who sentences to fix some reasonable time within which the prisoner may pay the fine. *Broomhead v. Chisolm*, 47 Ga. 390. If that is not done, the prisoner

(g) *Sentences upon Invalid Ordinances*.—A person arrested and imprisoned for the violation of a void ordinance of a municipal corporation is imprisoned by the State without due process of law, and, therefore, in violation of the fourteenth amendment to the constitution of the United States, and may be discharged therefrom on habeas corpus, issued by the proper federal court.¹ But in some of the state courts a person convicted of a violation of a city ordinance will not be discharged on habeas corpus, where the sole ground alleged is the invalidity or unconstitutionality of the ordinance. The court will not pass upon that question, but will remand the prisoner.²

(h) *Commitment or Mittimus*.—In a conviction for a misdemeanor before a justice of the peace, it is not necessary to recite all the facts conferring jurisdiction, and to amplify all the proceedings, in order to constitute a valid *mittimus*.³ When it appears that the justice had jurisdiction of the person and of the subject-matter, and had authority to imprison, and the sentence conforms to such authority, the recitals in the *mittimus* will be taken to be true, in the absence of all proof to the contrary.⁴ It is not necessary that the commitment shall contain the names of the witnesses or the testimony given by them. It is sufficient if it contain a brief statement of the offence charged and the conviction and judgment thereon.⁵ The judgment need contain no recital of the particular offence, but only of the general offence, within which the particular one is charged.⁶ And a prisoner confined on a sentence will not be released on habeas corpus for

is entitled to a reasonable time within which to pay the fine; and if the fine be paid within a reasonable time, and is accepted by the officer authorized to receive it, the prisoner is entitled to his discharge on habeas corpus. *Id.*

1. *In re Lee Tong*, 9 Sawy. (U. S.) 335; s. c., 1 West. C. Rep. 35; *Stockton Laundry Case*, (Cal.) 26 Fed. Rep. 611. *In re Ah Jow*, (Cal.) 29 Fed. Rep. 181; *Laundry License Case*, (Oreg.) 22 Fed. Rep. 705; *Compare Ex parte Yung Jon*, (Oreg.) 28 Fed. Rep. 308. *In re Wo Lee*, 9 West. C. Rep. 81. The supreme court of the State, and the United States circuit court have concurrent original jurisdiction on habeas corpus to inquire into the constitutionality and validity of a city ordinance alleged to have been passed in contravention of the fourteenth amendment to the constitution of the United States. But the circuit court should not overrule the solemn judgment of the supreme court of the State upon this question where there is reasonable ground for doubt. In such cases the question should be referred to the

supreme court of the United States for an authoritative decision of the doubtful point. *In re Wo Lee*, 9 West. C. Rep. 81.

2. *Ex parte Boenninghausen*, 21 Mo. App. 267; *Ex parte Bowler*, 16 Mo. App. 14; *Platt v. Harrison*, 6 Iowa 79; s. c., 71 Am. Dec. 389. If the invalidity or unconstitutionality of the ordinance is not asserted, the judgment must be void to obtain relief upon habeas corpus. *Ex parte Hubbard*, 65 Ala. 473; *Ex parte Thompson*, 93 Ill. 89. But in other States, if the prisoner has been convicted under an invalid ordinance, it is held, that no crime is shown, and that the prisoner is entitled to discharge on habeas corpus. *Ex parte Bernert*, 7 Pac. C. L. J. 460; *Ex parte Kearney*, 55 Cal. 212; reviewed in 5 Pac. C. L. J. 549; 14 Am. L. Rev. 675.

3. *In Matter of Goldsmith*, 24 Kan. 757.

4. *In Matter of O'Conner*, 6 Wis. 288.

5. *People v. Neilson*, 16 Hun. (N. Y.) 214.

6. *Ex parte Murray*, 43 Cal. 455.

errors in the *mittimus* when the court has the judgment before it.¹

4. Judgments of Courts of General Jurisdiction.—(a) *Jurisdiction, The Three Elements of, etc.*—It is held in many cases that if a court has jurisdiction of the subject-matter and the person, its judgment cannot be successfully attacked upon habeas corpus, as such a writ cannot be made to take the place of a writ of error, appeal, or *certiorari*, and cannot have the force or effect of those proceedings.² But other courts hold that jurisdiction of the per-

1. Sennott's Case, 146 Mass. 489.

Miscellaneous Matters.—Habeas corpus cannot be used to review trials before a magistrate on questions of *vagrancy*. In *Matter of Moses*, 13 Abb. N. C. (N. Y.) 189; s. c., 66 How. Pr. (N. Y.) 296. Nor to impeach the order of a probate court awarding the *custody of an apprentice*. *Ackley v. Tinker*, 26 Kan. 485. Nor to attack a judgment of the justice of the peace, rendered after a trial for petty misdemeanors, and *without the intervention of a jury*. *Ex parte Wooten*, 62 Miss. 174; s. c., 5 Am. Crim. Rep. 181. The State laws defining the powers of a justice of the peace in making *preliminary examinations* are applicable to a United States commissioner sitting in that State; and if a witness *refuses to be sworn* before the latter, in a legal proceeding, he is in contempt and cannot be discharged on habeas corpus until he purge himself. *In re Perkins*, 9 Crim. L. Mag. 17.

2. *Rex v. Suddis*, 1 East. 306; *Ex parte Wilson*, 114 U. S. 417; *Ex parte Parks*, 93 U. S. 18; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Carll*, 106 U. S. 521; *Ex parte Crouch*, 112 U. S. 178; *Ex parte Watkins*, 3 Pet. (U. S.) 193; *Emanuel v. State*, 36 Miss. 627; *Matter of Eaton*, 27 Mich. 1; *Smith's Petition*, 2 Nev. 338; *Ex parte Winston*, 9 Nev. 71; *State v. Fenderson*, 28 La. Ann. 82; *Ex parte Twohig*, 13 Nev. 302; *Matter of Wakker*, 3 Barb. (N. Y.) 162; *Ex parte Call*, 2 Tex. App. 497; *Ex parte Siebold*, 100 U. S. 371; *State v. Towle*, 42 N. H. 450; *Ex parte Hartman*, 44 Cal. 32; *Ex parte Max*, 44 Cal. 579; *Darrah v. Westerlage*, 44 Tex. 388; *Ex parte Schwartz*, 2 Tex. App. 74; *Ex parte Oliver*, 3 Tex. App. 345; *Griffin v. State*, 5 Tex. App. 457; *Ex parte McGill*, 6 Tex. App. 498; *Ex parte Boland*, 11 Tex. App. 159; *Ex parte Yarbrough*, 110 U. S. 651; *Johnson v. U. S.*, 3 McLean (U. S.) 89; *Bell v. State*, 4 Gill (Md.) 301; s. c., 45 Am. Dec. 130; *Willis v. Bayles*, 105 Ind. 363; *Ex parte State*, *In re Merlet*,

71 Ala. 371; *Ex parte Twohig*, 13 Nev. 302; *Platt v. Harrison*, 6 Iowa 79; s. c., 71 Am. Dec. 389.

Jurisdiction of Person and Subject-Matter.—Must exist in order to make a valid judgment, and if either is wanting, the judgment is void and the imprisonment without authority of law. *Reynolds v. Orvis*, 7 Cow. (U. S.) 269; *Ex parte Bridges*, 2 Wood (U. S.) 428; *Ex parte Hayne*, 4 Cent. L. J. 72; *Cropper's Case*, 2 Rob. (Va.) 842; *Johnson v. U. S.*, 3 McLean (U. S.) 89; *Miller v. Snyder*, 6 Ind. 1. The question of jurisdiction over the subject-matter is one of fact, to be proved or admitted, as any other fact alleged. Ordinarily, in criminal trials, the jurisdiction of the court over the place where the offence is alleged to have been committed, is assumed. If admitted by pleading over, that ends the matter. If traversed, and the jury find that the prisoner committed the offence within the jurisdiction of the court, as alleged, the defendant cannot impeach that finding on habeas corpus by showing that the place where the offence was committed is without the said territorial limits. *In re Newton*, 16 Com. B. 97; s. c., 30 Eng. L. & Eq. 432; *People v. Liscomb*, 60 N. Y. 571; s. c., 19 Am. Rep. 211; 11 Alb. L. J. 396; *Deckard v. State*, 38 Md. 186; *State v. Fenderson*, 28 La. Ann. 82; *Ex parte Edgington*, 10 Nev. 215; *Reg. v. Newton*, 1 Jur. N. S. Q. B. 591; 3 Cent. L. J. 618. In courts of general jurisdiction, though the record fails to show jurisdiction of the person and subject-matter, their jurisdiction will be presumed where the imprisonment is under process valid on its face, and the prisoner must assume the burden of proving its invalidity by showing a want of jurisdiction. *People v. Liscomb*, 60 N. Y. 559; s. c., 19 Am. Rep. 211; 11 Alb. L. J. 396; *Deckard v. State*, 38 Md. 186; *Brenan v. Gallan*, 2 Cox C. C. 193; *People v. Cavanagh*,² Park. Cr. R. (N. Y.) 650. If the record be challenged, the examination,

son and of the subject-matter are not alone conclusive; and that the jurisdiction of the court to render the particular judgment in question is a proper subject of inquiry.¹ If any one of these elements is lacking, the judgment is fatally defective, and the prisoner held under it may be released on habeas corpus.²

(b) *Void Judgment or Sentence*.—If the prisoner is detained under a void sentence, his release will be ordered on habeas corpus.³ But the sentence or judgment must be shown to be void.

of course, will be confined to it alone. *People v. Liscomb*, 60 N. Y. 559; s. c., 19 Am. Rep. 211; 11 Alb. L. J. 390. If the court is found to have jurisdiction of the person, subject-matter, and to render the particular final judgment rendered, no further inquiries can be made on habeas corpus. *Ex parte* Twohig, 13 Nev. 302; *Ex parte* Toney, 11 Mo. 661; Lumly v. Quarry, 7 Mod. 9; Anon, 7 Mod. 118; and cases cited in note 2, *infra*.

1. *Ex parte* Lange, 18 Wall. U. S. 163; *People v. Walters*, 15 Abb. N. C. (N. Y.) 461; *People v. Liscomb*, 60 N. Y. 559; s. c., 11 Alb. L. J. 396. *Ex parte* Kearney, 55 Cal. 212; *In re* Petty, 22 Kan. 477; s. c., 9 Cent. L. J. 135; *Ex parte* J. C. H., 17 Fla. 368; *Ex parte* Bulger, 60 Cal. 438; *Miller v. Snyder*, 6 Ind. 1; *Petition of Crandall*, 34 Wis. 177; *Ex parte* Smith, 2 Nev. 338; *Ex parte* Milligan, 4 Wall. (U. S.) 2, 131; *Ex parte* Wilson, 114 U. S. 417; *In re* Pierce, 44 Wis. 411-426; *U. S. v. Rogers*, (Ark.) 23 Fed. Rep. 658.

Court Must Have Power to Render Particular Judgment.—Thus, the want of jurisdiction to inflict punishment in respect to more than one conviction for unlawful cohabitation on three several indictments for acts constituting but one entire offence, and which appears on the face of the judgment, may be taken advantage of on habeas corpus, when the sentence on more than one of the convictions is sought to be enforced. *Ex parte* Snow, 120 U. S. 274. To illustrate, as in *Ex parte* Lange, 18 Wall. (U. S.) 163, if a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party properly charged before him, should render a judgment that he be hanged, it would simply be void. Why void? Because he had no power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death, or confiscation of property, it would for

the same reason be void. It matters not what the general powers and jurisdiction of a court may be; if it act without authority in the particular case, its judgments and orders are mere nullities; not voidable, but simply void, protecting no one acting under them, and constituting no hindrance to the prosecution of any right. See *Elliott v. Piersol*, 1 Pet. (U. S.) 340. Statutes which prohibit the review of a court of competent jurisdiction apply only to such judgments as may be shown, by the record or otherwise, to be simply erroneous, and not to those judgments which could not, under any circumstances or upon any state of facts, have been pronounced. *People v. Liscomb*, 60 N. Y. 559; s. c., 11 Alb. L. J. 396, 19 Am. Rep. 211.

2. See cases cited, note 2, *supra*.

3. *Ex parte* Lange, 18 Wall. (U. S.) 163; *Bushel's Case*, T. Jones 13; s. c., Vaughan 135; 6 How. St. Tr. 999; *Ex parte* Yarbrough, 110 U. S. 651; *Ex parte* Bigelow, 113 U. S. 328; *Ex parte* Wilson, 114 U. S. 417; *Ex parte* Shaw, 7 Ohio St. 81; s. c., 70 Am. Dec. 55; *Garvey's Case*, 7 Colo. 384; *People v. Riseley*, 38 Hun. (N. Y.) 280; *Ex parte* Bain, 121 U. S. 1; *Wales v. Whitney*, 114 U. S. 564; *Ex parte* Rosenblatt, 19 Nev. 439; *State v. Gray*, 37 N. J. L. 368; *In re* Rolfs, 30 Kan. 759; *Miller v. Snyder*, 6 Ind. 1.

Thus, one may be discharged on habeas corpus, where there is an excess of, or want of jurisdiction. *In re* Staff, 63 Wis. 285; *Wales v. Whitney*, 114 U. S. 564. *Ex parte* Shaw, 7 Ohio St. 81; s. c., 70 Am. Dec. 55; *Ex parte* Page, 49 Mo. 291; *People v. Warden*, 100 N. Y. 20, reversing 34 (N. Y.) Hun. 393; note to *Com. v. Lecky*, 1 Watts (Pa.) 41; s. c., 26 Am. Dec. 41; *In re* Snow, 120 U. S. 274; *Ex parte* State, *In re* Merlet, 71 Ala. 371; *Hamilton's Case*, 51 Mich. 174; *In re* Dill, 32 Kan. 668; *U. S. v. Rogers*, (Ark.) 23 Fed. Rep. 658. As, where a judgment is not based on a valid verdict of con-

viction. Garvey's Case, 7 Col. 384; or where the court has exceeded its jurisdiction; as, by imposing a greater sentence than that allowed by law. *People v. Riseley*, 38 Hun. (N. Y.) 280; or by passing sentence upon a void indictment; *Ex parte Bain*, 121 U. S. 1; or, by sentencing one to hard labor for an offence, where such a sentence is unauthorized by statute; *State v. Gray*, 37 N. J. L. 369; or, by sentencing one to imprisonment for an infamous crime, without having been presented or indicted by a grand jury, as required by the fifth amendment to the constitution of the United States. *Ex parte Wilson*, 114 U. S. 417. A conviction after an unauthorized and ineffectual waiver of a jury trial is void for want of jurisdiction, and the prisoner may successfully attack the judgment upon habeas corpus. *In re Staff*, 63 Wis. 285.

Unconstitutional Laws, Statutes, or Ordinances.—The invalidity or unconstitutionality of a law, statute or ordinance is also a jurisdictional question. *Darrah v. Westerlage*, 44 Tex. 388; *Cropper's Case*, 2 Rob. (Va.) 842; *People v. Neilson*, 16 Hun. (N. Y.) 214; *Ex parte Yarbrough*, 110 U. S. 651; s. c., 5 Crim. L. Mag. 549; *In re Booth*, 3 Wis. 157; *In re Blair*, 4 Wis. 322; *In re O'Conner*, 6 Wis. 288; *In re Falvey*, 7 Wis. 630; *In re Boyle*, 9 Wis. 264; *In re Semler*, 41 Wis. 517; *In re Eldred*, 46 Wis. 530; *Miller v. Snyder*, 6 Ind. 1. The court will examine the alleged unconstitutionality of a law, statute or ordinance under which the petitioner is held after indictment and conviction, and if found to be invalid, the court will release the prisoner on habeas corpus. *Ex parte Siebold*, 100 U. S. 371; *Ex parte Clarke*, 100 U. S. 399; *Ex parte Rosenblatt*, (Nev.) 14 Pac. Rep. 298; *Fisher v. McGirr*, 1 Gray (Mass.) 1; s. c., 61 Am. Dec. 381; *Brown v. Duffus*, 66 Iowa 193; *Whitcomb's Case*, 120 Mass. 118; *In Matter of Brosnahan*, 4 McCrary (U. S.) 1; s. c., 4 Am. Crim. Rep. 16; note to *Com. v. Lecky*, 26 Am. Dec. 48; s. c., 1 Watts (Pa.) 66; *Ex parte Burnett*, 30 Ala. 461; *In re Payson*, 23 Kan. 757; *Ex parte Delaney*, 43 Cal. 478; *People v. Roff*, 3 Park. Cr. R. (N. Y.) 216; *Ex parte Rollins*, 80 Va. 314; *Ex parte Mato*, 19 Tex. App. 112, overruling *Parker v. State*, 5 Tex. App. 579; on the authority of *Ex parte Siebold*, 100 U. S. 371; *Ex parte Rosenblatt*, 19 Nev. 439; *In re Lee Tong*, 9 Sawy. (U. S.) 335; *In re Wo*

Lee, 9 West. C. Rep. 81; *In re Tie Loy* (Stockton Laundry Case) (Cal.) 26 Fed. Rep. 611; *In re Ah Jow*, 29 Fed. Rep. 181; *In re Wan Yin* (Laundry License Case), (Oreg.) 22 Fed. Rep. 701; *In re Ziebold*, 23 Fed. Rep. 791; *Ex parte Yarbrough*, 110 U. S. 651; s. c., 5 Crim. L. Mag. 549; and a federal court will do this even though the prisoner is held under state process in violation of the federal constitution. *Ex parte Royall*, 117 U. S. 241, 254; *Ex parte Bridges*, 2 Woods (U. S.) 428; *In Matter of Brosnahan*, 4 McCrary (U. S.) 1. Thus, a prisoner may be released on habeas corpus, if detained for violating an invalid law respecting the regulation of interstate commerce; *Ex parte Rollins*, 80 Va. 314; as by licensing "drummers"; *Ex parte Rosenblatt*, 19 Nev. 439; or for violating an ordinance of a city forbidding the visiting of a place where opium is sold. *In re Ah Jow*, (Cal.) 29 Fed. Rep. 181; or for violating a city ordinance, making it an offence for any person to carry on a laundry where clothes are washed for pay, within the habitable portion of the city. *In re Tie Loy* (Stockton Laundry Case), (Cal.) 26 Fed. Rep. 611. But the federal courts have no jurisdiction to discharge a prisoner held under a state statute, upon the ground that such statute is in violation of the constitution of the State, or in excess of the powers which the people of the State have conferred on their legislature. If it does not violate the federal constitution, the question is for the state courts. *In Matter of Brosnahan*, 4 McCrary (U. S.) 1.

There are some cases, however, which hold that the constitutionality of a law, statute or ordinance, cannot be tested on habeas corpus; and where that is the only alleged ground for relief the prisoner will be remanded. *Ex parte Boenninghausen*, 91 Mo. 301; s. c., 21 Mo. App. 267; *Platt v. Harrison*, 6 Iowa 79; s. c., 71 Am. Dec. 389; *Ex parte Bowler*, 16 Mo. App. 14; note to *Com. v. Lecky*, 1 Watts (Pa.) 66; s. c., 26 Am. Dec. 48; *Matter of Underwood*, 30 Mich. 502; *In Matter of Harris*, 47 Mo. 164; *Ex parte Fisher*, 6 Neb. 309; *Ex parte Winston*, 9 Nev. 71; *In re Callicott*, 8 Blatchf. U. S. 89. But the contrary rule is the soundest in reason and best supported by authority. An unconstitutional amendment to a valid act has no effect, and an offender convicted under the original act, cannot be discharged on

It must be more than simply erroneous.¹

(c) *Errors and Irregularities*.—The judgment of a court of competent jurisdiction cannot be impeached on a collateral attack by habeas corpus for errors or irregularities not extending so far as to affect the question of power or jurisdiction in the court to act in the case. On this writ nothing will be investigated except jurisdictional defects, although, by prosecuting his appeal, writ of error, or *certiorari*, the party may have errors and irregularities reviewed, and the result of his review entitle him to an immediate discharge, it is no ground for his release on habeas corpus.²

habeas corpus. *Ex parte Davis*, (Ky.) 21 Fed. Rep. 396. A statute permitting the defendant in a criminal action to waive a trial by jury is not unconstitutional. *In re Staff*, 63 Wis. 285.

1. *Willis v. Bayles*, 105 Ind. 363; extended note to *Com. v. Lecky*, 1 Watts (Pa.) 66; s.c., 26 Am. Dec. 41. Thus it is only when the court pronounces a judgment in a criminal case which is not authorized by law, under any circumstances in the particular case made by the pleadings, whether the trial has proceeded regularly or otherwise, that such judgment can be said to be void so as to justify the discharge of the defendant held in custody by such judgment. *State v. Sloan*, 65 Wis. 647; *People v. Liscomb*, 60 N. Y. 571, 590, 591, 604; *Ex parte Gibson*, 31 Cal. 628; *In re Perry*, 30 Wis. 268; *In re Crandall*, 34 Wis. 177; *In re Semler*, 41 Wis. 517; *Hauser v. State*, 33 Wis. 678; *Ex parte Lange*, 18 Wall. (U. S.) 163. Thus, a judgment of conviction is not void because of a failure to inform the accused of his right to an appeal. *Jacoby v. Waddell*, 61 Iowa 247. But if an election is not conducted in accordance with the requirements of law, it is void and not merely voidable, and all proceedings had under and by virtue of such void election are absolutely void and may be questioned not only directly, but collaterally, on habeas corpus, where one is illegally imprisoned under such proceedings. *Ex parte Kramer*, 19 Tex. App. 123. So a decree of divorce in one State, on service by publication, so far as it attempts to fix the custody of minor children, residents of another State, is void, and may be impeached on this writ. *Kline v. Kline*, 57 Iowa 386. But the general rule is that when the court has jurisdiction by law of the offence charged, and of the party who is so charged, its judgments are not nullities. *Ex parte Bigelow*, 113 U. S. 328;

Williamson's Case, 26 Pa. St. 9; s. c., 67 Am. Dec. 374.

2. *Ex parte Virginia*, 100 U. S. 339; *Ex parte Yerger*, 8 Wall. (U. S.) 85; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Parks*, 93 U. S. 18; *People v. Liscomb*, 60 N. Y. 559; s. c., 11 Alb. L. J. 396; 19 Am. Rep. 211; *In re Petty*, 22 Kan. 477; s. c., 9 Cent. L. J. 135; *Ex parte Schwartz*, 2 Tex. App. 74; *Ex parte McGill*, 6 Tex. App. 498; *Ex parte Boland*, 11 Tex. App. 159; *Ex parte Farnham*, 3 Col. 545; *Kirby v. State*, 62 Ala. 51; *Ex parte Simmons*, 62 Ala. 416; *Ex parte Williams*, 1 Wash. (U. S.) 240; *Ex parte Gibson*, 31 Cal. 619; *Ex parte Smith*, 2 Nev. 338; *People v. Foster*, 104 Ill. 156; *People v. Cavanagh*, 2 Park. Cr. R. (N. Y.) 650; *State v. Fenderson*, 28 La. Ann. 82; *Ex parte Hartman*, 44 Cal. 32; *Petition of Semler*, 41 Wis. 517; s. c., 16 Alb. L. J. 119; *In re Truman*, 44 Mo. 181; *Ex parte Mess*, 12 Pac. C. L. J. 279; *In re Schenck*, 74 N. C. 607; *Ex parte Sam*, 51 Ala. 34; *Ex parte Winston*, 9 Nev. 71; *Herrick v. Smith*, 1 Gray (Mass.) 1; s. c., 61 Am. Dec. 381; *Matter of Eaton*, 27 Mich. 1; *Phinney, Petitioner*, 32 Me. 440; *In re Blair*, 4 Wis. 522; *Ex parte Granice*, 51 Cal. 375; *Com. v. Keeper*, etc., 26 Pa. St. 279; *Williamson's Case*, 26 Pa. St. 9; s. c., 67 Am. Dec. 374; *People v. McLeod*, 1 Hill (N. Y.) 377; s. c., 37 Am. Dec. 328; *Ex parte McCullough*, 35 Cal. 98; *O'Malia v. Wentworth*, 65 Me. 129; *Rex v. Carlile*, 4 Car. & P. 415; *Ex parte Watkins*, 3 Pet. (U. S.) 193; *Baker's Case*, 11 How. Pr. (N. Y.) 418; *Olmsted v. Hoyt*, 4 Day (Conn.) 436; *Ex parte Toney*, 11 Mo. 661; *Walbridge v. Hall*, 3 Vt. 114; *Ex parte Reed*, 100 U. S. 13; *People v. Nevins*, 1 Hill (N. Y.) 154; *Keen v. McDonough*, 8 La. 185; *Ex parte Twohig*, 13 Nev. 302; *In re Dougherty*, 27 Vt. 325; *Ex parte Rollins*, 80 Va.

(d) *Reviewing Evidence and Retrying Issues of Fact.*—On habeas corpus proceedings, oral evidence cannot be introduced to contradict the record, or to show error in the court rendering the judgment so long as it does affect the jurisdiction thereof. The issues of fact determined by the court rendering judgment will not be retried, nor the evidence given before such court be reviewed for the purpose of testing its sufficiency. Nor will the reasons for the judgment be inquired into.¹ The lawfulness of a

314; note to *Com. v. Lecky*, 26 Am. Dec. 41; s. c., 1 Watts (Pa.) 66; *Patterson v. Pressley*, 70 Ind. 94; *Ex parte Lemkuhl*, 72 Cal. 53; *In re Rolfs*, 30 Kan. 759; *Dover v. State*, 75 Ala. 40; *Rolfs v. Shallcross*, 30 Kan. 758.

Illustrations.—Thus, error or irregularity cannot be reviewed on habeas corpus, as where the court pronounces judgment upon a verdict on a charge of felony, during the enforced absence of the relator in jail. *Ex parte Farnham*, 3 Col. 545; and see *Green v. People*, 3 Col. 68; or, where a judgment entered on the minutes of the court in a criminal case does not definitely state the offence of which the prisoner was convicted, or does not state it at all, provided it shows that he was indicted for some offence, and tried and convicted, and that the sentence passed on him was one which the court had jurisdiction to pronounce for an offence of which he might have been convicted under the indictment. *Ex parte Gibson*, 31 Cal. 619; *S. P. Ex parte Mess*, 12 Pac. C. L. J. 279; *Ex parte Smith*, 2 Nev. 338; or where the record shows affirmatively that there was no interval of time between the plea of guilty and sentence, where the statute provides that the judgment must be at least two days after the verdict, etc. *Ex parte Smith*, 2 Nev. 338; *Ex parte Mess*, 12 Pac. C. L. J. 279; or where the court errs in refusing to admit proper evidence on an application for a discharge from imprisonment. *People v. Cavanagh*, 2 Park. Cr. R. (N. Y.) 650; compare *People v. Foster*, 104 Ill. 156; or where the court errs in setting aside, modifying or granting orders in criminal cases. *Ex parte Hartman*, 44 Cal. 34. Errors made by the court in the determination of questions arising on motions to arrest judgment, etc., are not jurisdictional defects, though the question determined is, whether an act charged in an indictment is or is not a crime by the law which the court administers. *Ex parte Parks*, 93 U. S.

18; *Ex parte Shaffenberg*, 4 Dill. (U. S.) 271. It makes no difference whether the error occurred at the trial or is alleged to exist in the judgment, it cannot be reviewed on habeas corpus. *People v. Cavanagh*, 2 Park. Cr. R. (N. Y.) 650; nor can any error, irregularity, want of form or defect which may be amended or remedied by further entry or motion. *People v. Baker*, 89 N. Y. 460; *People v. Nevins*, 1 Hill (N. Y.) 154; *People v. Cavanagh*, 2 Park. Cr. R. (N. Y.) 650. Error in the selection of a grand jury is not available on habeas corpus after conviction and sentence. *State v. Fenderson*, 28 La. Ann. 82; or the question as to whether or not an indictment, regular upon its face and upon which the relators were tried and convicted, was ever in fact found by the grand jury. *Ex parte Twohig*, 13 Nev. 302. So, where only one officer was present instead of two, as required by law, is an irregularity not attackable on habeas corpus. *Rex v. Carlile*, 4 Car. & P. 415. So, with error in designating the place of imprisonment. *People v. Cavanagh*, 2 Park. Cr. R. (N. Y.) 650; see *Ex parte Gibson*, 31 Cal. 627; *Ex parte Geary*, 2 Biss. (U. S.) 485. See *Ex parte Wilson*, 114 U. S. 417. As to when delay in execution of sentence will justify discharge on habeas corpus, see *Ex parte Geary*, 2 Biss. (U. S.) 485; *Kirby v. State*, 62 Ala. 51. Habeas corpus is not the remedy to escape from the effects of a defective verdict reversible on error or appeal. *Dover v. State*, 75 Ala. 40. Errors of law cannot be inquired into on habeas corpus to test the jurisdiction of the court which passed sentence. *Ex parte Yarbrough*, 110 U. S. 651; s. c., 5 Crim. L. Mag. 549.

1. *Macke v. Ryan*, 31 Kan. 54; *People v. Warden*, etc., 34 Hun. (N. Y.) 393; *In re Gilson*, 34 Kan. 641; *Ex parte Jackson*, 45 Ark. 158; *In re Watson*, 30 Kan. 753, 758; *Starr v. Barton*, 34 Ga. 99; *State v. Bloom*, 17 Wis.

judgment is the test of the efficacy of the writ, and the judgment itself must be tested by the record of the court which assumed to pronounce it.¹

(c) *Insufficiency of Indictment or Information.*—There is some trouble with respect to the question as to whether the sufficiency of the complaint, indictment or information can be inquired into on habeas corpus after judgment rendered. On the one hand it is held that the sufficiency of the pleadings is always a question to be determined by the trial court; that when the court has jurisdiction of the person and of the subject-matter, and to render the particular judgment, the prisoner must abide by that determination, whether the decision be right or wrong; that the court having jurisdiction of the question as to whether an act charged in an indictment is or is not a crime, may err; and that if it errs, there is no remedy after final judgment, unless a writ of error lies to some superior court.² If it be assumed that the court has juris-

521; in *Matter of Baker*, 11 How. Pr. (N. Y.) 418; *Ex parte Phillips*, 57 Miss. 357.

Illustrations.—Thus, on habeas corpus, an appellate court will not, for the purpose of discharging the applicant, consider the sufficiency of facts relied on as supporting a plea of former acquittal of the same offence for which he is in custody. *Griffin v. State*, 5 Tex. App. 457; *Perry v. State*, 41 Tex. 488; *S. P. In re Bogart*, 2 Saw. (U. S.) 396, as to the plea of the statute of limitations. Indictments not void upon their faces, and regularly returned to and pending in a court having jurisdiction thereof, can only be disposed of by some appropriate proceeding in such court, and the question as to whether they have all been found on the same evidence, and for one and the same supposed offence, will not be considered on habeas corpus. *Perry v. State*, 41 Tex. 488. The sufficiency of the evidence upon which process is based, or the decision upon the regularity of proceedings upon which process is based, not affecting the jurisdiction of the court or officer to issue the process, will not be considered under this writ. In *Matter of Baker*, 11 How. Pr. (N. Y.) 418. Questions of age tried and determined in the trial court will not be retried in another court on habeas corpus. *Ex parte Kaufman*, 73 Mo. 588; s. c., 12 Cent. L. J. 574. But parol evidence may sometimes be introduced in connection with the judgment record to show what was litigated by the parties; to show the facts more fully than they would be shown by the

record. *Ex parte Smith*, 2 Nev. 338; or to show a continuance, thus supplying the omission of a recital of such fact in the warrant. In *Matter of Baker*, 11 How. Pr. (N. Y.) 418.

1. *Ex parte Phillips*, 57 Miss. 357.

2. *Ex parte Parks*, 93 U. S. 20; *Ex parte Watkins*, 3 Pet. (U. S.) 192; *In re Truman*, 44 Mo. 181; In *Matter of Eaton*, 27 Mich. 1; *Parker v. State*, 5 Tex. App. 579; *Ex parte Whitaker*, 43 Ala. 323; *Emanuel v. State*, 36 Miss. 627; *Ex parte Twohig*, 13 Nev. 302; and the well considered case of *Petition of Semler*, 41 Wis. 523; s. c., 16 Alb. L. J. 119; *Davis' Case*, 122 Mass. 324; note to *Com. v. Lecky*, 26 Am. Dec. 47; s. c., 1 Watts (Pa.) 66.

Two or More Counts, Etc.—Where a person breaks into a house with intent to steal therefrom, and actually does steal, he may be punished under separate indictments for two offences, or one, at the election of the power prosecuting him; and if he is sentenced under such an indictment he cannot be released on habeas corpus upon the ground that distinct offences were improperly joined. *Ex parte Peters*, (Mo.) 12 Fed. Rep. 461. So if, in the record of a general conviction and sentence upon two counts, one of which is good, there is a misrecital of the verdict as upon the other count only, in stating the inquiry whether the convict had ought to say why sentence should not be pronounced against him, it is no ground for his discharge on habeas corpus. *Ex parte Wilson*, 114 U. S. 417. A justice of the peace has jurisdiction to try a misdemeanor case, al-

diction and power to punish every conceivable act, then it is doubtless true that any deficiency in the indictment cannot be a cause for release on habeas corpus. But no such power has ever been vested in any of our courts. A court derives its jurisdiction from the law, and its jurisdiction extends to such matters as the law declares criminal, and none other, and when it undertakes to imprison for an offence to which no criminality is attached, it acts beyond its jurisdiction, and the prisoner is entitled to a discharge upon habeas corpus, just as much as if he had been convicted of violating an unconstitutional law, statute or ordinance.¹

(f) *Erroneous Sentences*.—An erroneous sentence cannot be successfully attacked upon habeas corpus.² A judgment may be errone-

though several counts, each charging a separate offence, are united in the same complaint, providing the offences are all of the same general nature, and are each, taken separately, within the limits of his jurisdiction. *Macke v. Ryan*, 31 Kan. 54. See *MITTIMUS, infra*.

1. 2 Hale, P. C. 144; Bacon's Abr. Habeas Corpus B. 10; Freeman on Judgments, § 678; *Ex parte Corryell*, 22 Cal. 178; *Ex parte Kearney*, 55 Cal. 212; s. c., 1 Crim. L. Mag. 726; *Ex parte Siebold*, 100 U. S. 376. As to convictions under unconstitutional laws, see *supra*, subdivision (b), note 5.

Necessity of Indictment.—A person sentenced to imprisonment for an infamous or capital crime without having been presented or indicted by a grand jury, as required by the fifth amendment to the constitution of the United States, is entitled to be discharged on habeas corpus. *Ex parte Wilson*, 114 U. S. 417; *Ex parte Bain*, 121 U. S. 1; 9 Crim. L. Mag. 646. No court of the United States has authority to try a prisoner without indictment or presentment in such cases. The question is a jurisdictional one. *Ex parte Bain*, 121 U. S. 1; 9 Crim. L. Mag. 646.

2. *Williamson's Case*, 26 Pa. St. 9; s. c., 67 Am. Dec. 374; *Ex parte Shaw*, 7 Ohio St. 81; s. c., 70 Am. Dec. 55; *Platt v. Harrison*, 6 Iowa 79; s. c., 71 Am. Dec. 389; *Ex parte Wilson*, 114 U. S. 417; *In re Davison*, (N. Y.) 21 Fed. Rep. 618; *Ex parte Watkins*, 3 Pet. (U. S.) 102; *Ex parte Kearney*, 7 Wheat. (U. S.) 38; *Ex parte Reed*, 100 U. S. 13; *Ex parte Lemkuhl*, 72 Cal. 53; *Ex parte Max*, 44 Cal. 579; *Ex parte Cohn*, 55 Cal. 193; *Rolls v. Shallcross*, 30 Kan. 758; and cases there cited; *People v. Kelly*, 97 N. Y. 212; *Willis v. Bayles*, 105 Ind. 363; *Lowery v. Howard*, 103 Ind. 440; *Ex parte Mooney*, 26 W. Va. 36; s. c., 53 Am. Rep. 59; *McGuire v. Wallace*,

109 Ind. 284; *Holderman v. Thompson* 105 Ind. 112; *Ex parte Jackson*, 96 U. S. 727; *Petition of Crandall*, 34 Wis. 177; *Petition of Semler*, 41 Wis. 517; s. c., 16 Alb. L. J. 119.

Erroneous Sentences.—Thus, the following erroneous sentences cannot be successfully attacked on this writ: A sentence for an indefinite time. *Williamson's Case*, 26 Pa. St. 9; s. c., 67 Am. Dec. 374. Or where the court fixes the punishment of a prisoner who has pleaded guilty to a charge of murder in the first degree, without calling in a jury. *Lowery v. Howard*, 103 Ind. 440. Or where the court makes an order denying a prisoner's application for a discharge where he has been confined for two or more consecutive terms without a trial. *McGuire v. Wallace*, 109 Ind. 284. Or where sentence is rendered upon a defective verdict. *Willis v. Bayles*, 105 Ind. 363; *Dover v. State*, 75 Ala. 40. Or where, after an inadequate sentence has been transmitted to a revising officer, the sentence is revoked and another sentence substituted for it, inflicting a severer punishment. *Ex parte Reed*, 100 U. S. 13. Or where one is sentenced to confinement in the penitentiary at hard labor, when the offence is not punishable by confinement in the penitentiary. *Ex parte Bond*, 9 S. C., 80; s. c., 30 Am. Rep. 20; *People v. Kelly*, 97 N. Y. 212. Or where one is erroneously sentenced, for a misdemeanor, to the county jail instead of the penitentiary. *People v. Cavanagh*, 2 Park. Cr. R. (N. Y.) 650; s. c., 2 Abb. Pr. 84. Or where the sentence for an offence is one year, when under the law it could not be for less than three years. *Ex parte Shaw*, 7 Ohio St. 81; s. c., 70 Am. Dec. 55; but see, *contra*, *Ex parte Bernert*, 7 Pac. C. L. J. 460. Or where the prisoner is sentenced to

eous and not void, and it may be erroneous because it is void.¹ But a judgment or sentence cannot be impeached on habeas corpus if it is merely erroneous, the court having given a wrong judgment when it had jurisdiction of the person and subject-matter.² But the error must not be so flagrant as to affect the question of jurisdiction. If the judgment shows a clear case of excess, or want of jurisdiction, the prisoner will be entitled to his discharge.³

(g) *Excessive Sentences*.—A whole sentence is not illegal and void because of an excess. An excessive sentence is not void *ab initio*. It is good so far as the power of the court extends, and invalid only as to the excess. This is the prevailing rule, although there are contrary doctrines.⁴

labor on only a part of the public works instead of all of them. *Lark v. State*, 55 Ga. 435. But see *Ex parte Bernert*, 7 Pac. C. L. J. 460. Or where the prisoner is sentenced for burglary for more than two years to hard labor for the county, when the imprisonment should be in the penitentiary when the term exceeds two years. *Kirby v. State*, 62 Ala. 51; *Ex parte Simmons*, 62 Ala. 416. So with deciding whether or not an ordinance was passed without authority of law, habeas corpus is not the remedy for error in such a case. *Platt v. Harrison*, 6 Iowa 79; s. c., 71 Am. Dec. 389; *Ex parte Fisher*, 6 Neb. 309; *Kirby v. State*, 62 Ala. 51; *Ex parte Simmons*, 62 Ala. 416. So, where a fine with substitutional imprisonment is imposed, the sentence cannot direct that the prisoner shall perform labor on public works, where such a sentence is unauthorized. *Ex parte Kelly*, 65 Cal. 154. But as to attacking sentence to hard labor, compare *Ex parte Davis*, 23 Fla. 56; *Ex parte Crews*, 78 Ala. 458.

Fine, Imprisonment and Costs; Unity of Punishment.—The judgment in *Ex parte Kelly*, 65 Cal. 154, was held to be a unit where the prisoner was directed to labor, etc., and that portion being without the jurisdiction of the justice, the judgment was void, and the prisoner entitled to discharge on habeas corpus, as the court could not excise the void portion from the judgment and order what remained to be carried into execution. See **EXCESSIVE SENTENCES, infra**. Where the statute provides a penalty as well as fine and imprisonment for an offence, a judgment for the amount of the penalty does not bar a criminal prosecution to enforce the fine and imprisonment. All together make only one punishment for the offence. In *Matter of Leszynski*, 16

Blatchf. (U. S.) 9. As to sentences for the payment of fine and costs, see *Ex parte Harrison*, 63 Cal. 299; *Petition of Crandall*, 34 Wis. 177; *State v. Miller*, 97 N. Car. 450.

1. *Ex parte Lange*, 18 Wall. (U. S.) 163, 175.

2. *People v. Liscomb*, 60 N. Y. 559; s. c., 19 Am. Rep. 211; 11 Alb. L. J. 396.

3. See cases on JURISDICTION, *supra*, and EXCESSIVE SENTENCES, *infra*.

4. *Ex parte Watkins*, 7 Pet. (U. S.) 568; *Bigelow v. Forrest*, 9 Wall. (U. S.) 339; *Day v. Micon*, 18 Wall. (U. S.) 156; *Ex parte Lange*, 18 Wall. (U. S.) 163; *People v. Baker*, 89 N. Y. 460; *People v. Liscomb*, 60 N. Y. 559; s. c., 19 Am. Rep. 211; 11 Alb. L. J. 396; *People v. Jacobs*, 66 N. Y. 8; *Ex parte Bulger*, 60 Cal. 438; *Ex parte Kelly*, 65 Cal. 154; *Ex parte Mooney*, 26 W. Va. 36; s. c., 53 Am. Rep. 59; *Ex parte Gibson*, 31 Cal. 619; *Petition of Crandall*, 34 Wis. 177; *Feeley's Case*, 12 Cush. (Mass.) 598; *Ex parte Shaw*, 7 Ohio St. 81; s. c., 70 Am. Dec. 55; *Brooks' Case*, 4 Leigh (Va.) 669; *Murray's Case*, 5 Leigh (Va.) 720, 724; *Hall's Case*, 6 Leigh (Va.) 615, 618; *In re Petty*, 22 Kan. 417. Thus it has been held that where a statute authorizes imprisonment in the penitentiary or imprisonment in jail and a fine, and a court adjudges imprisonment in the penitentiary and a fine, the defendant is not entitled to discharge on habeas corpus until he has served the term of imprisonment. *Ex parte Mooney*, 26 W. Va. 36; s. c., 53 Am. Rep. 59; compare *Ex parte Lange*, 18 Wall. (U. S.) 163; *People v. Baker*, 89 N. Y. 460; that where the statute makes battery punishable by fine or by imprisonment in the county jail not exceeding six months, or both, and the prisoner is sentenced to three years' imprisonment

(h) *Cumulative and Concurrent Sentences.*—In some States it has been held on habeas corpus that the courts have no authority to adjudge, on several convictions, that one term of imprisonment shall commence at the expiration of another in the absence of a statute to that effect; but that where there are several convictions and several terms of imprisonment adjudged, the terms run concurrently.¹

(i) *Modifying Judgments.*—The power of a court over its judgment stops at the point of execution. There can be but one sentence imposed as the result of one judgment of conviction; and when action is taken to carry a sentence into effect, the court no longer has power to modify it or to substitute another punishment.²

in the house of correction, he will be released on habeas corpus at the expiration of the period of six months' imprisonment; *Ex parte* Bulger, 60 Cal. 438; and that, upon the trial of an indictment containing several counts, charging separate and distinct misdemeanors of the same grade, where a general verdict of guilty is rendered, or a verdict of guilty upon two or more specified counts, the court has no power to impose a sentence or cumulative sentences exceeding, in the aggregate, what is prescribed by statute as the maximum punishment for one offence of the character charged. *People v. Liscomb*, 60 N. Y. 559; s. c., 19 Am. Rep. 211; 11 Alb. L. J. 396. It is said in *People v. Baker*, 89 N. Y. 460, that where the period of imprisonment is a separate portion of the sentence, complete in itself and valid, the remainder of the sentence can be disregarded, and that the prisoner is not entitled to discharge on habeas corpus until the expiration of the period of his imprisonment. But in *Ex parte* Kelly, 65 Cal. 154, it is held that the supreme court cannot excise the void portion of an excessive sentence from the judgment and order what remains to be carried into execution. In *People v. Riseley*, 38 Hun. (N. Y.) 280, and *Ex parte* Page, 49 Mo. 291, an excessive sentence was held to be void and the prisoner ordered discharged, and in *Ex parte* Bernert, 7 Pac. C. L. J. 460, a punishment inflicted less than that prescribed by law was held to be void, because unauthorized by law. In *Ex parte* Van Hagan, 25 Ohio St. 426, it was held that the excessive punishment might be remitted on error or appeal, but not on habeas corpus; and in *In re* Shenck, 74 N. C. 607, the prisoner was left to his *certiorari*.

1. *Kennedy v. Howard*, 74 Ind. 87; *Miller v. Allen*, 11 Ind. 389; *Ex parte* Meyers, 44 Mo. 279; *People v. Liscomb*, 60 N. Y. 559; s. c. 19 Am. Rep. 211; 11 Alb. L. J. 396; *U. S. v. Patterson*, (N. J.) 29 Fed. R. 775; s. c., 9 Crim. L. Mag. 358; *In re* Snow, 120 U. S. 274, and in *People v. Liscomb*, 60 N. Y. 559, it was held that the New York statute providing that one term of imprisonment should commence at the expiration of another applied only to separate convictions upon distinct trials, and not to convictions upon the same trial of several offences joined in one indictment; that the power of the court was exhausted by the first sentence; that the others were *coram non judice* and void, and that the prisoner was entitled to discharge on habeas corpus after having served the first sentence. Compare *Ex parte* Peters, 4 Dill (U. S.) 169; s. c., on renewed application, 12 Fed. Rep. 461; *Macke v. Ryan*, 31 Kan. 54; *Ex parte* Roberts, 9 Nev. 44. The illegality of other commitments need not be considered until the prisoner's term of service under a valid sentence has transpired. *Ex parte* Ryan, 17 Nev. 139. In *In re* Jackson, 3 McArthur (D. C.) 24, it is held, however, that there is no error in making one term of imprisonment commence when another terminates, but that this should form part of the judgment.

2. *Ex parte* Lange, 18 Wall. (U. S.) 163; *People v. Liscomb*, 60 N. Y. 559; s. c., 19 Am. Rep. 211; 11 Alb. L. J. 396. If by inadvertence in pronouncing a sentence a requirement of a statute has been overlooked, it may be corrected by the same tribunal before further action is taken. *Miller v. Finkle*, 1 Park. C. R. (N. Y.) 374. So, on habeas corpus, it has been held that the judge of a court has power to revise

(j) *The Mittimus.—Recitals in Judgment.*—A prisoner legally sentenced cannot be discharged on habeas corpus for imperfections in the *mittimus*. A proper *mittimus* can, if needed, be supplied at any time, and if the prisoner is safely in the proper custody, there is no office for a *mittimus* to perform. The prisoner is detained by virtue of the judgment, and not of the *mittimus*. A certified copy of the record of a sentence to imprisonment is sufficient to authorize the detention of the prisoner, without any warrant or *mittimus*. And if the certified copy of the minutes of the court imperfectly describe the crime of which the prisoner was convicted, the keeper can, upon the return to a writ of habeas corpus, show by the records of the court what the precise crime was, and thereby that the sentence was valid and imprisonment authorized. But this must be proved by the records themselves, and not by parol evidence.¹

(k) *Courts-Martial* are special tribunals with jurisdiction limited to a particular class of cases. If a court-martial has no jurisdiction over the subject-matter of the charge it has been convened to try, or shall inflict a punishment forbidden by the law,

and increase a sentence imposed upon a convict during the same term of court, and before the original sentence has gone into effect, or any action had upon it. *Com. v. Weymouth*, 2 Allen (Mass.) 144. But where a person is legally committed on a valid sentence, and has served nineteen days of confinement, his sentence cannot be recalled and revoked, and a revised and greater one imposed, although the punishment imposed by the second one may be within the limit fixed by law. The first sentence being valid, and the second one void, the prisoner will be remanded to serve out the first one. *Brown v. Rice*, 57 Me. 55. So when a court has imposed fine and imprisonment, where the statute only confers power to punish by fine or imprisonment, and the fine has been paid, it cannot, even during the same term, modify the judgment by imposing imprisonment instead of the former sentence. The judgment of the court having been executed so as to be a full satisfaction of one of the alternative penalties of the law, the power of the court as to that offence is at an end. A second judgment on the verdict is, under such circumstances, void for want of power, and it affords no authority to hold the party a prisoner, and he must be discharged on habeas corpus. *Ex parte Lange*, 18 Wall. (U. S.) 163. An appellate court has no power, on habeas corpus, to reduce an excessive term of imprisonment so as to bring it

within the statutory limit. *Ex parte Page*, 49 Mo. 291.

1. *People v. Baker*, 89 N. Y. 461; *People v. Cavanagh*, 2 Park. Cr. R. (N. Y.) 650; App. to 1 Blatchf. (U. S.) 651; *Ex parte Wilson*, 114 U. S. 417. In case the *mittimus* appears to be absolutely void, the prisoner will be retained until a certified copy of the judgment has been obtained, or until a reasonable time has been allowed for that purpose; and if the judgment is good, the prisoner will be remanded; if it is void, he will be discharged. *Ex parte Gibson*, 31 Cal. 619. Resort may also be had to the indictment, to find out the crime of which the prisoner was convicted, if no record has been made up and filed. *People v. Cavanagh*, 2 Park. Cr. R. (N. Y.) 656. A commitment that fully shows the character of the court rendering the judgment, name of the judge, clerk, and date of the judgment, is good although such judgment does not contain the usual recitals. *In re Waldrip*, 1 Ariz. 482. Where, upon the trial of a complaint containing several counts, a justice of the peace finds the defendant guilty on each count, and imposes a fine as to each count, such as would be proper if the defendant had been tried upon that count separately, and no portion of the judgment has been satisfied, a *mittimus* issued on such judgment and sentence is not void, although the aggregate of the fines exceeds \$500, the limit of jurisdiction as

though its sentence shall be approved by the officers having a revisory power over it, civil courts may, on habeas corpus, inquire into the court's jurisdiction, and discharge the prisoner if there is found to be a want or excess of jurisdiction. But, to warrant such discharge, the sentence must be absolutely void, not merely erroneous and voidable. Where courts-martial have jurisdiction, their proceedings cannot be collaterally impeached on habeas corpus for any mere error or irregularity committed within the sphere of their authority.¹ Their judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals—including the lowest as well as the highest—under like circumstances.²

(l) *Immigration and Court Commissioners.*—The decision of the collector or commissioners of immigration, upon the *status* of an immigrant whose right to land in the United States is challenged, is conclusive, and not open to review in the courts on habeas corpus, if there was competent evidence on which to exercise their judgment. If not, or if new facts are disclosed, the whole case should be again presented to those officers to be reconsidered.³ So, where a court commissioner has, on habeas corpus, determined the custody of an infant, on competent evidence, his decision cannot be reversed by a district court, there being no assignable error.⁴

(m) *Conflict of State and Federal Jurisdiction.*—A person held by virtue of the sentence of a state court for a crime which was not within the jurisdiction of such court, may be released on habeas corpus from a federal court.⁵ So, a state statute creating

to a single offence, and the prisoner is not entitled to discharge on habeas corpus. *Macke v. Ryan*, 31 Kan. 54.

1. *Wise v. Withers*, 3 Cranch (U. S.) 331; *Barrett v. Hopkins*, 2 McCrary, (U. S.) 129; *Dynes v. Hoover*, 20 How. (U. S.) 85; *Ex parte Milligan*, 4 Wall. (U. S.) 2; *In re Bogart*, 2 Sawy. (U. S.) 396; *Ex parte Mason*, 105 U. S. 696; *Ex parte Reed*, 100 U. S. 13; *Com. v. Gamble*, 11 Serg. & R. (Pa.) 93; *Meade v. Deputy Marshal*, 2 Wheel. Crim. Cas. 569; *People v. Warden*, 100 N. Y. 20; reversing 34 Hun. (N. Y.) 393; *Wales v. Whitney*, 114 U. S. 564; *In re Davison*, (N. Y.) 21 Fed. Rep. 618; *In re Zimmerman*, 24 Rep. 135; *In re Wall*, (Mass.) 12 Rep. 322; *In re Esmond*, 8 Crim. L. Mag. 455. The question of jurisdiction is the only one open to inquiry by the civil courts. *In re Esmond*, 8 Crim. L. Mag. 455. But it has been held that judgments pronounced by courts-martial, when questioned collaterally, are of no force or effect, unless accompanied by proof of

the jurisdictional facts upon which authority to render their judgments depends; that the mere recital in the record of jurisdictional facts does not furnish even *prima facie* evidence thereof, but they must be affirmatively proved; and that whether or not the record recites the jurisdictional facts, their judgments may be impeached by evidence showing a want of jurisdiction. *People v. Warden*, 7 Crim. L. Mag. 534; 8 C. 100 N. Y. 20; reversing 34 Hun. (N. Y.) 393.

2. *In re Davison*, (N. Y.) 21 Fed. Rep. 618; *Ex parte Reed*, 100 U. S. 13.

3. *In re Cummings*, (N. Y.) 32 Fed. Rep. 75; *In re Day*, (N. Y.) 27 Fed. Rep. 678; *People v. Hurlburt*, 67 How. Pr. (N. Y.) 356.

4. *State v. Bechdel*, (Minn.) 37 N. W. Rep. 338.

5. *Brown v. U. S.*, 2 Am. L. T., N. S. 464; *Ex parte Bridges*, 2 Woods (U. S.) 428; s. c., 2 Cent. L. J. 327; *Ex parte Houghton*, (Vt.) 7 Fed. Rep.

an offence in violation of a law of the United States, or of the federal constitution, or a treaty of the United States, is void; and a judgment on conviction for such an offence is also void. The prisoner will be released by a federal court on habeas corpus.¹ When a state court, on habeas corpus, finds that the prisoner is held under federal process, it will remand him;² and when a federal court, on habeas corpus, finds that the prisoner is held for an offence exclusively cognizable by state laws, and that he is not restrained contrary to any federal law, constitution, or treaty, it will remand him, or refuse in the first instance to issue the writ.³

(n) *Sentences in Violation of Federal Laws.*—A federal court may, on habeas corpus, discharge any person in custody in violation of the constitution, or of a law or treaty of the United States, or who is restrained of his liberty without due process of law, whether by state or federal authority.⁴

(o) *Review by United States Supreme Court of Judgments of Inferior Federal Courts.*—The judgment of the district and circuit courts of the United States in criminal cases is final, and cannot be reviewed by writ of error; but if such a judgment, or any part thereof, is void, either because the court that renders it is not competent to do so for want of jurisdiction, or because the

657; *Ex parte Hebard*, 4 Dill. (U. S.) 380; *Ex parte Reynolds*, 3 Hughes (U. S.) 559. As where one has been sentenced by a state court for passing counterfeit national bank bills. *Ex parte Houghton*, (Vt.) 7 Fed. Rep. 657; or for the crime of perjury committed in the course of a judicial investigation conducted under authority of acts of congress. *Ex parte Bridges*, 2 Woods (U. S.) 428; s. c., 2 Cent. L. J. 327; *Brown v. U. S.*, 2 Am. L. T., N. S. 464.

1. *In re Wong Yung Qui*, 6 Sawy. (U. S.) 237; *In Matter of Brosnahan*, 4 McCrary (U. S.) 1. But a person under the sentence of a state court for violating the state marriage law cannot impeach the judgment in a federal court on habeas corpus, upon the ground that such law violates the constitution or a law of the United States. *Ex parte Kinney*, 3 Hughes (U. S.) 9.

2. *In re Booth*, 3 Wis. 1.

3. *In re Taylor*, 12 Chicago L. N. Oct. 4th, p. 17, 1880. The United States supreme court has no authority by habeas corpus to discharge a person imprisoned under the sentence of a territorial court, unless that court has transgressed its jurisdiction. *Ex parte Harding*, 120 U. S. 782. And in a suit brought to that court from a state court which involves the constitutionality of ordinances made by a municipal cor-

poration in the State, that court will, when necessary, put its own independent construction upon the ordinances. *Yick Wo v. Hopkins*, 118 U. S. 356. The supreme court of a territory will not, on habeas corpus, review the judgment of a territorial district court sentencing a murderer to imprisonment, on the alleged ground that the district court had no jurisdiction in the premises, and that the prisoner was tried under a territorial law, when in fact he should have been tried by a law of the United States. *Ex parte Williams*, 1 Wash. (U. S.) 240.

4. *Ex parte Yung Jon*, (Oreg.) 28 Fed. Rep. 308; *In re Lee Tong*, 9 Sawy. (U. S.) 335; s. c., 5 Crim. L. Mag. 67, commented on in notes to 6 Crim. L. Mag. 407; *U. S. ex rel Spink*, (La.) 19 Fed. Rep. 631; *In re Byron*, (N. Y.) 18 Fed. Rep. 722; *Ex parte Kenyon*, 5 Dill. (U. S.) 385; *Ex parte McCready*, 1 Hughes (U. S.) 598; *McCready v. Virginia*, 94 U. S. 391; U. S. Rev. Stats. §§ 751, 753, 755. But where the relator is held to answer by a United States commissioner, for an offence against the laws of the United States, and upon competent evidence, he is not in custody contrary to law, such evidence will not be reviewed by federal courts on habeas corpus. *In re Byron*, (N. Y.) 18 Fed. Rep. 722.

court has exceeded its jurisdiction, or because it is rendered under a law clearly unconstitutional, or because it is senseless and without meaning and cannot be corrected, or for any other cause showing a want of authority to hold the prisoner under the sentence, the party imprisoned by virtue of such judgment may be discharged on habeas corpus by the supreme court of the United States or one of the justices thereof. But this power is limited to the question of jurisdiction. It will not review errors and irregularities.¹ Except in cases affecting ambassadors, other public ministers, or consuls, or those in which a State is a party, the supreme court of the United States can only issue a writ of habeas corpus under its appellate jurisdiction.² But where a prisoner is held without any lawful authority, or by a judgment or sentence which is excess of the jurisdiction of the inferior federal court that rendered it, or where there is a want of jurisdiction, the supreme court of the United States will, in favor of liberty, grant a habeas corpus, not to review the whole case, but to examine the authority of the court below to act at all. The writ is usually issued in connection with the writ of *certiorari* to bring up the record of the inferior court.³

(p.) *Sentence by Court or Judge de Facto*.—The writ of habeas corpus cannot be used as a substitute for *quo warranto*. One convicted by a jury and sentenced in court by a judge *de facto*, acting *colore officii*, though not *de jure*, and detained in custody in

1. *In re Guiteau*, 10 Fed. Rep. 161; *U. S. v. Patterson* (N. J.) 29 Fed. Rep. 775; s. c., 9 Crim. L. Mag. 358; *Ex parte Yerger*, 8 Wall. (U. S.) 85; *Ex parte Lange*, 18 Wall. (U. S.) 163; *Ex parte Harding*, 120 U. S. 782; *Ex parte Wilson*, 114 U. S. 417; *Ex parte Bigelow*, 113 U. S. 328; *Ex parte Curtis*, 106 U. S. 371; s. c., 5 Morr. Trans. 469; *Ex parte Reed*, 100 U. S. 13; *Ex parte Virginia*, 100 U. S. 339; s. c., 19 Am. L. Reg. N. S. 256; 14 Am. L. Rev. 320; *Ex parte Carll*, 106 U. S. 521; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Clarke*, 100 U. S. 399; *Ex parte Hung Hang*, 108 U. S. 552; *Ex parte Parks*, 93 U. S. 18; *Ex parte Snow*, 120 U. S. 274; *Yick Wo v. Hopkins*, 118 U. S. 356; *Ex parte Crouch*, 112 U. S. 178; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Watkins*, 3 Pet. (U. S.) 193; s. c., 7 Pet. U. S. 568; *Ex parte Jackson*, 96 U. S. 727. See CONFLICT OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, *ante*. The supreme court will not examine errors of law committed by an inferior federal court in passing sentence, for the purpose of testing the jurisdiction of the court which passed sentence.

Ex parte Yarbrough, 110 U. S. 651; s. c., 5 Crim. L. Mag. 549.

2. *Ex parte Hung Hang*, 108 U. S. 552; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Parks*, 93 U. S. 18; *Ex parte Lange*, 18 Wall. (U. S.) 163; *Ex parte Yerger*, 8 Wall. (U. S.) 85; *Ex parte Watkins*, 7 Pet. (U. S.) 568; *Ex parte Bollman*, 4 Cranch (U. S.) 75.

3. *Ex parte Lange*, 18 Wall. (U. S.) 163; *Ex parte Milligan*, 4 Wall. (U. S.) 2; *Ex parte McCardle*, 6 Wall. (U. S.) 318; s. c., 7 Wall. (U. S.) 506; *Ex parte Yerger*, 8 Wall. (U. S.) 85; *U. S. v. Hamilton*, 3 Dall. (U. S.) 17; *Burford's Case*, 3 Cranch (U. S.) 448; *Ex parte Bollman*, 4 Cranch (U. S.) 75; *Ex parte Watkins*, 3 Pet. (U. S.) 193; s. c., 7 Pet. (U. S.) 568; *Ex parte Metzger*, 5 How. (U. S.) 176; *Ex parte Kaine*, 14 How. (U. S.) 103; *Ex parte Wells*, 18 How. (U. S.) 307; *Ex parte Virginia*, 100 U. S. 339; s. c., 19 Am. L. Reg. N. S. 256; 14 Am. L. Rev. 320; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Curtis*, 106 U. S. 371; 5 Morr. Trans. 469; *Ex parte Carll*, 106 U. S. 521. An inferior federal court will not, on habeas corpus, look behind the record to review the sentence of a court

pursuance of his sentence, cannot properly be discharged on habeas corpus. The validity of the appointment or election of an officer *de facto*, before whom a prisoner has been convicted of crime, will not be inquired into on habeas corpus.¹

XIV. RES JUDICATA.—1. Writ of Error.—Independent of statutory provisions, the general rule is that a writ of error or appeal will not lie from a judgment remanding the prisoner on habeas corpus proceedings.² The prisoner is entitled to the opinion of all the courts as to his freedom, and in his applications for the writ of habeas corpus may exhaust the entire judicial power of the State.³ The decision, therefore, is not a final one, and is not understood to be of that conclusive character which is necessary to support a writ of error. Whether the decision is the simple order of a judge, or the determination of a court, the effect is the same. In

of co-ordinate jurisdiction. *Ex parte* Alexander, 14 Fed. Rep. 680.

1. Griffin's Case, 1 Chase Dec. (U. S.) 364; s. c., 25 Tex. Supp. 623; *People v. Stevens*, 5 Hill (N. Y.) 630; *Ex parte* Call, Jr., 2 Tex. App. 497; *Green v. Burke*, 23 Wend. (N. Y.) 490; *People v. White*, 24 Wend. (N. Y.) 520; *People v. Carrique*, 2 Hill (N. Y.) 93; *Hoglan v. Carpenter*, 4 Bush (Ky.) 89; *State v. Fenderson*, 28 La. Ann. 82; *Sheehan's Case*, 122 Mass. 445; note to *Com. v. Lecky*, 1 Watts (Pa.) 66; s. c., 26 Am. Dec. 48; *Matter of Prime*, 1 Barb. (N. Y.) 340; *Matter of Wakker*, 3 Barb. (N. Y.) 162; *Ex parte* Strahl, 16 Iowa 369; *State v. Bloom*, 17 Wis. 521; 4 Cent. L. J. 524.

Miscellaneous Matters.—Habeas corpus is the only remedy after final judgment. *Southern Ex. Co. v. Lynch*, 65 Ga. 240. The entry of a formal judgment in a habeas corpus proceeding is not required. *Ex parte* Richards, 102 Ind. 260. A judgment finding a creditor guilty of fraud, is not reviewable on habeas corpus. *Ex parte* Grace, 12 Iowa 208; s. c., 79 Am. Dec. 529. A prisoner who is serving his sentence, cannot, after an illegal discharge, be rearrested and subjected to punishment on the same indictment upon which he was serving. *Com. v. Smith*, 1 Brewst. (Pa.) 547. Habeas corpus and writ of error thereon having been brought to attack a sentence alleged to be illegal, the writ of error will not be dismissed, when reached for argument in the supreme court on the ground that the period of time covered by the sentence has then expired. *Lark v. State*, 55 Ga. 435; s. c., 1 Am. Crim. Rep. 563. In attacking judgments on habeas corpus, it is proper to inquire whether

they have been stayed or have spent their force. *Rolfs v. Shallcross*, 30 Kan. 758; but the record cannot be impeached by parol testimony. *Watson v. Balch*, 30 Kan. 753. An order remanding a prisoner to jail until bail is given, where he has been held to answer for a criminal offence, will not be reviewed or reversed, or the prisoner discharged on habeas corpus, by the supreme court. *In re* Edwards, 35 Kan. 99.

Under a void order for a new trial, the keeper has no authority to surrender a prisoner serving out a sentence under the judgment of the court making such order. *Ex parte* Holmes, 21 Neb. 324. A court may, on habeas corpus, inquire into the legality of its own sentence. *In re* Greathouse, 4 Sawy. (U. S.) 487.

2. *Burdett v. Abbott*, 14 East. 91; *Bushell's Case*, Freem. K. B. & C. P. 1; *Wilson's Case*, 7 Ad. & El. Q. B. 684; *City of London's Case*, 4 Fraser, 8 Co. 121; *Pender v. Herle*, 3 Bro. P. C. 505; *King v. Suddis*, 1 East. 306; *King v. Bythell*, 12 Mod. 75; *King v. Dean*, etc., 8 Mod. 27; *contra*, *Queen v. Paty*, 2 Salk. 503; s. c., 2 Ld. Raym. 1105.

But the judgment of a state court on habeas corpus may be reviewed by the supreme court of the United States on a writ of error issued from that court to the state court, at the instance of the attorney general, whenever a right has been claimed under the constitution or laws of the United States, and the decision of the state court is against it. *Ableman v. Booth*, 21 How. (U. S.) 506; *Tarble's Case*, 13 Wall. (U. S.) 397.

3. *King v. Suddis*, 1 East. 306; *Ex parte* Partington, 2 Dowl. & L. 650;

neither case is there any such final judgment as will sustain a writ of error;¹ because a refusal to discharge the prisoner on habeas corpus is not a bar to another application for the same writ before another officer or court.² A judgment discharging the prisoner, whether erroneous or not, is, in the absence of statutory provisions, and as being in favor of personal liberty, regarded as final and conclusive, and not subject to appeal or writ of error, and the prisoner cannot afterwards be arrested for the same cause.³

2. Custody of Children. — The determination of a court, on habeas corpus, respecting the custody of children, is conclusive in a subsequent application for the writ, unless some new fact has occurred which has "altered the state of the case, or the relative claims of the parents to the custody of the child in any material respect."⁴ But the estoppel, even in such cases, continues only while the circumstances remain the same.⁵

3. Statutory Provisions. — Under the statute and practice in some of the States, an appeal,⁶ or writ of error,⁷ will lie from a

s. c., 13 Mees. & W. 678; see authorities cited in note 2, *infra*.

1. *Ex parte* Thompson, 93 Ill. 89; *People v. Brady*, 56 N. Y. 182; *Ex parte* Reynolds, 6 Park. Crim. Rep. (N. Y.) 276; *In Matter of Perkins*, 2 Cal. 424; *In Matter of Stephen*, 1 Wheel. Crim. Cas. 326; *Wyeth v. Richardson*, 10 Gray (Mass.) 240; *Ex parte* Ellis, 11 Cal. 222; *Bell v. State*, 4 Gill (Md.) 301; s. c., 45 Am. Dec. 130; *Ex parte* Mitchell, 1 La. Ann. 413; *Howe v. State*, 9 Mo. 690; *Ex parte* Alexander, 2 Am. L. Reg. 44; *In Matter of Ring*, 28 Cal. 247; *Yates v. People*, 6 Johns. (N. Y.) 429; *Hammond v. People*, 32 Ill. 446; *Wade v. Judge*, 5 Ala. 130; *Ex parte* Kaine, 3 Blatchf. (U. S.) 1; *Ex parte* Robinson, 6 McLean (U. S.) 360; *In re* Blair, 4 Wis. 522; *contra*, *Yates v. People*, 6 Johns. (N. Y.) 335; *Ex parte* Scott, 1 Dak. 140; *Selz v. Presburger*, 49 N. J. 396; *People v. Cunningham*, 3 Park. Cr. R. (N. Y.) 531, admitting to bail; *Perry v. McLendon*, 62 Ga. 598.

2. See cases cited in *supra*, n. 3, p. 237. SECOND APPLICATIONS, *infra*; *Ex parte* Ellis, 11 Cal. 222; *Ex parte* Lynn, 19 Tex. App. 120; *In re* Snell, 31 Minn. 110; *In re* Garvey, 7 Colo. 502; *People v. Hurlburt*, 67 How. Pr. (N. Y.) 362; *Ex parte* Kaine, 3 Blatchf. (U. S.) 1; *People v. Brady*, 56 N. Y. 182; *Ex parte* Nichols, 62 Miss. 158.

3. *Com. v. Smith*, 1 Brewst. (Pa.) 547; *Ex parte* Jilz, 64 Mo. 205; *People v. Brady*, 56 N. Y. 182; *In re* Clasby, 3 Utah 183; *Com. v. McBride*, 2 Brewst. (Pa.) 545; *Grady v. Superior Court*

Fresno Co., 64 Cal. 155; compare *Ex parte* Powell, 20 Fla. 806, showing that after discharge on habeas corpus, the defendant can have no relief on a second writ, when afterwards arrested for the same cause, unless the cause of the first arrest is shown.

4. *Mercein v. People*, 25 Wend. (N. Y.) 64; s. c., 35 Am. Dec. 653, note 668; *Freeman on Judgments*, § 324; *People v. Mercein*, 3 Hill (N. Y.) 399; s. c., 38 Am. Dec. 644; *In Matter of Da Costa*, 1 Park. Cr. R. (N. Y.) 129; *McConologue's Case*, 107 Mass. 170; *People v. Burtnett*, 13 Abb. Pr. (N. Y.) 8; *State v. Malone*, 3 Sneed. (Tenn.) 413; *People v. Cooper*, 8 How. Pr. (N. Y.) 288; *State v. Bechdel*, 37 Minn. 360. Note to *State v. Smith*, 20 Am. Dec. 336; s. c., 6 Greenl. (Me.) 462; *Brooke v. Logan*, 112 Ind. 183. Compare *State v. Bechdel*, 37 Minn. 360; s. c., 38 Minn. 278.

5. *People v. Mercein*, 3 Hill (N. Y.) 399; s. c., 38 Am. Dec. 644; *State v. Bechdel*, 37 Minn. 360; s. c., 38 Minn. 278.

6. *Kline v. Kline*, 57 Iowa 386; *State v. Kirkpatrick*, 54 Iowa 373; *Speer v. Davis*, 38 Ind. 271; *Miller v. Snyder*, 6 Port. (Ind.) 1; *Nichols v. Cornelius*, 7 Port. (Ind.) 611; *Ferguson v. Ferguson*, 36 Mo. 197; *Ex parte* Phillips, 57 Miss. 357; *Hamilton v. Flowers*, 57 Miss. 14; *Emanuel v. State*, 36 Miss. 627.

7. *People v. Liscomb*, 60 N. Y. 559; s. c., 19 Am. Rep. 211; 11 Alb. L. J. 396; *Lark v. State*, 55 Ga. 435; *McCready v. Wilcox*, 33 Conn. 321; *Ex parte* Finch, 15 Fla. 630; *Lumm v.*

judgment on habeas corpus.¹

4. Second Applications.—While the decision on a writ of habeas corpus, independently of statutory provisions, is not final and conclusive, and, therefore, not subject to review by writ of error or appeal, it is entitled to some consideration on a second application, and may warrant the refusal of the second writ. This occurs where the case has already been heard upon the same evidence, where the facts and circumstances are the same. When this is so, the first judgment will be undisturbed as a rule.² But even when the statute makes the decision conclusive upon all matters which were, or might have been investigated upon the first hearing, it does not preclude the issuance of a second writ based upon a new state of facts, or upon new and important evidence, which entitle the prisoner to a discharge.³ A decision on a habeas corpus in one State will not be considered *res judicata* in another.⁴ *Res judicata* does not apply to judgments on habeas corpus in cases of extradition.⁵

State, 3 Port. (Ind.) 293; *Dodge's Case*, 6 Mart. (La.) 569; *Ex parte La Fonta*, 2 Rob. (La.) 495; *Weddington v. Sloan*, 15 B. Mon. (Ky.) 147; *Com. v. Biddle*, 6 Pa. L. J. 287; *McFarland v. Johnson*, 27 Tex. 105.

1. Appeals.—The review is sometimes had at the instance of the State when the prisoner is discharged. *State v. Everett, Dudley* (S. C.) 295. Where the appeal suspends the order of discharge, the prisoner will be remanded if the order be reversed. *People v. Cavanagh*, 2 Park. Cr. R. (N. Y.) 650. But where the appeal does not suspend the order of discharge, no decision will recapture the defendants. *State v. Everett, Dudley* (S. Car.) 295. The prisoner may sometimes appeal, after trial, upon his application for a habeas corpus being refused, without that right where the application is heard and the writ refused. *Ex parte Ainsworth*, 27 Tex. 731. See *Ex parte Coupland*, 26 Tex. 386; *Ex parte Foster*, 5 Tex. App. 625; *Ex parte McGill*, 6 Tex. App. 498; *Ex parte Boland*, 11 Tex. App. 159. In Minnesota, an order discharging the prisoner may be reviewed by appeal, but not by *certiorari*. *State v. Buckham*, 29 Minn. 462. In Alabama, Maryland and Tennessee no appeal lies from a decision on habeas corpus. *Guilford v. Hicks*, 36 Ala. 95; *Roth v. House of Refuge*, 31 Md. 329; *State v. Galloway*, 5 Coldw. (Tenn.) 326; s. c., 98 Am. Dec. 404. Nor in Utah, when the defendant is discharged. *In re Clasby*, 3

Utah 183. In California no appeal lies from an order admitting a party to bail on habeas corpus. *People v. Schuster*, 40 Cal. 627. In Mississippi the principle of *res judicata* applies under the code to an order denying bail on habeas corpus, before indictment, and the bar or estoppel continues after indictment, so long as the facts are the same as when judgment was given. *Ex parte Hamilton*, (Miss.) 3 Southern Rep. 68.

2. Ex parte *Lawrence*, 5 Binn. (Pa.) 304; *Ex parte Campbell*, 20 Ala. 89. Note to *People v. McLeod*, 3 Hill (N. Y.) 676; In *Matter of Place*, 34 How. Pr. (N. Y.) 259; *Ex parte Patterson*, 56 Miss. 161; *Ex parte Bridewell*, 57 Miss. 177; *Ex parte Nichols*, 62 Miss. 158. The prisoner is not entitled to discharge unless he alleges some fact occurring since the former trial which changes the legal aspects of his case. See case last cited.

3. Ex parte *Pattison*, 56 Miss. 161; *People v. Fancher*, 1 Hun. (N. Y.) 27; *In re Blair*, 4 Wis. 522; In *Matter of Stephen*, 1 Wheel. Crim. Cas. 326; *In re Curley*, 34 Iowa 184; *Ex parte Robinson*, 6 McLean (U. S.) 360; *Lea v. White*, 4 Sneed (Tenn.) 73; *Ex parte Ring*, 28 Cal. 247; *McFarland v. Johnson*, 27 Tex. 105; *Hammond v. People*, 32 Ill. 446.

4. State v. Brearly, 2 South. (N. J.) L. 555; *Maria v. Kirby*, 12 B. Mon. (Ky.) 550.

5. Kurtz v. State, 22 Fla. 36; s. c., 1 Am. St. Rep. 173.

XV. CUSTODY OF LEGITIMATE CHILDREN.—1. English Doctrines.—
(a) Common Law Rights of Father.—At common law the father had an unlimited right to the custody of his children, subject only to the control of the courts in cases of gross breach of duty.¹ When he abused that right to the detriment of the child, the courts would protect the child; but where no abuse of that right was shown, the father was entitled to have the child restored to him.² And it appears to have been the invariable practice of the common law courts, on an application for a habeas corpus, to bring up the body of a child detained from the father, to enforce the father's right to the custody, even against the mother, unless the child be of an age to judge for itself, or there be an apprehension of cruelty from the father, or of contamination in consequence of his immorality or gross profligacy.³ In conflicting claims between parents for the custody of their legitimate children, the right of the father was held paramount to that of the mother; but the first and cardinal rule by which the courts were governed in awarding the custody, was the welfare of the child, and not the technical legal right.⁴

(b) Surrender of Custody by Parent.—A bare contract by the father with a third person that the latter shall have the custody of the former's child, is in the nature of a mere consent, and may be revoked by the father. He is, therefore, entitled, on habeas corpus, to have the child delivered over to him.⁵

1. Forsyth's Custody of Infants; 52 Law Lib., ch. 3; Matter of Andrews, 4 Eng. Rep. 261; Moak's Notes; Rex v. Greenhill, 4 Ad. & El. 624; Rex v. De Mannville, 1 Smith 358; Matter of Hakewill, 22 Eng. L. & Eq. 395; *In re* Pulbrook, 11 Jur. 185; Curtis v. Curtis, 5 Jur. N. S. 1147; Article in 15 Cent. L. J. 281.

2. King v. De Mannville, 5 East. 220; Forsyth's Custody of Infants, 52 Law Lib., ch. 3; *Ex parte* Skinner, 9 Moore 278; Article in 15 Cent. L. J. 281; In Matter of Fynn, 12 Jur. 713.

3. *In re* Andrews, 4 Eng. Rep. 265; Moak's Notes; Rex v. Greenhill, 4 Ad. & El. 624; Forsyth's Custody of Infants, §§ 20, 44; *Ex parte* Skinner, 9 Moore 278; Article in 15 Cent. L. J. 281; In Matter of Fynn, 12 Jur. 713; *In re* Pulbrook, 11 Jur. 185; Rex v. Wilson, 4 Ad. & El. 645, note.

But the father's conduct had to be very gross before the courts would deprive him of the custody of his child, or refuse, on habeas corpus, to deliver it up to him. Rex v. De Mannville, 5 East. 221; *Ex parte* Skinner, 9 Moore 278. Mere illicit intercourse with a woman not his wife was held insufficient in itself. Rex v. Greenhill, 4 Ad. & El. 624; Forsyth's Custody of In-

fants, §§ 20, 44; *In re* Pulbrook, 11 Jur. 185; *In re* Fynn, 12 *Id.* 716; Rex v. Wilson, 4 Ad. & El. 645, note. So with mere acts of harshness or severity, or of passionate temper. Curtis v. Curtis, 5 Jur. N. S. 1147. In one case an infant eight months old was given to the father as against the mother, no neglect being imputable to him. Rex v. De Mannville, 5 East. 221; see *Ex parte* Skinner, 9 Moore 278.

Persons in Loco Parentis, such as testamentary guardians, may recover the custody of their wards on habeas corpus, if the applicant be a fit person, and the child too young to choose for itself. But if the validity of the testamentary appointment is disputed, the court will direct the issue to be tried by a jury. Matter of Andrews, 4 Eng. Rep. 261; see Queen v. Clarke, 7 El. & Bl. 186; s. c., 26 L. J., N. S., Q. B. 169.

4. *Ex parte* Fynn, 12 Jur. 713; Rex v. Delaval, 3 Burr. 1434; Blissett's Case, Lofft. 748; Archer's Case, 1 Ld. Raym. 673; Forsyth's Custody of Infants, § 4044; Rex v. Greenhill, 4 Ad. & El. 624; *Ex parte* Skinner, 9 Moore 278; Article in 15 Cent. L. J. 281.

5. Queen v. Smith, 22 L. J., N. S., Q. B. 116; s. c., 17 Jur. 24; 16 Eng. L. & Eq. 221; *In re* Andrews, 4 Eng. Rep.

(c) *Practice as to Disposition of Child*.—The court is bound, on habeas corpus, to set the infant free from an improper restraint, but the proper disposition of the child rests in the court's discretion. If it is old enough to exercise a choice, the court will let the child elect where it will go. If not old enough for that, and a want of direction would only expose the child to dangers or seductions, the court must make an order for its being placed in the proper custody.¹ The right of the father is not absolute. The present and future welfare of the infant is the leading consideration; and the court will exercise its discretion in attaining that end by sometimes giving the custody to a third person other than the parents.² It is the general practice to consider the child as not of sufficient discretion to choose for itself until it attains the age of nurture, viz., fourteen.³

(d) *Equity Jurisdiction*.—The almost absolute right of the father at common law to the custody of his children as laid down in *Rex v. Greenhill*,⁴ has been modified by the provisions of the Talfourd Act,⁵ and the "Infants' Custody Act."⁶ These acts gave new rights to the wife,⁷ but did not affect the power of the court to exercise its discretion in awarding the custody of the child, according to the best interests of the child.⁸ The method to obtain the custody of a child at law is by habeas corpus;⁹ in equity it is by petition.¹⁰

480. Moak's Notes; *Queen v. Clarke*, 7 El. & Bl. 186. There must be some other element than a mere contract to deprive the father of the custody of his children at common law; but if the contract is equitable and ought to be enforced it will be. *Hamilton v. Hector*, 2 Eng. Rep. 393, Moak's Notes; s. c., L. R. 13 Eq. Cas. 511; *Hope v. Hope*, 8 De Gex, M. & G. 731; *Walrond v. Walrond*, Johnson 18; *In re Andrews*, 4 Eng. Rep. 280, Moak's Notes.

1. *King v. Greenhill*, 4 Ad. & El. 640; *Rex v. Delaval*, 3 Burr. 1434; *Forseyth's Custody of Infants*, 52 Law Lib. §§ 44, 74; *King v. Isley*, 5 Ad. & El. 441; *Queen v. Clarke*, 7 El. & Bl. 186; *Matter of Doyle*, *Clarke Ch.* 154; *In re Pulbrook*, 11 Jur. 185; *In re Fynn*, 12 Id. 713; *Rex v. De Manneville*, 5 East. 220; *Rex v. Johnson*, 1 Stra. 579; *In re Lloyd*, 3 Man. & Gr. 547. The parent has a right of access to his children, at all reasonable times, and in a reasonable manner, though not entitled to their custody. *Barns v. Barns*, L. R. 1 Prob. & Div. 463, 464; *Suggate v. Suggate*, 1 Sw. & Tr. 492; *Phillip v. Phillip*, 27 L. T. 592.

2. *Blissett's Case*, Loft. 748; *Queen v. Clarke*, 7 El. & Bl. 186; Article in 15 Cent. L. J. 284, and cases cited in last note, *supra*.

3. *Queen v. Clarke*, 7 El. & Bl. 186; s. c., 40 Eng. L. & Eq. 109, and cases cited; see, also, *In re Lloyd*, 3 Man. & Gr. 547; *In re Moore*, 11 Ir. R., C. L. 1; *Rex v. Johnson*, 1 Stra. 579; *In re Preston*, 5 Dowl. & L. 247; *In re Conner*, 16 Ir. R., C. L. 112; *Rex v. Greenhill*, 4 Ad. & El. 624, and cases there cited.

4. 4 Ad. & El. 624. For comments upon this case see *In re Taylor*, 4 L. R. Ch. Div. 157; *Mercein v. People*, 25 Wend. (N. Y.) 64; s. c., 35 Am. Dec. 653; 44 Parl. Debates 3rd series, 744; *In re Andrews*, 4 Eng. Rep., Moak's Notes, 268; 49 Parl. Debates, 494; *Forseyth's Custody of Infants*, 52 Law Lib. § 7.

5. 2 & 3 Vict. ch. 54.

6. 8 L. R., 36 & 37 Vict. ch. 12.

7. That is, the court of chancery might, in its discretion, on the application of the mother, when the child was under seven years of age, give the custody of the child to the mother under the former act. The latter act extended the period to sixteen years.

8. *In re Taylor*, L. R., 4 Ch. Div. 157; For comments upon the Talfourd act see *In re Fynn*, 12 Jur. 718.

9. *In re Andrews*, 4 Eng. R. 261, Moak's Notes.

10. *In re Taylor*, L. R., 4 Ch. Div. 157.

2. **American Doctrines.**—(a) *English Cases Inapplicable.*—The act of 31 Car. II, in England, was to relieve those committed or imprisoned upon a criminal charge. The writ of habeas corpus, therefore, sued out to recover the custody of children was the common law writ, and the decisions in such cases are inapplicable here except where the common law is administered.¹

(b) *Scope of Writ.*—The office of the writ of habeas corpus is to release from illegal restraint;² and when such restraint is disproved the writ has performed its functions and the jurisdiction ceases.³ The office of the writ is not to recover the possession of the persons detained, but simply to free from illegal restraint.⁴ The detention of a child, particularly one of tender years, from the one entitled to its custody, amounts to an illegal restraint.⁵ On habeas corpus it should be discharged from such restraint, and allowed to go where it will, if of years of discretion; but if not of sufficient age to determine for itself, the court or judge must decide for it, and make an order for its being placed in the proper custody.⁶

(c) *Application for Writ.*—To secure the custody of a child from illegal restraint the application should state the locality of the confinement;⁷ and a demand for the child should be made before legal proceedings are instituted; for they can be commenced only in case that the respondent, having the power to do so, refuses to restore the child.⁸ So, the one promoting the application for a habeas corpus must either be entitled to the custody, or have been duly authorized by the child to make it.⁹

1. *People v. Porter*, 1 Duer. (N. Y.) 709; *People v. Wilcox*, 22 Barb. (N. Y.) 178.

2. *People v. Porter*, 1 Duer. (N. Y.) 709; *State v. Baird*, 18 N. J. Eq. 194.

3. *People v. Porter*, 1 Duer. (N. Y.) 709.

4. *State v. Baird*, 18 N. J. Eq. 194; *People v. Kling*, 6 Barb. (N. Y.) 366; *Foster v. Alston*, 6 How. (Miss.) 406; *State v. Banks*, 25 Ind. 495; *In re Mitchell*, R. M. Charl. (Ga.) 489; *Com. v. Barney*, 4 Brewst. (Pa.) 408; *Armstrong v. Stone*, 9 Gratt. (Va.) 102; *People v. Wilcox*, 22 Barb. (N. Y.) 178; *Ex parte Schumpert*, 6 Rich. (S. Car.) 344.

5. *Williamson's Case*, 26 Pa. St. 9; s. c., 67 Am. Dec. 374; *People v. Cooper*, 8 How. Pr. (N. Y.) 288; showing minutely how such restraint of a child may exist. A child, however, in the custody of its general guardian, is not illegally restrained because such guardian refuses to deliver such child to its mother. *People v. Wilcox*, 22 Barb. (N. Y.) 178. See *People v. Gilmore*, 26 Hun. (N. Y.) 1.

6. *Rust v. VanVacter*, 9 W. Va. 600; *In Matter of Wollstonecraft*, 4

Johns. Ch. (N. Y.) 80; cases cited in note 4, *supra*.

7. *People v. Cowles*, 59 How. Pr. (N. Y.) 287.

8. *Speer v. Davis*, 38 Ind. 271; *Bullen's Petition*, 28 Kan. 781. The writ of habeas corpus should not issue when the child is not in the custody of the respondent at the time of the application. *In Matter of Larson*, 31 Hun. (N. Y.) 539. But the mere fact that the child is, at the time of the application, in a foreign jurisdiction, does not deprive the court of jurisdiction, nor is it a sufficient excuse for not producing it in obedience to the writ. The important question is, Where is the power of control exercised? If it be exercised by the respondent before the court, he may be required to produce the child, and be punished for his failure. *Rivers v. Mitchell*, 57 Iowa 193; see *In Matter of Jackson*, 15 Mich. 417.

9. *People v. Mercein*, 3 Hill (N. Y.) 399; s. c., 38 Am. Dec. 644; *Ex parte Child*, 29 Eng. L. & Eq. 259; *Hottentot Venus*, 13 East 194; *Rex v. Clarke*, 3 Burr. 1362; *In re Poole*, 2 McArthur (D. C.) 583; *Linda v. Hudson*, 1 Cush. (Mass.) 385. But one entitled to the

(d) *Rights of Father* to the custody of his children are not so absolute in this country as they were in England. Where each is blameless, the father is usually entitled to the custody of his children.¹ But the courts adopt the equitable principle that this right must yield to considerations affecting the welfare of the children, and, by regarding more highly the rights of the mother.² This change from the common law has been brought about in some of the States by legislation.³ In the absence of any statute, the stern rule of the common law unquestionably makes the rights of the father, under ordinary circumstances, paramount to the mother's.⁴ The later and better doctrine now generally recognized with respect to contentions among relatives for the custody of infants is, that the future welfare and interest of the child is the paramount consideration, even as against the claim of either

custody may maintain the writ without the consent or privity of the child, and even against its express wishes. *People v. Mercein*, 3 Hill (N. Y.) 399; s. c., 38 Am. Dec. 644; *In re Mitchell*, R. M. Charlt. (Ga.) 489; *Mayne v. Baldwin*, 5 N. J. Eq. 454; *Com. v. Taylor*, 3 Met. (Mass.) 73. A corporation, such as a charitable institution, is entitled to the custody of a child, and may assert its rights on habeas corpus. *Milligan v. Children's Home*, 97 Ind. 355. The petition for a habeas corpus to obtain the possession of a child, may be in the name of the infant by his *prochain ami*, or in the name of the person claiming the possession, and where this person is the mother, and she is married, it may be in the names of her husband and herself. *Armstrong v. Stone*, 9 Gratt. (Va.) 102; *People v. Wilcox*, 22 Barb. (N. Y.) 178.

1. See note *infra*, COURTS WILL RECOGNIZE, etc.

2. See note *infra*, COURTS WILL RECOGNIZE, etc.

3. *Dumain v. Gwynne*, 10 Allen, (Mass.) 270.

4. Courts will recognize the father as the child's natural guardian, and commit to him the custody of the child, unless he is shown to be an unfit and unsafe custodian of his trust; but if immoral, incompetent, intemperate, or otherwise unfit, the court will exercise its discretion on habeas corpus in awarding the custody where it best belongs. *Taylor v. Jeter*, 33 Ga. 195; s. c., 81 Am. Dec. 202, note 208. Note to *State v. Smith*, 6 Greenl. (Me.) 462; s. c., 20 Am. Dec. 330, 337; *People v. Mercein*, 3 Hill. (N. Y.) 399; s. c., 38 Am. Dec. 644; *En parte Murphy*, 75

Ala. 409; *State v. Libbey*, 44 N. H. 321; s. c., 82 Am. Dec. 223; *Verser v. Ford*, 37 Ark. 27; *U. S. v. Green*, 3 Mason (U. S.) 482; *En parte Schumpert*, 6 Rich. (S. Car.) 344; *Ellis v. Jesup*, 11 Bush (Ky.) 403; *Bennet v. Bennet*, 2 Beas. (N. J.) Eq. 114; *State v. Stigall*, 2 Zab. (N. J.) L. 286; *Johnson v. Terry*, 34 Conn. 259; *En parte Hewitt*, 11 Rich. 326; *En parte Williams*, 11 Rich. (S. Car.) 452; *State v. Smith*, 6 Greenl. (Me.) 462; s. c., 20 Am. Dec. 324; *In re Mitchell*, R. M. Charlt. (Ga.) 489; *Brinster v. Compton*, 68 Ala. 299; *Com. v. Gilkeson*, 1 Phila. (Pa.) 194; s. c., 7 Leg. Int. 195; *Com. v. Smith*, 1 Brewst. (Pa.) 547; *State v. Bratton*, 15 Am. L. Reg. N. S. 359; *State v. Richardson*, 40 N. H. 272; *En parte Boaz*, 31 Ala. 425; *Com. v. Briggs*, 16 Pick. (Mass.) 203; *State v. Banks*, 25 Ind. 495; *People v. Chegaray*, 18 Wend. (N. Y.) 637. In *Matter of Cuneen*, 17 How. Pr. (N. Y.) 516; *Nickols v. Giles*, 2 Root (Conn.) 461; *In Matter of O'Neal*, 3 Am. L. Rev. 578; *Com. v. Reilley*, 2 Del. Co. (Pa.) 369; *Mercein v. People*, 25 Wend. (N. Y.) 64; s. c., 35 Am. Dec. 653; Cincinnati House of Refuge v. Ryan, 37 Ohio St. 197. But the father may show, on habeas corpus, that former objections to his having the custody of his child no longer exist. *Farnham v. Pierce*, 141 Mass. 203; *En parte Murphy*, 75 Ala. 409. And it is sometimes said that if he has possession of the children in controversy the courts are not quite so ready to exercise their discretion in depriving him of the custody, and to act upon the particular circumstances of the case in the interest and welfare of the children, as where he has lost

or both of its parents;¹ and notwithstanding a statute recognizing generally the superior rights of the father.²

(e) *Mother's Rights*.—In cases where the infant is sickly and delicate, or of such tender years as to require the personal care of the mother, she is undoubtedly entitled to its custody, on habeas corpus, when this question is in controversy, if she is a suitable and respectable person. And this whether the contention for custody is between her and her husband, or between her and third persons.³

(f) *Surrender of Custody*.—The later decisions hold that a parent may relinquish or forfeit the right of custody to his child by contract; and that unless a clear breach of the agreement or

possession of them; but this distinction is not generally recognized. See, *State v. Paine*, 4 Humph. (Tenn.) 523.

1. *Com. v. Reilley*, 2 Del. Co. (Pa.) 369; *Jones v. Darnall*, 103 Ind. 569; *Sturtevant v. State*, 15 Neb. 459; *Cook v. Cook*, 1 Barb. Ch. (N. Y.) 639; *Dailey v. Dailey*, *Wright* (Ohio) 514; *Gishwiler v. Dodez*, 4 Ohio St. 617; *Corrie v. Corrie*, 42 Mich. 509; *Verser v. Ford*, 37 Ark. 27; *Ex parte Murphy*, 75 Ala. 409; *Taylor v. Jeter*, 33 Ga. 195; s. c., 81 Am. Dec. 202; *Mercein v. People*, 25 Wend. (N. Y.) 64; s. c., 35 Am. Dec. 653, note 668; *Dumain v. Gwynne*, 10 Allen (Mass.) 271; *People v. Kling*, 6 Barb. (N. Y.) 369; *State v. Libbey*, 44 N. H. 321; s. c., 82 Am. Dec. 223; *State v. Smith*, 6 Greenlf. (Me.) 462; s. c., 20 Am. Dec. 324, note 330, 337; *People v. Erbert*, 17 Abb. Pr. (N. Y.) 395; In Matter of *Gregg*, 5 N. Y. Leg. Obs. 265, and cases cited in note 2, subdivision (g), *infra*, p. 246.

Some of the earlier cases conformed more strictly to the common law rule regarding the superior legal rights of the father. See *Rust v. Van Vacter*, 9 W. Va. 600; *State v. Baird*, 18 N. J. Eq. 194; *People v. —*, 19 Wend. (N. Y.) 16; *People v. Humphreys*, 24 Barb. (N. Y.) 521; *People v. Olmstead*, 27 Barb. (N. Y.) 9; *State v. Paine*, 4 Humph. (Tenn.) 523; *People v. Cooper*, 8 How. Pr. (N. Y.) 288; *Ex parte Hewitt*, 11 Rich. (S. Car.) 326; *Ex parte Williams*, 11 Rich. (S. Car.) 452. Where a child has been committed to a public institution as prescribed by statute, the court will not, on habeas corpus, by the parents, inquire into the legality, regularity, or sufficiency of the proceedings resulting in such commitment. *People v. N. Y. Juv. Asylum*, 12 Abb. Pr. (N. Y.) 92.

2. *Sturtevant v. State*, 15 Neb. 549; see *Jones v. Darnall*, 103 Ind. 569;

State v. Kirkpatrick, 54 Iowa 373; *Cole v. Cole*, 23 Iowa 433.

3. *Ex parte Murphy*, 75 Ala. 409; *Mercein v. People*, 25 Wend. (N. Y.) 63; s. c., 35 Am. Dec. 653; *Clark v. Bayer*, 32 Ohio St. 209; *State v. Stigall*, 2 Zab. (N. J.) L. 286; *Hunt v. Hunt*, 4 G. Greene (Iowa) 216; *State v. Bratton*, 15 Am. L. Reg. N. S. 359; *Com. v. Smith*, 1 Brewst. (Pa.) 547; *State v. Kirkpatrick*, 54 Iowa 373; *Com. v. Addicks*, 2 Serg. & R. (Pa.) 174; s. c., 5 Binn. (Pa.) 520; *McShan v. McShan*, 56 Miss. 413; In Matter of *Pray*, 60 How. Pr. (N. Y.) 194; *State v. Smith*, 6 Greenlf. (Me.) 400; s. c., 20 Am. Dec. 324; *Wand v. Wand*, 14 Cal. 512; *People v. Mercein*, 8 Paige (N. Y.) 417; *Reeves v. Reeves*, 75 Ind. 342; In *re Holmes*, 19 How. Pr. (N. Y.) 329; *Moore v. Christian*, 56 Miss. 408; *People v. Chegaray*, 18 Wend. (N. Y.) 637; *Armstrong v. Stone*, 9 Gratt. (Va.) 102. But where a wife is not blameless before separating from her husband, as where she has been guilty of adultery, and the children have arrived at an age where they no longer need those attentions which a mother alone can bestow, and their morals are likely to be injured by her bad example, the court will not, on habeas corpus, allow her to take the children. *Com. v. Addicks*, 2 Serg. & R. (Pa.) 174; s. c., 5 Binn. (Pa.) 520; *People v. Olmstead*, 27 Barb. (N. Y.) 10; *People v. —*, 19 Wend. (N. Y.) 16. So where she is intemperate, but she may renew her application after reformation. *Com. v. Smith*, 1 Brewst. (Pa.) 547. An inquiry as to the father's ill treatment of his wife is pertinent as bearing upon the father's right to take the children from their mother. In Matter of *Pray*, 60 How. Pr. (N. Y.) 194. In contentions between the father and grandparents of a motherless child, the court will place

abuse of the child is shown, the courts will not assist him to recover it on habeas corpus,¹ especially if the best welfare and interests of the child require that it should remain where placed by the parent.² Where the duties of maintenance and education have been properly performed by a third person to whom the father has surrendered his infant child, the authority of the father ceases, and passes to the person standing in *loco parentis*;³ and he cannot reassert that right on habeas corpus against such person, or against the wishes of the child;⁴ and this though he is not bound by the contract.⁵ Where the parental control over an infant child is released to another by voluntary contract, such contract is not revocable without sufficient legal reasons shown therefor, such as bad treatment, etc.⁶

(g) *Practice as to Disposition of Child*.—On habeas corpus the court is bound to set the infant free from improper restraint; but it is not bound to deliver it to any particular person. This must be left to the court's discretion according to the particular circum-

stances as best demanded by its future welfare and interests. *Jones v. Darnall*, 103 Ind. 569; *Sturtevant v. State*, 15 Neb. 459.

1. *Dumain v. Gwynne*, 10 Allen Mass. 270; *Byrne v. Love*, 14 Tex. 81; *State v. Barrett*, 45 N. H. 15; *State v. Reuff*, 29 W. Va. 751; *Bonnett v. Bonnett*, 61 Iowa 199; *contra*, *People v. Mercein*, 3 Hill (N. Y.) 399; s. c., 38 Am. Dec. 644; *Mercein v. People*, 25 Wend. (N. Y.) 63; s. c., 35 Am. Dec. 653; *State v. Libbey*, 44 N. H. 321; *State v. Barrett*, 45 N. H. 15; *Mayne v. Baldwin*, 1 Halst. Ch. (N. J.) 454; s. c., 45 Am. Dec. 399.

But the father cannot divest himself of custody by an agreement with the mother. *Johnson v. Terry*, 34 Conn. 259; *Hunt v. Hunt*, 4 G. Greene (Iowa) 216; *Cook v. Cook*, 1 Barb. Ch. (N. Y.) 630; *contra*, *State v. Smith*, 6 Greenlf. (Me.) 462; s. c., 20 Am. Dec. 324. Nor can he, by any contract, deprive the mother of the custody of their child, after the father's death. *State v. Reuff*, 29 W. Va. 751.

Where the father is dead and the mother has signed a contract putting her child in another's custody for an indefinite time, she may, at any time, free it from restraint, and regain custody thereof on habeas corpus, if she be a suitable person. *Wishard v. Medaris*, 34 Ind. 168. A parent may relinquish or forfeit his right of custody to his child by desertion or abandonment, bad conduct, or being in a condition of total inability to afford his minor children necessary care and

support. *State v. Bratton*, 15 Am. L. Reg. N. S. 359; *Clark v. Bayer*, 32 Ohio St. 299; *In Matter of O'Neal*, 3 Am. L. Rev. 578; *Young v. State*, 15 Ind. 480; *compare* *Shaw v. Nachtwey*, 43 Iowa 653, and where the right has thus been lost or forfeited through the parent's fault or misfortune, the parent cannot necessarily revive his right by reformation, or otherwise reinstating himself in a position to properly care for and maintain his child. On habeas corpus, a court will, in such a case, exercise a sound discretion in view of all the circumstances, with reference to the welfare of the child itself. *In Matter of O'Neal*, 3 Am. L. Rev. 578; *State v. Bratton*, 15 Am. L. Reg. N. S. 359; *compare*, *Shaw v. Nachtwey*, 43 Iowa 653.

2. *Bonnett v. Bonnett*, 61 Iowa 199; *State v. Libbey*, 44 N. H. 321; *State v. Smith*, 6 Greenlf. (Me.) 462; s. c., 20 Am. Dec. 324.

3. *Ellis v. Jesup*, 11 Bush (Ky.) 403.

4. *Com. v. Gilkeson*, 1 Phila. (Pa.) 194; s. c., 7 Leg. Int. 195.

5. *Id.*

6. *Janes v. Cleghorn*, 54 Ga. 9; *Bentley v. Terry*, 59 Ga. 555. Indentures of apprenticeship are voidable only by the apprentice, and not by any other person. *Fowler v. Hollenbeck*, 9 Barb. (N. Y.) 309. If the transfer of custody occurs just prior to the issuance of a habeas corpus, the return is bad unless it discloses a reason for the change, for the object may have been to avoid the process of the court. *Sears v. Dessar*, 28 Ind. 472.

stances in each case.¹ And this discretion is to be exercised by looking both to the present and future welfare and interests of the child.² In awarding the custody of a child on habeas corpus the court will respect its feelings, its attachments, its preferences, and its probable contentment. In other words, where the child has reached the age of discretion, it will often be allowed to make its own choice. But this is not a controlling legal right of the infant; and whether the court will regard its preference or not, depends upon the reasonableness of its wishes, and the intelligence which it manifests.³ Mental capacity, and not age, is the criterion

1. In *Matter of Waldron*, 13 Johns. (N. Y.) 418; *Com. v. Addicks*, 5 Binn. (Pa.) 520; s. c., 2 Serg. & R. (Pa.) 174; *In re Stephens*, Dudley (Ga.) 42; *State v. Paine*, 4 Humph. (Tenn.) 523; *Com. v. Nutt*, 1 Browne (Pa.) 143; extended note to *State v. Smith*, 6 Greenl. (Me.) 462; s. c., 20 Am. Dec. 334; *Boyd v. Glass*, 34 Ga. 253; s. c., 89 Am. Dec. 252.

2. *Brinster v. Compton*, 68 Ala. 299; *In re Mitchell*, R. M. Charl. (Ga.) 489; *Garner v. Gordon*, 41 Ind. 92; *Bullen's Petition*, 28 Kan. 781; *State v. Stigall*, 2 Zab. (N. J.) L. 286; *State v. Paine*, 4 Humph. (Tenn.) 523; *In re Bort*, 25 Kan. 308; s. c., 20 Am. L. Reg. N. S. 493; *Com. v. Addicks*, 5 Binn. (Pa.) 520; s. c., 2 Serg. & R. (Pa.) 174; *U. S. v. Green*, 3 Mason (U. S.) 482; *Cole v. Cole*, 23 Iowa 433; *Matter of Heather Children*, 50 Mich. 261; *Drumb v. Keen*, 47 Iowa 435; *State v. King*, 1 & 2 Ga. Dec. 93; *Clark v. Bayer*, 32 Ohio St. 299; *Nickols v. Giles*, 2 Root (Conn.) 461; *Wand v. Wand*, 14 Cal. 512; *Ellis v. Jesup*, 11 Bush (Ky.) 403; *McShan v. McShan*, 56 Miss. 413; *People v. Wilcox*, 22 Barb. (N. Y.) 178; *Ex parte Schumpert*, 6 Rich. (S. Car.) 344; *Ex parte Williams*, 11 Rich. (S. Car.) 452; *Rowe v. Rowe*, 28 Mich. 353; *State v. Baird*, 18 N. J. Eq. 194; *In re Cuneen*, 17 How. Pr. (N. Y.) 516; *Com. v. Barney*, 4 Brewst. (Pa.) 408; *Shaw v. Nachtwey*, 43 Iowa 653; *In re Poole*, 2 McArthur (D. C.) 583; s. c., 29 Am. Rep. 628; *In re Waldron*, 13 Johns. (N. Y.) 418; *State v. Kirkpatrick*, 54 Iowa 373; *Bustamento v. Analla*, 1 N. M. 255; *In re Hansen*, 1 Edm. Sel. Cas. (N. Y.) 9; *House of Refuge v. Ryan*, 37 Ohio St. 197; *Kline v. Kline*, 57 Iowa 386; *James v. Cleghorn*, 63 Ga. 335; *In Matter of Pray*, 60 How. Pr. (N. Y.) 194, and cases cited in note 2, subdivision (d), *supra*. This welfare depends upon many and ever varying circumstances. *Bennet v. Bennet*, 2 Beas.

(N. J.) Eq. 114. But the character of the respective parents, the age, health, sex, and number of the children, and the pecuniary resources liable to contribution for their maintenance and education, are all considerations to exert more or less influence of the judicial result. *State v. Baird*, 21 N. J. Eq. 384. The court should be careful to elicit the exact truth, after full inquiry and an exhaustive examination, and not allow the fate or interest of the child to depend upon the mere allegations of the parties in their formal altercations or pleadings. *Corrie v. Corrie*, 42 Mich. 509.

3. Note to *State v. Smith*, 6 Greenl. (Me.) 462; 20 Am. Dec. 336; *State v. Bratton*, 15 Am. L. Reg. N. S. 359; *In re Poole*, 2 McArthur (D. C.) 583; s. c., 29 Am. Rep. 628; *Bennet v. Bennet*, 2 Beas. (N. J.) Eq. 114; *Ex parte Schumpert*, 6 Rich. (S. Car.) 344; *Shaw v. Nachtwey*, 43 Iowa 653; *State v. Baird*, 18 N. J. Eq. 194; *Moore v. Christian*, 56 Miss. 408; *Com. v. Hammond*, 10 Pick. (Mass.) 274; *People v. Wilcox*, 22 Barb. (N. Y.) 178; *In Matter of Wollstonecraft*, 4 John. Ch. (N. Y.) 80; *Armstrong v. Stone*, 9 Gratt. (Va.) 102; *State v. Stigall*, 2 Zab. (N. J.) L. 286; *People v. Mercein*, 8 Paige (N. Y.) 47; *Ex parte Ralston*, R. M. Charl. (Ga.) 119; *State v. Scott*, 30 N. H. 274; *Ellis v. Jesup*, 11 Bush (Ky.) 403; *Com. v. Hamilton*, 6 Mass. 273; *In Matter of Hansen*, 1 Edm. Sel. Cas. (N. Y.) 9; *People v. Porter*, 1 Duer. (N. Y.) 700; *Gishwiler v. Dodez*, 4 Ohio St. 615; *State v. Banks*, 25 Ind. 495; *Bustamento v. Analla*, 1 N. M. 255; *State v. Richardson*, 40 N. H. 272; *People v. Weissenbach*, 60 N. Y. 385; *In re Goodenough*, 19 Wis. 274. Where the infant is old enough to choose, the court will often advise and instruct him as to the choice he should make; but if he is under that age, or is, from men-

for determining whether an infant has sufficient judgment and discretion to choose for itself.¹

(h) *Equitable Jurisdiction*.—Courts of law and courts of equity, in the exercise of their respective jurisdictions under the writ of habeas corpus, possess exactly the same power and discretion.² But chancery, of course, has a wide jurisdiction respecting the care and custody of infants which is not open to the courts of law.

tal incapacity, incapable of choosing, it will substitute its discretion for his choice. *Ex parte* Schumpert, 6 Rich. (S. Car.) 344. So if the court sees any ill purpose in the proceedings, it will not only discharge the infant from illegal restraint, but will protect the child in returning. In *Matter of Kottman*, 2 Hill (S. Car.) 363; s. c., 27 Am. Dec. 390; *Brinster v. Compton*, 68 Ala. 299; In *Matter of McDowle*, 8 Johns. (N. Y.) 328; *Com. v. Smith*, 1 Brewst. (Pa.) 547; *Com. v. Briggs*, 16 Pick. (Mass.) 203; *Ex parte* Williams, 11 Rich. (S. Car.) 452; as the court will never allow a child to depart from the court in injurious custody. *State v. Bratton*, 15 Am. L. Reg. N. S. 359; *Brinster v. Compton*, 68 Ala. 299; In *Matter of McDowle*, 8 Johns. (N. Y.) 328; *In re* Mitchell, R. M. Charlit. (Ga.) 489; *Ex parte* Williams, 11 Rich. (S. Car.) 452; *Boyd v. Glass*, 34 Ga. 253; *Com. v. Smith*, 1 Brewst. (Pa.) 547.

1. If the infant shows sufficient intelligence and capacity to declare an election when under illegal restraint, and there is no objection to the person chosen, the court will permit it to follow its own inclinations; otherwise the court will direct its choice or make the award on its own discretion. Note to *State v. Smith*, 6 Greenl. (Me.) 642; s. c., 20 Am. Dec. 337; *State v. Bratton*, 15 Am. L. Reg. N. S. 359; *In re* Poole, 2 McArthur (D. C.) 583; s. c., 29 Am. Rep. 628; *Armstrong v. Stone*, 9 Gratt. (Va.) 102; *Ex parte* Schumpert, 6 Rich. (S. Car.) 344; *Ellis v. Jesup*, 11 Bush (Ky.) 403; *State v. Scott*, 30 N. H. 274; *State v. Banks*, 25 Ind. 495; *Rust v. Van Vacter*, 9 W. Va. 600; *Com. v. Taylor*, 3 Met. (Mass.) 72; *State v. Richardson*, 40 N. H. 272; In *Matter of Kottman*, 2 Hill (N. Y.) 363; s. c., 27 Am. Dec. 390. In Wisconsin, an infant over fourteen will, in every case, be permitted to choose for himself. *In re* Goodenough, 19 Wis. 274. In the case of an infant of tender years, it can only be discharged from the

restraint of one person by giving it to another. *People v. Porter*, 1 Duer. (N. Y.) 709; In *Matter of Kottman*, 2 Hill (N. Y.) 363; s. c., 27 Am. Dec. 390. A minor, even of the age of choice, must obey his parents, and in discharging him on habeas corpus, some courts have thought it best to express what would be implied by a simple order of discharge, and declare the one entitled to custody to take it. *Ex parte* Williams, 11 Rich. (S. Car.) 452; *Moore v. Christian*, 56 Miss. 408.

2. *People v. Wilcox*, 22 Barb. (N. Y.) 178; *Mercein v. People*, 25 Wend. (N. Y.) 64; s. c., 35 Am. Dec. 653; *Verser v. Ford*, 37 Ark. 27; *State v. Libbey*, 44 N. H. 321; s. c., 82 Am. Dec. 223; *Bennet v. Bennet*, 2 Beas. (N. J.) 114; *State v. Baird*, 21 N. J. Eq. 384; *People v. Mercein*, 8 Paige (N. Y.) 46; *People v. Porter*, 1 Duer. (N. Y.) 709; *State v. King*, 1 Ga. Dec. 93; *People v. Olmstead*, 27 Barb. (N. Y.) 9; In *Matter of Wollstonecraft*, 4 Johns. Ch. (N. Y.) 80. *Compare* *Kline v. Kline*, 57 Iowa 386.

Divorce and Other Matters.—A decree of divorce may bind the parties *inter sese*, but it does not conclude the court as to the best interests of the minor children. In *Matter of Bort*, 25 Kan. 308; s. c., 20 Am. L. Reg. N. S. 493. So, though a decree has been made and the custody of the minor children has been awarded to either the father or mother, it is the duty of the court on habeas corpus to make such order for their care and custody as the best interests and welfare of the children may require. They may be taken from either parent and committed to the custody of a third person. The jurisdiction of the court in such matters is a sort of continuing jurisdiction, and on proper application may be invoked to modify orders originally made in respect to the custody of children whenever the nature of the case requires it. In *Matter of Bort*, 25 Kan. 308; s. c., 20 Am. L. Reg. N. S. 493; *Compare* *Shaw v. McHenry*, 52 Iowa

XVI. CUSTODY OF ILLEGITIMATE CHILDREN.—1. Respective Rights of Parents.—The putative father of an illegitimate child has no right to its custody as against the mother. The mother, as against every one else, has the right to its custody, where she is a proper person and not unworthy of the trust.¹ But the father is entitled to the custody of his illegitimate child over every other person except the mother.²

2. Practice in Awarding on Habeas Corpus.—The court will simply deliver the child from undue or illegal restraint, when such is imposed upon it.³ If the child be of the age of discretion, it will be allowed to choose for itself.⁴ If under that age the court will deliver it to the proper custodian, the mother, when she is a proper and suitable person;⁵ if not, the child will be delivered to another person.⁶

182. Where a court has awarded the custody of children, in a decree for divorce, another court will not interfere on habeas corpus while such decree remains in force. *Hoffman v. Hoffman*, 15 Ohio St. 427; *In re Poole*, 2 McArthur (D. C.) 583; s. c., 29 Am. Rep. 628. And on habeas corpus by a parent to recover the custody of his infant child, when his legal right to such custody has before been declared by a decree in an action for divorce, a copy of the decree need not be filed with the petition. *Sears v. Dessar*, 28 Ind. 472. When children are in the custody of their father, and are brought by him into court in obedience to a writ of habeas corpus sued out by the mother, he thereby surrenders them to the custody of the court as *parens patriae*, pending the litigation. *Matter of Viele*, 44 How. Pr. (N. Y.) 14.

1. *King v. Soper*, 5 T. R. 278; *King v. Nagapen*, 2 Notes of Cases at Madras 253; *Ex parte Knee*, 1 Bos. & Pul. 148; *Strangeways v. Robinson*, 4 Taunt. 497; *Bustamento v. Analla*, 1 N. M. 255; *People v. Cooper*, 8 How. Pr. (N. Y.) 288; *People v. Mitchell*, 44 Barb. (N. Y.) 245; *Alfred v. McKay*, 36 Ga. 440; *Robalina v. Armstrong*, 15 Barb. (N. Y.) 247; *People v. Landt*, 2 Johns. (N. Y.) 374; *In Matter of Doyle*, 1 Clarke Ch. (N. Y.) 154; *People v. Kling*, 6 Barb. (N. Y.) 360; *Dalton v. State*, 6 Blackf. (Ind.) 357.

2. *People v. Cooper*, 8 How. Pr. (N. Y.) 288; *In Matter of Doyle*, 1 Clarke Ch. (N. Y.) 154. In Texas, after an illegitimate child is seven years old, the father has an equal claim with the mother to its guardianship. *Byrne v. Love*, 14 Tex. 81.

3. *In re Lloyd*, 3 Man. & Gr. 547.

4. *King v. Soper*, 5 T. R. 278; *In re Lloyd*, 3 Man. & Gr. 547; *Rex v. Moseley*, 5 East. 223; *King v. Hopkins*, 7 East. 578.

5. *King v. Nagapen*, 2 Notes of Cases at Madras 253; *Ex parte Knee*, 1 Bos. & Pul. 148.

6. *People v. Landt*, 2 Johns. (N. Y.) 375.

Illustrations.—As to an illegitimate infant's liberty of choice, maturity of judgment, welfare, etc., the same rules apply as to those born in lawful wedlock. The mother is bound to support her illegitimate child, except as otherwise provided by statute; see cases cited in *Simmons v. Bull*, 21 Ala. 501; s. c., 56 Am. Dec. 259. If the putative father wrongfully and fraudulently obtains possession of his illegitimate child, and retains such possession until obliged to relinquish it on habeas corpus, an action of false imprisonment will lie in the name of the child. *Robalina v. Armstrong*, 15 Barb. (N. Y.) 247. An officer authorized to bind out minors whose parents are unable to support them, etc., cannot apprentice an illegitimate child without the consent of the mother, unless it be shown that she is unable to support her child, or some other legal reason be shown. *Alfred v. McKay*, 36 Ga. 440; see *Copeland v. State*, 60 Ind. 394. Nor can another guardian be appointed for such child by a probate court without notice to the mother of the application for such appointment. *Dalton v. State*, 6 Blackf. (Ind.) 357; see *Bustamento v. Analla*, 1 N. M. 255. The mother may give her illegitimate child away to keep, etc., without forfeiting her right to reclaim its custody at her pleasure, during its infancy, and

XVII. EXTRADITION. (See EXTRADITION, vol. 7.)—1. **Foreign Extradition.**—(a) *Illegal Extradition.*—Extradition to the United States is illegal if not made for one of the causes stipulated in the treaty.¹ So, an arrest procured by fraud or trick is illegal.² But the fact that the prisoner has been forcibly brought within the jurisdiction of the courts has been *held*, on habeas corpus, to be no ground for discharging him in a criminal matter, and for which he was not extradited.³

(b) *Extradition for One Crime; Trial for Another.*—One extradited to the United States can be tried only for the offence for which he was extradited until he has had an opportunity to return to the country from which he was taken.⁴

(c) *Demand, Arrest and Habeas Corpus.*—Extradition proceedings from the United States are usually commenced by the president's mandate; but this is not absolutely necessary for the commencement of such proceedings before judicial tribunals, and any foreign government entitled by treaty to the extradition of a fugitive from justice, may apply to the courts in the first instance for his arrest.⁵ A judicial ascertainment of the facts, however, and their being certified to the secretary of state, do not exclude the president's discretion, and he may refuse to deliver the party accused, even after his discharge has been refused by the courts on habeas corpus.⁶ On the other hand, the executive warrant of extradition is not absolute and final; but the prisoner may still avail himself of habeas corpus so long as he remains within the jurisdiction of the United States. The federal courts will look behind the warrant of extradition to see whether it issued in a proper case, and upon an examination by a competent magistrate.⁷

though the mother has married after the gift; see case last cited; *Fullilove v. Banks*, 62 Miss. 11; but the court will consider the circumstances of the case in awarding the custody of such child to the mother on habeas corpus. *Fullilove v. Banks*, 62 Miss. 11. If she has given it to a guardian, the latter may after the mother's death, be awarded the custody of such child on habeas corpus. *Johns v. Emmert*, 62 Ind. 533.

1. *Adriance v. Lagrave*, 59 N. Y. 110; 6 Opin. Atty. Gen. 85; *In Matter of Lagrave*, 45 How. Pr. (N. Y.) 301; s. c., 14 Abb. Pr. N. S. (N. Y.) 333.

2. *Matter of Lagrave*, 45 How. Pr. (N. Y.) 301; s. c., 14 Abb. Pr. N. S. (N. Y.) 333; but see *infra*, 2. INTERSTATE EXTRADITION, subdivision (b), and note.

3. *Ker v. People*, 110. Ill. 629; s. c., 32 Alb. L. Jour. 126; but see *infra*, 2. INTERSTATE EXTRADITION, subdivision (b), note for qualification of the rule.

4. *Com. v. Hawes*, 13 Bush (Ky.)

697; s. c., 26 Am. Rep. 242; 17 Alb. L. J. 325; *Bacharach v. Lagrave*, 1 Hun. (N. Y.) 689; *U. S. v. Watts*, 8 Sawy. (U. S.) 370; but see *infra*, 2. INTERSTATE EXTRADITION, subdivision (b), note.

5. *In re Kaine*, 14 How. (N. Y.) 103; s. c., 10 N. Y. Leg. Obs. 257; *In re Thomas*, 12 Blatchf. (U. S.) 370; *In re Kelley*, 9 Am. L. Rev. 167; *Ex parte Ross*, 2 Bond (U. S.) 252; *In re Calder*, 6 Opin. Atty. Gen. 91. *Contra*, *Ex parte Kaine*, 3 Blatchf. (U. S.) 1; *In re Henrich*, 5 Blatchf. (U. S.) 414; *In re Farez*, 7 Blatchf. (U. S.) 34; *In re McDonnell*, 11 Blatchf. (U. S.) 79.

6. *In re Stupp*, 12 Blatchf. (U. S.) 501; s. c., 11 Blatchf. (U. S.) 124; 14 Opin. Atty. Gen. 281.

7. *In re Kaine*, 3 Blatchf. (U. S.) 1; *Matter of Metzger*, 1 Barb. (N. Y.) 248; *British Prisoners*, 1 Woodb. & M. (U. S.) 66; *Ex parte Smith*, 3 McLean (U. S.) 121; *Milburn's Case*, 9 Pet. (U. S.) 704; *In re McDonnell*, 11 Blatchf. (U. S.) 170.

The district and circuit courts of the United States have jurisdiction to issue writs of habeas corpus in extradition cases,¹ but the supreme court does not have such jurisdiction.²

(d) *Reviewing Decisions of United States Commissioners.*—In extradition matters, the courts will, on habeas corpus, inquire whether a United States commissioner has acquired jurisdiction by conforming to the treaty and statutes; whether he has exceeded such jurisdiction, and whether he has *any* legal or competent evidence of facts before him on which to exercise a judgment as to the criminality of the accused. And if there was any such evidence before him, its sufficiency, or the commissioner's decision of a question of fact founded on such evidence, or an error committed by him in receiving illegal or incompetent evidence, or his coming to a wrong conclusion, will not be reviewed on habeas corpus. The case will not be retried. The commissioner's decision is, however, subject to the final action of the executive.³

(e) *Extradition Papers* must be sufficient, conformable to law, and properly authenticated.⁴

1. *Ex parte* Van Aernam, 3 Blatchf. (U. S.) 160; *Ex parte* Van Hoven, 4 Dill. (U. S.) 411; s. c., 4 Dill. (U. S.) 415; *In re* McDonnell, 11 Blatchf. (U. S.) 79; s. c., 11 Blatchf. (U. S.) 170; *In re* Farez, 7 Blatchf. (U. S.) 34; s. c., 7 Blatchf. (U. S.) 345; *Ex parte* Kaine, 3 Blatchf. (U. S.) 1; *In re* Henrich, 5 Blatchf. (U. S.) 414.

2. *Matter of* Metzger, 5 How. (U. S.) 176; *Ex parte* Kaine, 14 How. (U. S.) 103.

3. *In re* Fowler, (N. Y.) 4 Fed. Rep. 317; *In re* Stupp, 12 Blatchf. (U. S.) 501; *In re* Vandervelpen, 14 Blatchf. (U. S.) 137; *In re* Wiegand, 14 Blatchf. (U. S.) 370; *In re* Wahl, 15 Blatchf. (U. S.) 334; *Matter of* Metzger, 5 How. (U. S.) 176; *Matter of* Veremaitre, 9 N. Y. Leg. Obs. 137; *Matter of* Kaine, 10 N. Y. Leg. Obs. 257; *Matter of* Heilbronn, 12 N. Y. Leg. Obs. 65; *Ex parte* Van Aernam, 3 Blatchf. (U. S.) 160; *In re* Farez, 7 Blatchf. (U. S.) 34; *In re* McDonnell, 11 Blatchf. (U. S.) 170; s. c., 2 Crim. L. Rep. (Green) 166; *In re* McDonnell, 11 Blatchf. (U. S.) 79; s. c., 2 Crim. L. Rep. (Green) 151; *Ex parte* Geissler (Ill.) 4 Fed. Rep. 188; *In re* Doig, (Cal.) 4 Fed. Rep. 103; *Ex parte* Van Hoven, 4 Dill. (U. S.) 415; see, also, *Queen v. Maurer*, 10 L. R. Q. B. Div. 513; s. c., 4 Am. Crim. Rep. 588, that on habeas corpus, in extradition proceedings, the court has no power to review the decision of the magistrate on the ground that it is against the weight of evidence. So where a United States commissioner

has adjourned a hearing on extradition no relief can be obtained on habeas corpus, on the ground that it is unreasonably long, unless it appears that the commissioner has abused his discretion. *In re* Ludwig, 32 Fed. Rep. 774. While in custody under a writ of habeas corpus, the prisoner cannot be arrested on a second warrant. *In re* Farez, 7 Blatchf. (U. S.) 345; but he may be arrested on a new complaint after his discharge. *Ex parte* Van Hoven, 4 Dill. 415.

4. *Extradition Papers.*—(a) *Sufficiency of Complaint.*—In foreign extradition the complaint upon which the warrant of arrest is asked should set forth clearly, but briefly, the substance of the offence charged, and the substantial, material features thereof. *Ex parte* Smith, 3 McLean (U. S.) 121; *Farez' Case*, 2 Abb. (U. S.) 346; and the complaint will be sufficient where it clearly appears that a treaty offence is meant to be charged. *In re* Roth, (N. Y.) 15 Fed. Rep. 506; *Farez' Case*, 2 Abb. (U. S.) 346; but it is fatally defective if it does not show on its face or if it does not elsewhere appear in the proceedings that the person making it was an agent or representative of the foreign government. *In re* Ferrelle, 28 Fed. Rep. 878; *In re* Herris, (Minn.) 33 Fed. Rep. 165, reversing *In re* Herris, (Minn.) 32 Fed. Rep. 583, holding that such fact must appear on the face of the complaint. Extradition is a right of foreign governments only; not of individuals. *In re* Ferrelle, 28

Fed. Rep. 878. An alleged fugitive may be arrested a second time on a new complaint, either with or without a new warrant of the president. *Ex parte Van Hoven*, 4 Dill. (U. S.) 415; 6 Opin. Atty. Gen. 91; and it may be founded, if on oath, upon the strength of telegrams and depositions. *Ex parte Van Hoven*, 4 Dill. (U. S.) 415. A complaint, however, made simply upon information and belief is fatally defective; gives the commissioner no jurisdiction; and entitles the prisoner to discharge on habeas corpus. *Ex parte Lane*, (Mich.) 6 Fed. Rep. 34. The warrant need not show that the commissioner was appointed to issue the particular warrant. An averment of his authority to issue such warrants generally is sufficient. *Farez' Case*, 2 Abb. (U. S.) 346. But the complaint and warrant should show upon their face that the commissioner issuing the warrant is duly empowered to act in cases of that description. *Ex parte Lane*, (Mich.) 6 Fed. Rep. 34; and if the person making the complaint has no personal knowledge of the facts, it should appear that he is a representative of the foreign government, acting in an official capacity. *Id. In re Ferrelle*, (N. Y.) 28 Fed. Rep. 878; *In re Herris*, (Minn.) 33 Fed. Rep. 165. Or, he should produce an indictment against the party charged, or depositions tending to show his guilt; or at least, set forth with particularity the sources and details of his information, in order that the arrest may appear to be sought upon something more than a mere rumor or suspicion of the fugitive's guilt. *Ex parte Lane*, (Mich.) 6 Fed. Rep. 34. The commissioner has no power to amend the complaint or warrant, or supply defects by his certificate, after the case is closed and a writ of *certiorari* is served upon him to produce the record of his proceedings. *Ex parte Lane*, (Mich.) 6 Fed. Rep. 34.

(b) *Authentication of Documents.*—The act of June 19, 1876 (19 U. S. St. at Large, 597), amending section 5271 of the U. S. Revised Statutes, provides for two classes of documentary evidence in extradition cases. 1. Original depositions, original warrants and original "other papers." 2. Copies of any such depositions, warrants or other papers. The originals must be documents that may be received in the tribunals of the foreign country as evidence of the criminality of the accused person, in

respect to the offence charged against him there, and as if the inquiry concerning the criminality of his offence were being had in such foreign tribunals. And such originals must be authenticated in a legal manner, such as would entitle them to be received as such evidence in the foreign tribunals. The copies must also be authenticated according to the law of such foreign country. Parol proof is admissible to show what the foreign law is as to such authentication and that such authentication is according to the laws of the foreign country. This is admissible in addition to the certificate of the United States diplomatic or consular officers. *In re Fowler*, (N. Y.) 4 Fed. Rep. 303. So, the authentication of documents in extradition proceedings, which would be received "in similar proceedings" in the demanding country, when aided by oral proof of handwriting and by proof showing the purpose for which they are issued, is sufficient under section 5 of the act of August 3, 1882; see *In re Wadge*, (N. Y.) 15 Fed. Rep. 83.

(c) *Sufficiency of Warrant and Other Matters.*—The warrant of arrest should show on its face the facts requisite to the jurisdiction of the officer issuing it. *In re Kelley*, (N. Y.) 25 Fed. Rep. 268; that such jurisdiction has been regularly and formally invoked for the arrest of the alleged fugitive; the special authority, upon which the proceeding is based, to wit: the treaty, the act of congress and the appointment of the officer to execute the law; the demand of the foreign government, the mandate of our own, and the offence charged. But it is not necessary that the particulars required to be proved, in order to establish the offence mentioned in the treaty should be specified in the warrant; nor is it any part of the province of the warrant to disclose the details, in order that the prisoner may be notified of those details. *In re McDonnell*, 11 Blatchf. (U. S.) 88. In extradition proceedings the prisoner has a right to examine witnesses in his own behalf. *In re Kelley*, (Minn.) 25 Fed. Rep. 268. A person cannot be held, for an offence committed in another State or territory, for extradition, unless he is arrested upon a charge properly made in the jurisdiction to which he is accountable. The charge cannot be laid and enforced elsewhere. *Smith v. State*, (Neb.) 23 Rep. 695.

(f) *Jurisdiction*.—The federal and state courts have concurrent jurisdiction in extradition proceedings.¹

2. *Interstate Extradition*.—(a) *Jurisdiction*.—In questions of interstate extradition, the state and federal courts have concurrent jurisdiction.² But the judgment of the state courts do not conclude the federal courts on this federal question.³

(b) *Illegal Extradition*.—*Extradition Crime*.—The later and better opinion is that a person cannot lawfully be tried for any other offence than the one for which he has been extradited, until he has had an opportunity to return to the State or country from which he was taken for the purpose alone of trial for the offence specified in the demand for his surrender.⁴

(c) "*Fugitive from Justice*" is one who, having within a State committed that which by its laws constitutes a crime, leaves its jurisdiction when it is sought to subject him to its criminal process to answer for his offence, and is found in the jurisdiction of an-

1. *Ex parte Coy*, (Tex.) 32 Fed. Rep. 911; *Ex parte Brown*, 28 Fed. Rep. 653; *In re Roberts*, (Ga.) 24 Fed. Rep. 132; *Robb v. Connolly*, 111 U.S. 624.

2. *Ex parte Brown*, (N. Y.) 28 Fed. Rep. 653; *In re Roberts*, (Ga.) 24 Fed. Rep. 132; *In re Robb*, 64 Cal. 431; *Robb v. Connolly*, 111 U. S. 624, reversing same case, *sub. nom.*; *In re Robb*, 64 Cal. 431; *People v. Fiske*, 45 How. Pr. (N. Y.) 294; *Compare In re Doo Woon*, (Oreg.) 18 Fed. Rep. 898; *Ex parte Smith*, 3 McLean (U. S.) 121. *In Matter of Leary*, 10 Ben. (U. S.) 197; s. c., 6 Abb. N. C. (N. Y.) 43; 1 Crim. L. Mag. 265; *Ex parte McKean*, 3 Hughes (U. S.) 23; *U. S. v. McClay*, (Neb.) 4 Cent. L. J. 255; *In re Jackson*, 12 Am. L. Rev. 602; *In Matter of Titus*, 8 Ben. (U. S.) 411.

3. *In re Roberts*, (Ga.) 24 Fed. Rep. 132.

4. *U. S. v. Rauscher*, 119 U. S. 407; *Ex parte Coy*, (Tex.) 32 Fed. Rep. 911; *People v. Gray*, 66 Cal. 271; *Ex parte Hibbs*, (Oreg.) 26 Fed. Rep. 421; *U. S. v. Watts*, 8 Sawy. (U. S.) 370; *Cannon's Case*, 47 Mich. 481; *Ker v. People*, 110 Ill. 629; s. c., 32 Alb. L. J. 126; *Com. v. Hawes*, 13 Bush (Ky.) 697; s. c., 26 Am. Rep. 242; *Blandford v. State*, 10 Tex. App. 627; *State v. Vanderpool*, 39 Ohio St. 273; s. c., 48 Am. Rep. 431; *Ham v. State*, 4 Tex. App. 645. *Compare Hackney v. Welsh*, 107 Ind. 253. In fact, it has been held that he cannot waive his privilege of such exemption. *Ex parte Coy*, (Tex.) 32 Fed. Rep. 911. And no distinction in this respect is to be made between international and inter-

state extradition; see *In re Cannon*, 47 Mich. 481, and cases above cited; also extended note to *In re Miller*, 6 Crim. L. Mag. 514-519. But, in some of the cases, the following distinction is made, viz: that a fugitive from justice charged with crime will not be released on habeas corpus, because he was induced by stratagem, falsehood, artifice and fraud to come within territory where he could properly be arrested, provided the stratagem, etc., used, was not itself an infraction of law. *Matter of Brown*, (N. Y.), decision by the governor, 8 Crim. L. Mag. 313; s. c., on habeas corpus, *Id.* 676; 28 Fed. Rep. 653; and in *Ker v. People*, 110 Ill. 629, it is held that the general doctrine above laid down has no application where the fugitive has been brought back forcibly, and not under the terms of the treaty, or under an extradition warrant. *Compare Browning v. Abrams*, 51 How. Pr. 172. On the other hand, however, some courts have held that a man who has been extradited for a particular crime and not tried for that crime, or if tried and acquitted, may be immediately rearrested for an entirely different offence, without being allowed a chance to return to the State or country from which he was extradited. *State v. Stewart*, 60 Wis. 587; s. c., 50 Am. Rep. 388; *Harland v. Territory*, (Wash. Ty.) 13 Pac. Rep. 453; *U. S. v. Caldwell*, 8 Blatchf. (U. S.) 131; *U. S. v. Lawrence*, 13 Blatchf. (U. S.) 295; *Adrianse v. Lagrave*, 59 N. Y. 110; s. c., 17 Am. Rep. 317; *In re Miller*, (Pa.) 6 Crim. L. Mag. 511, and extended note thereto, 514-519; *Compton v. Wilder*, 40 Ohio

other State. It is not necessary that he should have left after indictment found, or for the purpose of avoiding a prosecution anticipated or begun.¹ But one who goes into a State and commits a crime and returns home, is as much a fugitive from justice as though he had committed a crime in the State in which he resided, and then fled to some other State.²

(d) *Judicial Review of Executive Decisions*.—The courts have power, on habeas corpus, to review the decisions of the executive authority in extradition proceedings, but they will not overrule such decisions unless they are clearly satisfied that an error has been committed.³

(e) *Inquiry into Legality of Arrest*.—A fugitive from justice who is in custody under the direction of the executive for delivery is entitled to invoke the judgment of judicial tribunals, whether state or national, by the writ of habeas corpus, to test the validity of his arrest and imprisonment.⁴ An arrest of an offender who may be extradited will be supported, though no warrant for his arrest has been issued by a local magistrate.⁵

St. 130; *Browning v. Abrams*, 51 How. Pr. (N. Y.) 172; *In Matter of Miles*, 52 Vt. 217.

1. *Ex parte Brown*, 28 Fed. Rep. 653; s. c., 8 Crim. L. Mag. 676; *Roberts v. Reilly*, 116 U. S. 80; s. c., 7 Crim. L. Mag. 289; *Ex parte White*, 49 Cal. 433; s. c., 1 Am. Crim. Rep. 169.

2. *In re Roberts*, (Ga.) 24 Fed. Rep. 132. One who but constructively commits a crime in a State, but has never been corporeally within its bounds, is not a "fugitive from justice" from that State. *Ex parte Mohr*, 73 Ala. 503; s. c., 5 Crim. L. Mag. 539; 49 Am. Rep. 63. So, where he in fact has never fled from the State in which he has constructively committed a crime. *Jones v. Leonard*, 50 Iowa 106.

3. *Ex parte Brown*, (N. Y.) 28 Fed. Rep. 653; s. c., 8 Crim. L. Mag. 676. *In Matter of Leary*, 10 Ben. (U. S.) 197. After an alleged fugitive from justice has been arrested on an extradition warrant, he will not be discharged on the ground that there was no evidence before the executive issuing the warrant, showing that the fugitive had fled from the demanding State to avoid prosecution. *Ex parte Sheldon*, 34 Ohio St. 319. See *People v. Byrnes*, 33 Hun. (N. Y.) 98.

4. *Roberts v. Reilly*, 116 U. S. 80; s. c., 7 Crim. L. Mag. 289; 6 Sup. Ct. Rep. 291; 24 Fed. Rep. 132; *Ex parte Morgan*, (Ark.) 20 Fed. Rep. 298; *In re Wadge*, (N. Y.) 15 Fed. Rep. 864; *In re Fowler*, 18 Blatchf. (U. S.) 430; *Ex parte Mohr*, 73 Ala. 503; s. c., 5

Crim. L. Mag. 539; 49 Am. Rep. 63; *Ex parte Morgan*, 5 Crim. L. Mag. 698; *Ex parte Lane*, (Mich.) 6 Fed. Rep. 34. It is held in *People v. Warden*, etc., (N. Y.) 22 Week. Dig. Jan. 22d, p. 543, cited in 7 Crim. L. Mag. 383, that the only questions to be determined upon a writ of habeas corpus issued in behalf of a prisoner arrested upon a warrant of the executive for extradition to another State, where such warrant is sufficient upon its face, are whether the relator is the person against whom the warrant has been issued, and whether he is a fugitive from the justice of the State demanding his return. See, also, *Kurtz v. State*, 22 Fla. 36; 1 Am. St. Rep. 173; *Ex parte Powell*, 20 Fla. 806, holding that, on habeas corpus, in extradition cases, the only subjects of inquiry are the sufficiency of the papers and the identity of the prisoner. As to identity, see extended note to *Ex parte Ackerman*, 9 Crim. L. Mag. 644, 645. While the certificate of the governor as to the finding of the indictment cannot be disputed on habeas corpus, the prisoner may disprove the statement that he is a fugitive from justice by evidence that he was never in the State wherefrom the requisition has come, although such evidence also tends to prove that the indictment was unfounded. *Ex parte Mohr*, 73 Ala. 503; s. c., 5 Crim. L. Mag. 539; 49 Am. Rep. 63.

5. *Regina v. Weil*, 47 L. T. Rep. 631, 633; s. c., 15 Rep. 412; see *In re Peoples*, 47 Mich. 626.

(f) "*Guilt or Innocence*"; *No Inquiry Into*.—The courts have not definitely settled what matters connected with the arrest and surrender of fugitives from justice may be inquired into by the courts on habeas corpus; but it is settled that the guilt or innocence of the prisoner will not be investigated, though there must be a proper charge of crime.¹

(g) *Extradition Papers* must be sufficient, conformable to law, and properly authenticated.²

1. *Ex parte* Mohr, 73 Ala. 503; s. c., 5 Crim. L. Mag. 539; 49 Am. Rep. 63; s. c., 18 Cent. L. J. 252; *In re* Roberts, (Ga.) 24 Fed. Rep. 132; Matter of Voorhees, 32 N. J. L. 141, 150; *Ex parte* Swearingen, 13 S. Car. 74, 78; Matter of Clark, 9 Wend. (N. Y.) 212; State v. Schlemm, 4 Harr. (Del.) 577, 578; People v. Brady, 56 N. Y. 182, 187; Fullis v. Fleming, 69 Ind. 15; *In re* Greenough, 31 Vt. 279, 288; note 3 West. C. Rep. 317; note to Matter of Fetter, 57 Am. Dec. 395; s. c., 3 Zab. (N. J.) 311.

2. *Extradition Papers*.—1. *Papers requisite for the issuing of Warrants and their Authentication*.—The general practice as to extradition papers is well stated in Knowlton's Case, (Col.) 5 Crim. L. Mag. 250. It has been held on habeas corpus that an authenticated copy of an indictment found, or affidavit made, charging the person demanded with the commission of a crime must be produced, before a governor is authorized to issue his warrant for the apprehension of the fugitive. Knowlton's Case, (Col.) 5 Crim. L. Mag. 250; Matter of Rutter, 7 Abb. Pr. N. S. (N. Y.) 67; *Ex parte* Pfitzer, 28 Ind. 450; but an authenticated copy of an information filed is a sufficient compliance with the act of congress. *In re* Hooper, 52 Wis. 699. A requisition is not sufficient. Matter of Rutter, 7 Abb. Pr. N. S. (N. Y.) 67; *contra*, Hibler v. State, 43 Tex. 197. It is not necessary that a warrant should have been issued for the arrest of the fugitive in the State from which he has fled; it is the indictment or affidavit, and not the issuing of a warrant, that constitutes the charge against a fugitive upon which his return can be required. Tullis v. Fleming, 69 Ind. 15. The indictment or affidavit must be certified as authentic by the governor or chief magistrate of the State or territory from whence the person charged has fled. Knowlton's Case, (Col.) 5 Crim. L. Mag. 250; therefore, an affi-

davit certified as authentic by a secretary of state is insufficient. Solomon's Case, 1 Abb. Pr. N. S. (N. Y.) 347. The certificate of authentication is not required to be in any particular form; and where the language of the demanding governor in the requisition shows the copy of the indictment annexed thereto, to be authentic, it is sufficient. *Ex parte* Sheldon, 34 Ohio St. 319. In Matter of Manchester, 5 Cal. 237; and see Hibler v. State, 43 Tex. 197. The governor is not required to certify that an information and other papers accompanying a requisition are genuine; it is sufficient if he certifies that they are duly authenticated; and an authentication by affidavit and by the signature of the prosecuting attorney is sufficient. Hackney v. Welsh, 107 Ind. 253; s. c., 57 Am. Rep. 101.

2. *Sufficiency of Affidavits*.—An affidavit accompanying the demand must charge that a crime has been committed by the accused in the State or territory from which he has fled. *Ex parte* Smith, 3 McLean (U. S.) 121, 132; People v. Brady, 56 N. Y. 182; Matter of Fetter, 3 Zab. (N. J.) L. 311; s. c., 57 Am. Dec. 382. It must be so explicit, absolute and certain that if it were laid before a magistrate it would justify him in committing the accused to answer the charge. *Ex parte* Morgan (Ark.) 20 Fed. Rep. 298. It is not sufficient if founded on hearsay, belief or information. *Id.*; *Ex parte* Smith, 3 McLean (U. S.) 121, 132. Matter of Leland, 7 Abb. Pr. N. S. (N. Y.) 64. Matter of Rutter, 7 Abb. Pr. N. S. (N. Y.) 67. The governor of the demanding State is the only proper judge of the authenticity of the affidavit. Matter of Manchester, 5 Cal. 237; Kurtz v. State, 22 Fla. 36; s. c., 1 Am. St. Rep. 173; and a court on habeas corpus cannot inquire into the question as to whether the affidavit is a forgery. Matter of Manchester, 5 Cal. 237. A certificate that the affidavit "is duly authenticated according to the laws of

said State" is sufficient. *Kurtz v. State*, 22 Fla. 36; s. c., 1 Am. St. Rep. 173. *Matter of Manchester*, 5 Cal. 207. The alleged fugitive cannot, on habeas corpus, impeach the validity of the affidavit upon which the requisition is based, if it distinctly charge the commission of an offence. *Kurtz v. State*, 22 Fla. 36. If the affidavit does not appear to have been made before the proper officer in the demanding State, the warrant of arrest should not be issued. *Ex parte Powell*, 20 Fla. 806. As to above propositions, generally, as to affidavit, see *Ex parte Morgan*, (Ark.) 5 Crim. L. Mag. 698.

3. *Sufficiency of Indictments*.—An arrested fugitive will not be discharged on habeas corpus for technical defects in a duly authenticated indictment which charges a crime. The sufficiency of the charge, as a matter of technical pleading, is to be tried and determined in the State in which the indictment is found. *Davis's Case*, 122 Mass. 324; s. c., 12 Am. L. Rev. 753; 5 Cent. L. J. 273; *In re Voorhees*, 32 N. J. L. 141; *In re Greenough*, 31 Vt. 279; *In re Clark*, 9 Wend. (N. Y.) 212. *Matter of Manchester*, 5 Cal. 237. *Matter of Briscoe*, 51 How. Pr. (N. Y.) 422; *People v. Brady*, 56 N. Y. 182; *Brown's Case*, 112 Mass. 409; *State v. Schlemm*, 4 Harr. (Del.) 577. *Matter of Leland*, 7 Abb. Pr. N. S. (N. Y.) 64. *Ex parte Sheldon*, 34 Ohio St. 319. Thus, the absence of a seal to the certificate of the clerk of the court in which the indictment purported to be found, or of a file mark on the indictment, will not be noticed on habeas corpus, where the copy of the indictment is certified by the governor as authentic. *Hibler v. State*, 43 Tex. 197. And it is incompetent upon habeas corpus to show that the indictment upon which the requisition was issued was procured improperly or upon insufficient evidence. *U. S. v. McClay* (Neb.) 4 Cent. L. J. 255; *Matter of Donahue*, 1 Pac. C. L. Mag. 22; see *Hibler v. State*, 43 Tex. 197.

4. *Sufficiency of Executive Warrants*.—The law specifies the evidence upon which the arrest of an alleged fugitive criminal, for the purposes of extradition, is lawful, and makes the governor of the State or territory to whom the requisition is addressed the judge of its existence, authenticity and weight. *Matter of Manchester*, 5 Cal. 237. If it is conformable to law, and the governor, in his discretion, acts

upon it, his act should not be questioned by the courts, except in some rare and exceptional cases. *Wilcox v. Nolze*, 34 Ohio St. 520. The prisoner, however, may, on habeas corpus, ask the court to determine whether the evidence is such as the law prescribes. The requirements of the law must be exactly fulfilled; there must be a proper demand for the surrender of the fugitive; there must be a copy of a legal indictment or affidavit accompanying the demand and charging the fugitive with crime in the demanding State or territory; the copy must have been duly authenticated by the demanding executive and the executive to whom the demand was addressed must have issued his warrant for the arrest of the accused party. *State v. Richardson*, 34 Minn. 115. *Matter of Hayward*, 1 Sandf. (N. Y.) 701. *Ex parte McKean*, 3 Hughes (U. S.) 23. *Spear on Extra.*, 304. When these facts appear upon the return to a habeas corpus, a court will rarely attempt to afford relief upon that writ unless it is properly called for by some extrinsic or extraneous matter. The warrant of the governor is *prima facie* evidence, at least, that all necessary legal prerequisites have been complied with; and if the previous proceedings appear to be regular, such warrant is, as a general rule, conclusive evidence of the right to remove the prisoner to the State from which he fled. *Ex parte Sheldon*, 34 Ohio St. 319. *Ex parte Watson*, 2 Cal. 59; *Davis's Case*, 122 Mass. 324; s. c., 12 Am. L. Rev. 753; 5 Cent. L. J. 273; *Leary's Case*, 6 Abb. N. C. (N. Y.) 43; s. c., 10 Ben. (U. S.) 197; 1 Crim. L. Mag. 265. *Matter of Clark*, 9 Wend. (N. Y.) 212; *Taylor v. Taintor*, 16 Wall. (U. S.) 366; *State v. Schlemm*, 4 Harr. (Del.) 577; *Hibler v. State*, 43 Tex. 197; *Ex parte Manchester*, 5 Cal. 237; *Com. v. Hall*, 9 Gray (Mass.) 262; *Kingsbury's Case*, 106 Mass. 223; *Brown's Case*, 112 Mass. 409; *People v. Pinkerton*, 17 Hun. (N. Y.) 199; s. c., 77 N. Y. 245. *Contra*, *People v. Brady*, 56 N. Y. 182; *Jones v. Leonard*, 50 Iowa 106. But the courts will inquire into the question of identity of the prisoner, and whether a crime is charged, and whether he is a fugitive from justice.

(a) *Identity*.—Thus, the question of the party arrested with the party described as the alleged fugitive, in the mandate of the governor, is, of course, always open to inquiry on habeas cor-

(h) *Miscellaneous Questions of Practice.*—In extradition proceedings the court should decide upon the facts stated in the return to a writ of habeas corpus, and not upon those subse-

pus. *Leary's Case*, 10 Ben. (U. S.) 197; s. c., 6 Abb. N. C. (N. Y.) 43; 1 Crim. L. Mag. 265; *People v. Byrnes*, 33 Hun. (N. Y.) 98. But it has been said that this question can be tried only in the demanding State. *Robinson v. Flanders*, 29 Ind. 10.

(b) *Charge of Crime.*—It is established by authority and practice that a copy of the indictment or affidavit need not accompany the warrant. *Nichols v. Cornelius*, 7 Ind. 611; *Robinson v. Flanders*, 7 Ind. 10; *Matter of Leary*, 10 Ben. (U. S.) 197, 212; s. c., 6 Abb. N. C. (N. Y.) 643; 1 Crim. L. Mag. 265; *Robinson v. Flanders*, 29 Ind. 10. Under these circumstances the warrant itself can only be looked to for the evidence that the essential conditions of its issue have been complied with, and it is sufficient if it recites what the law requires, viz., that the requisition upon which it was issued was accompanied by a duly authenticated copy of an indictment or affidavit. See cases last cited. *People v. Donohue*, 84 N. Y. 438; *Ex parte Thornton*, 9 Tex. 635; *In re Doo Woon*, (Oreg.) 18 Fed. Rep. 898. When these requisites have been complied with, the warrant has been considered conclusive evidence that the person named therein stands charged with crime in the other State. See *Matter of Leary*, 10 Ben. (U. S.) 197; s. c., 6 Abb. N. C. (N. Y.) 43; *State v. Schlemm*, 4 Harr. (Del.) 577. Other cases, however, recognize the right to examine into the warrant to see if a crime has been properly charged. *People v. Donohue*, 84 N. Y. 438; *People v. Pinkerton*, 77 N. Y. 245; affirming 17 Hun. (N. Y.) 199, and to discharge the relator on habeas corpus if that has not been done. *In re Tully* (N. Y.) 20 Fed. Rep. 812; *Ex parte Ackerman*, 9 Crim. Law Mag. 642. Whether the fugitive is substantially charged with the commission of a crime against the laws of another State, is a question of law. *Roberts v. Reilly*, 116 U. S. 80; s. c., 7 Crim. L. Mag. 289.

(c) *"Fugitive from Justice."*—The governor's finding that one is a "fugitive from justice" in another State is not conclusive of that fact. *Ex parte Mohr*, 73 Ala. 503; s. c., 5 Crim. L. Mag. 539; 49 Am. Rep. 63; but he

should not be discharged on habeas corpus because in the judgment of the court, the proof showing that he is a fugitive from justice is not quite so full as may be required. *Ex parte Reggel*, 114 U. S. 642. This question is one of fact and the decision of the governor of the State in which the fugitive is found is sufficient to justify the removal—at least until overcome by contrary proof. *Roberts v. Reilly*, 116 U. S. 80; s. c., 7 Crim. L. Mag. 289; *In re Jackson*, 2 Flipp. (U. S.) 183; s. c., 12 Am. L. Rev. 602; *Matter of Romaine*, 23 Cal. 585, warrants were held to be insufficient because they did not state either satisfactorily or at all that the accused was a fugitive from justice.

(d) *Other Matters.*—It is not necessary that copies of the indictment, affidavit or other records, be annexed to the warrant. It is sufficient that they be produced if the warrant be called in question, or that the jurisdictional facts are recited on the face of the warrant. *State v. Richardson*, 34 Minn. 115; *People v. Donohue*, 84 N. Y. 442; *In re Romaine*, 23 Cal. 592. But a warrant annexed to the return to a writ of habeas corpus, reciting that the fugitive stands charged by "complaint" with the crime therein set forth, is insufficient as a justification for his arrest and surrender, unless a copy of the complaint is also produced, showing that it has all the essentials of the required affidavit. *State v. Richardson*, 34 Minn. 115. The term "complaint" is not equivalent to "affidavit" in extradition cases. *Id.* A warrant for the arrest and return of a fugitive must recite or set forth the evidence necessary to authorize the State executive to issue his warrant of arrest; and unless it does so it is illegal and void. *In re Doo Woon*, (Oreg.) 18 Fed. 898. The warrant for extradition is upon its face unauthorized by law; it is also void. *Ex parte Powell*, 20 Fla. 806. The warrant for extradition should specify the offence alleged to have been committed by the accused. *Ex parte Cubreth*, 49 Cal. 435. But a general description has been held sufficient. *Brown's Case*, 112 Mass. 409; s. c., 17 Am. Rep. 114; see, also, *Ex parte Butler*, 18 Alb. L. J. 369; *Matter of Ro-*

HABEAS CORPUS—HABENDUM—HABITABLE.

quently occurring.¹ In extradition a mere irregularity in commitment proceedings is insufficient to authorize a prisoner's discharge on habeas corpus.² An arrest by a sheriff and release on bail does not prevent an arrest by the agent of the demanding State under his warrant for extradition.³ Where, from the return to a writ of habeas corpus on behalf of a prisoner held under requisition proceedings, it appears that the proceedings are regular, the prisoner will be remanded.⁴ The superior courts of *California* have power to issue writs of habeas corpus commanding the production of the body of a prisoner held under authority of a warrant for his arrest issued by the governor of that State, upon the requisition of a governor of another State, that the causes of his detention may be inquired into; and the refusal of the custodian to obey the writ is a contempt of court.⁵

HABENDUM.—See DEED.

HABERE FACIAS POSSESSIONEM.—See EXECUTION.

HABERE FACIAS SEISINAM.—See EXECUTION.

HABIT.—See USAGES AND CUSTOMS.

HABITABLE.—See note 6.

maine, 23 Cal. 585, as to the necessity of charging the offence in the warrant.

1. Knowlton's Case, (Col.) 5 Crim. L. Mag. 257.

2. State v. Stewart, 60 Wis. 587.

3. Com. v. Hall, 9 Gray (Mass.) 262; s. c., 69 Am. Dec. 285.

4. *Ex parte* Bailey, 3 Pac. Rep. 107.

5. *In re* Robb, 64 Cal. 431; affirmed in Robb v. Connolly, 111 U. S. 624; and overruling *In re* Robb, (Cal.) 19 Fed. Rep. 26. Such custodian is not an officer of the United States. Robb v. Connolly, 111 U. S. 624. The general subject of extradition is well discussed in Spear on Extradition. Extended note to Matter of Fetter, 57 Am. Dec. 389-400; s. c., 3 Zab. (N. J.) 317; Articles in 3 West. C. Rep. pp. 265-274, 317-324.

Authorities.—Church on Habeas Corpus; Hurd on Habeas Corpus; note on when and under what circumstances a party may be restored to liberty by virtue of the writ of habeas corpus; Lowery v. Howard, 5 Am. Crim. Rep. 277-292; article on collateral remedies in cases of criminal contempt, 5 Crim. L. Mag. 661-669; article on habeas corpus in controversies touching the custody of children, 7 Crim. L. Mag. 1-38; note on custody of legitimate children on habeas corpus; State v. Smith, 20 Am. Dec. 330-337; note on to what extent can court go behind judgment or process on habeas corpus; Com. v.

Lecky, 26 Am. Dec. 40-49; note on authority of state court on habeas corpus, State v. Dimick, 37 Am. Dec. 200; note on when court may refuse writ of habeas corpus, Williamson's Case, 67 Am. Dec. 395-398; article on void sentences, 4 Crim. L. Mag. 797-845; Practice as to habeas corpus in extradition cases, 2 Whart. International L. Dig., § 279, and notes to Matter of Fetter, 57 Am. Dec. 389-400; Work v. Corrington, 32 Am. Rep. 355-359; Com. v. Hawes, 2 Am. Crim. Rep. 212-213; articles on interstate extradition, 3 West. C. Rep. 265-274; 3 *Id.* 317-324; 2 *Id.* 599-610; note on questions triable upon habeas corpus, People v. McLeod, 37 Am. Dec. 363-366; notes on attacking judgments by habeas corpus, 9 Crim. L. Mag. 23-24; 1 Am. Crim. Rep. 557-559; and notes on fourteenth amendment cases, 6 Crim. L. Mag. 407-408; Martin v. Blattner, 6 Am. Crim. Rep. 156-163.

6. **Habitable Repair**.—A lessee covenanted "to put the premises into habitable repair within a reasonable time and to deliver up the same together with the fixtures," at the expiration of his term, "in such state of habitable repair (reasonable wear and tear thereof, in the meantime, only excepted)." Said Alderson, B., in summing up to the jury in an action brought by the lessor for the breach of the agreement: "What then is the

HABITANCY—HABITUAL DRUNKENNESS.

HABITANCY.—See DOMICILE.

HABITATION.—See note 1.

HABITS OF INTEMPERANCE.—(Within the meaning of a life insurance policy.) If the habits of the insured in the usual, ordinary and every-day routine of his life are temperate, his representations that he is and always has been a man of temperate habits in answer to a question contained in a life insurance policy, are not untrue, although he may have had an attack of *delirium tremens* from an exceptional over-indulgence.²

HABITUAL DRUNKENNESS.—As a Crime.—As used in the statutes making drunkenness an offence against the State, the expression "common drunkard" signifies "habitual drunkard."³ There is said to be no fixed rule defining such drunkard. Occasional acts of drunkenness are not enough;⁴ nor, on the other hand, need the party be always, or even daily drunk.⁵ One to be

reasonable construction of the term 'putting into habitable repair'? It was difficult to suggest any material difference between the term 'habitable repair' used in this agreement, and the more common expression 'tenantable repair'; they must both import such a state, as to repair, that the premises might be used and dwelt in not only with safety, but with reasonable comfort, by the class of persons by whom, and for the sort of purposes for which they were to be occupied." *Belcher v. M'Intosh*, 2 Moo. & Rob. 186.

1. A statute of *Virginia* provides as follows: "No nuncupative will shall be established unless it be made in the time of the last sickness of the deceased, at his or her habitation, or where he or she hath resided for ten days next preceding, except where the deceased is taken sick from home, and dies before he or she returns to such habitation; or where," etc. It was held that "habitation" as used in the act, means "dwelling-house." *Nowlin v. Scott*, 10 Gratt. (Va.) 64. See, also, 2 Blk. Com. 4, and 4 Blk. Com. 220, where the word is used in the same sense.

2. *Ins. Co. v. Foley*, 105 U. S. 350. Said the court: "The question was as to the habits of the insured. This occasional use of intoxicating liquors did not render him a man of intemperate habits, nor would an occasional case of excess justify the application of this character to him. An attack of *delirium tremens* may sometimes follow a single excessive indulgence. . . . When we speak of the habits of a person we refer to his customary

conduct, to pursue which he has acquired a tendency from frequent repetition of the same act. . . . The court did not, therefore err in instructing the jury that, if the habits of the insured, 'in the usual, ordinary, and every-day routine of his life were temperate,' the representations made are not untrue, within the meaning of the policy, although he may have had an attack of *delirium tremens* from an exceptional over-indulgence. It could not have been contemplated, from the language used in the policy, that it should become void for an occasional excess by the insured, but only when such excess had by frequent repetitions become a habit." S. C. 33 Rep. 769; 7 Sup. Ct. Rep. 1221. See, also, *Nor. West. L. Ins. Co. v. Muskegon Bank*, 122 U. S. 501; *May on Insurance*, § 299.

3. *Com. v. Whitney*, 5 Gray (Mass.) 85; *Com. v. McNamee*, 112 Mass. 285. See, also, DRUNKARD; DRUNKENNESS.

4. *Bishop St. Cr.*, § 970, citing *Ludwick v. Com.*, 18 Pa. St. 172.

5. Proof that one has been drunk from five to seven times upon as many different days within a period of between three and four months, with no other evidence of his condition at other times, will justify a jury in convicting him as a "common drunkard." *Com. v. McNamee*, 112 Mass. 285. For the remarks of the court in this case, see DRUNKARD, note 3. The public statutes of *Rhode Island*, 1882, define "common drunkard" as follows: "Every person who shall have been convicted three times within a period of six months, of intoxication, under such circumstances as to amount to a

a common drunkard need not disturb the public by his drunkenness.¹

Under Statutes Authorizing Appointment of Committee for Habitual Drunkard.—Occasional acts of drunkenness do not make one an habitual drunkard; nor is it necessary he should be continually in an intoxicated state.² In proceedings under these statutes, if the jury finds the traverser to be an habitual drunkard, it is unnecessary for it to find that he is incapable of managing his estate; such incapacity is a conclusion of law.³

Under Statutes Forbidding the Sale or Giving of Liquor to Habitual Drunkards.—In a case arising under a statute of this nature, one witness testified that H, the man to whom the liquor was furnished, "used liquor to excess at some particular times," and that he had seen him "the worse for liquor some number of times;" another witness testified that H "was a dissipated man." It was held that this evidence had a tendency to show that H was an habitual drunkard, and that its sufficiency in amount was wholly a question for the jury.⁴

violation of decency, or who shall be proved to have been thus intoxicated three several times within a period of six weeks, shall be deemed a common drunkard." Title XXX, ch. 245, § 24; see, also, *State v. Kelly*, 12 R. I. 535.

1. *Com. v. Conley*, 1 Allen (Mass.) 6.

2. *Ludwick v. Com.*, 18 Pa. St. 172. Said the court in this case: "To constitute an habitual drunkard, it is not necessary that a man should be always drunk. It is impossible to lay down any fixed rule as to when a man shall be deemed an habitual drunkard. It must depend upon the decision of the jury, under the direction of the court. It may, however, be safely said, that to bring a man within the meaning of the act it is not necessary that he should always be drunk. Occasional acts of drunkenness do not make one an habitual drunkard. Nor is it necessary he should be continually in an intoxicated state. A man may be an habitual drunkard, and yet be sober for days and weeks together. The only rule is, has he a fixed habit of drunkenness? Was he habituated to intemperance whenever the opportunity offered? We agree that a man who is intoxicated or drunk one-half his time is an habitual drunkard, and should be pronounced such."

3. *Ludwick v. Com.*, 18 Pa. St. 172. Said the court: "His incapacity in that event is a conclusion of law. It is not necessary to say it is a *presumptio juris et de jure*, but, at least, it throws the burden of proof of capacity on the

traversers. Indeed, it may be well doubted whether his management or mismanagement of his estate is a matter of inquiry. It is very certain, under the act of the 13th June, 1836, proceedings may be instituted against an habitual drunkard who has no estate. But this cannot be, if mismanagement of it be necessary. It is well said, if there must be evidence of squandering property to support a proceeding to declare an individual an habitual drunkard, the object of the act in many cases would be defeated. For it is precautionary in its design, and hence a disposition of mind or body which might lead to the wasting of an estate, is sufficient to justify the enforcement of its provisions. Still *v. McNight*, 7 W. & S. (Pa.) 245. It is indeed impossible that a man can be an habitual drunkard without waste or mismanagement, as the very act of drunkenness is itself waste. In this case, even if required, the evidence was full and plenary to this point." See, also, *In re Tracy*, 1 Paige (N. Y.) 580.

4. *State v. Pratt*, 34 Vt. 223. Said the court: "The fair definition of *habitual drunkard*, as used in the statute, we suppose to be, 'one who is in the habit of getting drunk, or one who commonly or frequently is drunk,' and we do not suppose it necessary, to satisfy those terms, that a man should be constantly or universally drunk. The common term or phrase, *uses liquor to excess*, when applied to a person is ordinarily understood to mean the same as saying

As a Cause of Divorce.—See DIVORCE, 5 Am. & Eng. Ency. of Law 806.

HACKNEY COACH.—A coach let for hire.¹ (See also CARRIAGE.)

HAIR.—See note 2.

HALF.—See note 3.

that he gets intoxicated or drunk; and saying that such a person did so at particular times would generally be understood as meaning that these times occur about as often as he found an opportunity to do so. So the common understanding of the statement that a man is a dissipated man, is, that he uses intoxicating drinks frequently and excessively; in plainer terms, that he is often intoxicated."

1. Webster's Dict.

"Hackney coaches standing in the streets have existed so universally in England, and for so long a period (certainly since 1700, and perhaps further back), that the term hackney coach conveys the idea to the mind of a coach standing in the street for hire. Thus, an eminent lexicographer (Webster), defines a hackney coach to be 'a coach let for hire, commonly at stands in the streets.' [Edition of 1847.] When, therefore, the legislature uses the term hackney coach, it must be deemed to use it in such sense as to cover coaches for hire standing in the streets, as well as those kept in stables for hire." *Masterson v. Short*, 33 How. Pr. (N. Y.) 486.

2. **Bristles**, in the tariff acts are separately classified, and are regarded as a different article from hair; and they are not, therefore, included in the general words, "the hair of an animal." *Von Stade v. Arthur*, 13 Blatch. (U. S.) 251.

Manufactures of Hair.—"Goats' hair goods," composed of eighty per cent. of goats' hair and twenty per cent. of cotton, used chiefly for women's dresses, and "crinoline," composed of hair and cotton, and used chiefly for ladies' underwear, imported into the United States between Jan. 24, 1874, and June 25, 1874, were subject to the duty imposed by the act of July 14, 1870, 16 Stat. 264, ch. 255, § 21, upon "manufactures of hair not otherwise herein provided for," as modified by the act of June 6, 1872, 17 Stat. 231, and not to the duty imposed by the act of March 2, 1867, 14 Stat. 561, ch. 197, § 2, upon "women's and children's dress goods

and real or imitation Italian cloths, composed wholly or in part of wool, worsted, the hair of the alpaca goat, or other like animals," it being found by the jury that they were not known in commerce as "women's and children's dress goods." In the absence of a settled designation of a cloth by merchants and importers, its designation as hair, silk, cotton, or woollen for the purposes of customs revenue depends upon the predominance of such article in its composition, and not upon the absence of any other material. *Arthur v. Butterfield*, 125 U. S. 70.

3. **Half of a Piece of Ground.**—A description of the premises in a deed as being "half of a lot" *prima facie* means half in quantity. *Dart v. Barbours*, 32 Mich. 267.

But where the owner of a triangular lot conveyed a part of it by a deed describing it as the north half of said lot, to be divided by a line in the middle of the front thereof on a certain street, and back eastwardly parallel with the north line of the lot, it was held that the particular description would prevail over the general description, "north half," and that his subsequent conveyance of the remainder of the lot as the "south half" would not take the areal half, but only the residue not included in the particular description in the first deed, and that subsequent conveyances of the two parts of said lot as the "north half" and the "south half" would be construed with reference to the conventional meaning given by the particular description to the words, "north half" in the first named deed. *Grandy v. Casey*, 93 Mo. 595.

In an action to correct and foreclose a mortgage it appeared that the premises were described in the mortgage as the "west half" of a city lot; that the lot was rectangular, four rods in front and eight in depth, with both ends bounded by streets and both sides by other lots, that a due north and south line, dividing it into two equal parts, would be almost a diagonal; that at the date of the mortgage the mortgagor and another defendant, being

HALF BLOOD.—A term denoting the degree of relationship which exists between those who have one parent only in common.¹ (See also BLOOD; STATUTES OF DISTRIBUTION.)

HAM.—See note 2.

HAND.—See note 3.

owners in common, had agreed to divide the lot so as to give each a half, two rods in front by eight in depth, and each was in possession of his half and had fenced it and made valuable improvements (the half held by the mortgagor being south and west of the division line); and that before the commencement of the action the agreement to divide had been carried into effect by deeds of partition. It was *held*, that the words "west half" must be understood as describing the half owned by the mortgagor, and that it was not necessary to correct the description before foreclosing. Said the court: "The words 'west' and 'west half,' as applied to lots and parcels of land, have, both in ordinary conversation and in deeds, sometimes a very precise and exact meaning, and sometimes they are used very loosely and indefinitely." *Schmitz v. Schmitz*, 19 Wis. 207.

A conveyance of a "half" of a quarter section in Wisconsin would ordinarily be presumed to refer to a half section whose corners were defined by the government surveys. But it may be shown by extrinsic evidence that the parties intended by such description one-half of the area of the quarter section. *Prentiss v. Brewer*, 17 Wis. 635.

Half a Month.—When parties contract for the performance of an act during the first half of any month containing thirty-one days, they contract that it shall be performed by noon of the sixteenth day. *Grosvenor v. Magill*, 37 Ill. 239.

Half a Year.—In legal computation, a period of one hundred and eighty-two days; the odd hours in the half of the calendar being rejected. *Co. Litt.* 135 b; *Bishop of Peterborough v. Catesby*, Cro. Jac. 167; s. c., *Yelv.* 100; 2 *Shars. Blk. Com.* 140, *Chitty's note*. See, also, *N. Y. Rev. Stats.* part 1, ch. 19, § 3.

1. *Bouv. Law Dic.*

2. In an indictment for larceny "one ham of the value," etc., etc., is a sufficient description. In this case it was objected by counsel for the prisoner that the prisoner could not be convicted of felony, inasmuch as it did not suffi-

ciently appear by the indictment that the article stolen was the subject of larceny; it being urged by said counsel that for anything that appeared on the face of the indictment it might have been the ham of an animal *ferae naturae* which had been stolen. *Reg. v. Gallears*, Temp. & M. 196. Webster's definition of ham is as follows: "The inner or hind part of the knee; the inner angle of the joint which unites the thigh and the leg of an animal. The thigh of any animal, as a man's ham, a beef, mutton or venison ham; especially, the thigh of a hog cured by salting and smoking."

3. **Logs on Hand.**—The defendant leased to the plaintiff a saw-mill for the term of three years, subject to the contingency of a sale of the property. In regard to the sale, the parties agreed as follows: "It is hereby agreed that the party of the first part [the defendant] . . . may, upon the sale of the property, terminate this lease by notice thereof to the party of the second part [the plaintiff]; but the party of the second part shall have two months' notice to 'saw out' of water; and then, if any logs remain over, he shall either have the privilege to continue the possession (at option of the party of the first part) at the same rate rent till logs on hand are sawed, or shall be allowed the extra cost of teaming said logs to another mill, and the extra expense incurred of sawing said logs at another mill," etc. The defendant sold the premises and gave the required notice. In an action brought by the lessee to recover the extra expense incurred by reason of having his logs sawed at another mill, the evidence showed that the yard of the leased mill could not contain logs more than enough to supply the mill for one or two weeks, and that before receiving notice of the sale the plaintiff had purchased, in the usual course of business, a large number of logs that were in the course of transportation, or got out ready therefor, but which had not been sent to the mill for want of storage room. It was *held* that the words "logs on hand," as used in the lease, included not only the logs in the mill yard, but also all those purchased in in the usual

course of business. *Crouch v. Parker*, 56 N. Y. 597.

Stock on Hand.—A sold to B a quantity of goods by a contract containing the following clause: "Sold to B the entire manufactured stock, in good condition, consisting of pipes, fittings, fines, etc., now on hand at factory and store-rooms." Upon receiving the inventory B objected that a part of the stock in the factory and store-rooms at the time of the sale was not included. This A admitted; but he claimed that the goods had been sold to other parties prior to the sale to B, although not delivered at that time, and that they were not meant to be included in the sale to B. In an action brought by A to recover the contract price, the court, against the defendant's objection, left it to the jury to determine what the parties meant by the use of the term "stock now on hand"; *i. e.*, whether it meant all of the goods which were in the factory and store-rooms at the time of the sale, or only such as the plaintiff still owned. This was *held* to have been an error, on the ground that there was no ambiguity in the term, and that, therefore, it should have been construed by the court. It properly included the entire stock in the factory and store-rooms at the time of the sale. *Brady v. Cassidy*, 9 East. Rep. (N. Y.) 420.

Money on Hand.—A legacy of "all the money on hand or in bank at the time of my decease" will pass money in the hands of an agent, and such sum is not liable to reduction by reason of the agent's claim for commissions for past services. Said the court: "The agent might claim to deduct his commissions before paying the money over, but until the deduction was allowed by his principal no part of the sum became his. His commissions were due to him as a debt, for service rendered, and the retention of the amount would be the easiest mode of obtaining payment; but it was his option to deduct it or not. . . . There is no rule of law which *requires* the agent to deduct his commissions out of the sum collected, and it would be strange if, at his option, he could vary the amount of the legacy given by the will of his principal." *Copia's Est.*, 5 Phila. 214.

Notes of Hand.—A will, by which the testator divided his property among his five children, contained the following provision in regard to advancements: "And it is my will, as I have made some advances of money and other

property" to my children, "as will appear by notes of hand and my book accounts, I hold, of long or short standing," that such advances shall "be considered as so much of their portions individually." It was *held* that the description of the advances to be deducted from the portions did not include a debt due from one of the children to the testator evidenced by a bond and mortgage, and that, therefore, such debt might be collected by the executor. Said the court: "It seems impossible to say, judging merely from the face of the will, that a debt evidenced by bond and mortgage was intended by language referring only to debts evidenced by 'notes of hand' or 'book accounts.'" *Hopkins v. Holt*, 9 Wis. 228.

A testator bequeathed to his grandchildren "all his notes of hand." It was *held* that this bequest did not include a judgment upon a bond. Said the court: "Notes of hand may well include promissory notes, properly speaking, single bills and bonds. It is a name given generally by the unlearned, in common, to all those evidences of debts which are verified under the hand of the debtor, and which the creditor keeps. It is not an apt legal term to describe a debt by judgment, nor is it ever used in that sense as its popular one." *Perry v. Maxwell*, 2 Dev. Eq. (N. C.) 496.

Under Their Hands.—Where the declaration, in an action on a promissory note, alleged that the defendants in and by a certain writing or note, "under their hands," by them well executed, promised, etc., and the proof was that one of the defendants, having signed the note in his proper handwriting, the other defendant, acting freely and voluntarily, made his mark between his name written by another, and the word mark, thus, "E. A.'s X mark," it was *held* that there was no essential variance. Nor would it have made any difference if it had been shown that, in making such mark, the hand of the writer had been guided by the hand of another person. *Walbridge v. Arnold*, 23 Conn. 424.

Where the declaration in an action on a promissory note stated that the defendants, by a note "under their hands," promised to pay, and the note exhibited in evidence appeared to have been signed for the defendants by their attorney, it was *held* that this was no variance; the allegation being according to the operation of law. Said the

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court: "The averment, that R and L, under their hands, promised, etc., is not such a declaration in fact, that it requires proof of the act having been done by them *personally*. It is sufficient that facts took place which in point of law are equivalent. The case of *Levy v. Wilson*, 5 Esp. Rep. 180, is not parallel. The expression, 'his own proper handwriting,' in that case, ties down the allegation to the fact, as much as if it had been averred, that the defendant did the act 'by his own natural hand.' But the words, 'under their hands,' are not so precise as to authorize the court in saying, that the averment was on the literal fact and not on the

operation of law." *Phelps v. Riley*, 5 Conn. 266.

The leaseholds of a debtor liquidating under the English bankruptcy act of 1869, are vested absolutely in the trustee on his appointment, subject to the right to disclaim, and the trustee is personally liable on the covenants unless he has made a valid disclaimer. By § 23 of the act, this disclaimer must be "by writing under his hand." It was held that a letter signed by the solicitor of the trustee in his own name is not a "writing under the trustee's hand sufficient for the purposes of disclaimer." *Wilson v. Wallani*, 49 L. J. Ex. Div. 437.

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1. Definition.—Handwriting,¹ considered under the law of evidence, includes not only the ordinary writing of one able to write, but also writing done in a disguised hand,² or in cipher,³ and a mark made by one able or unable to write.⁴

1. In this article the law of handwriting is considered only as it relates to the law of evidence. As to what constitutes a writing, the materials which may be used, etc., see WILLS, WRITING.

2. *Com. v. Webster*, 5 Cush. (Mass.) 295, 301; *Lyon v. Lyman*, 9 Conn. 55; *Rex v. Cator*, 4 Esp. 117.

3. *Com. v. Nefus*, 135 Mass. 533.

4. A mark is a signature. *Savage v. Hutchinson*, 24 L. J. Ch. 232; *Zacharie et ux. v. Franklin*, 12 Peters (U. S.) 151; *Shank v. Butsch*, 28 Ind. 19; *Foye v. Patch*, 132 Mass. 105; *Willoughby v. Moulton*, 47 N. H. 205; *Paisley v. Snipes*, 2 Brev. (S. C.) 200; *Worden v. Van Gieson*, 6 Dem. (N. Y. Sur.) 237; *The State v. Byrd*, 93 N. C. 624. But see *Allen v. Moss*, 27 Mo. 354, 362. Even though the maker can write. *Baker v. Denning*, 8 A. & E. 94 (35 E. C. L.) For the law in *Pennsylvania* see *infra*, at end of note, and *Reap v. Featherstone*, 4 Luz. L. Reg. (Pa.) 4. By statute in *Arkansas* it is provided that in construing the code "signature or subscription includes mark when the person cannot write, his name being written near it and witnessed by a person who writes his name as a witness." Revised Statutes, § 6344; *Watson v. Billings*, 38 Ark. 278; *Ex parte Miller*, 49 Ark. 18. It has, however, been held that a mark, even though not witnessed, may be proved to be a signature. *Ex parte Miller*, 49 Ark. 18. The execution by marksmen of ordinary unattested obligations may be proved as their handwriting would be. *George v. Surrey*, 1 Moody & Mal. 516; *Sayer v. Glossop*, 12 Jurist 465; *Pearcy v. Dicker*, 13 Jurist 997; *Strong's Exrs. v. Brewer*, 17 Ala. 706; *Gervais v. Baird*, 2 Brev. (S. C.) 37; *Paisley v. Snipes*, 2 Brev. (S. C.) 200; *State v. Byrd*, 93 N. C. 624; *Fogg v. Dennis*, 3 Humph. (Tenn.) 47; see, also, *Thompson v. Davitte*, 59 Ga. 472; *Shank v. Butsch*, 28 Ind. 19; *Lansing v. Russell*, 3 Barb. Ch. (N. Y.) 325; *contra*, *Engles v. Bruington*, 4 Yeates (Pa.) 345.

Usually the execution of papers by marksmen is attested by witnesses, whether required by law or not. In such cases the execution can be proved by the subscribing witnesses. As to what evidence by them is sufficient, see *Hays v. Hays*, 6 Pa. St. 368.

If the subscribing witnesses cannot be found or are unable to identify the instrument, its execution may be proved by the party's admissions, or by the testimony of any one who saw him execute it. *Jones v. Hough*, 77 Ala. 437; *Ballinger v. Davis*, 29 Iowa 512; *Eichelberger v. Sifford*, 27 Md. 320; *Robinson v. Robinson*, 20 S. C. 567. But proof of the identity of the party sued with the party alleged to have executed the instrument, is necessary, if the identity is denied. *Whitelocke v. Musgrove*, 1 Cr. & M. 511; s. c., 3 Tyr. 541.

The handwriting of the subscribing witnesses may also be proved. *McDermott v. McCormick*, 4 Harr. (Del.) 543; In the Matter of *Dockstader*, 6 Dem. (N. Y. Sur.) 106; *Engles v. Bruington*, 4 Yeates (Pa.) 345; *Shiver v. Johnson*, 2 Brev. (S. C.) 397; *Bussey v. Whitaker*, 2 Nott & McC. (S. C.) 374; *Lyons v. Holmes et al.*, 11 S. Car. 429. The mark of a subscribing witness, however, cannot be proved. *Watts v. Kilburn*, 7 Ga. 356; *Allen v. Moss*, 27 Mo. 354, 362; *Carrier v. Hampton*, 11 Ire. Law (N. C.) 307; *Gilliam v. Perkinson*, 4 Rand. (Va.) 325. But where a subscribing witness had used his initials as his mark it was held provable in *Jackson v. Van Dusen*, 5 Johnson (N. Y.) 144. And see *Collins v. Nichols*, 1 Harr. & J. (Md.) 399. While a subscribing witness may prove his own mark. *Thompson v. Davitte*, 59 Ga. 472. A will may be executed by a marksman, and probate thereof by attesting witnesses is sufficient. *In re Goods of Bryce*, 2 Curtis 325; *Baker v. Denning*, 8 A. & E. 94 (35 E. C. L.); *Nickerson v. Bush*, 12 Cush. (Mass.) 332; *Butler v. Benson*, 1 Barb. (N. Y.) 526; In the Matter of *Reynolds*, 4

2. Principles Applicable Equally in Civil and Criminal Cases.—The principles regulating the proof of handwriting apply equally to civil and criminal cases.¹

Demarest (N. Y. Sur.) 68; In the Matter of Dockstader, 6 *Ibid.* 106; and Williams on Exrs., 75 n. q.³, 93, 94 n. n.

In *Pennsylvania*, by statute, a will must be in writing and *signed* by the testator or by some person in his presence and by his express direction. It has been there *held* that a mark is not a signature under this statute. *Asay v. Hoover*, 5 Pa. St. 21; *Shinkle v. Crook*, 17 Pa. St. 159; *McCarty v. Hoffman*, 23 Pa. St. 507. These cases were perhaps overruled by the act of January 27, 1848 (P. L. 16), in that State, which provided that a will should be valid to which the testator has made his mark. *Reap v. Featherstone*, 4 Luz. L. Reg. (Pa.) 4. But this act has been *held* not to be retroactive. *Greenough v. Greenough*, 11 Pa. St. 489; *Shinkle v. Crook*, 17 Pa. St. 159. Though it applies to wills executed prior to the date of the act, if the testator dies subsequent thereto. *Burford v. Burford*, 29 Pa. St. 221. Since this act of 1848, a mark is sufficient even though the testator could write, and though his name is added by another hand, giving him a wrong baptismal name. *Long v. Zook*, 13 Pa. St. 400; *Main v. Ryder*, 84 Pa. St. 217.

1. It has been expressly decided that there is no distinction between civil and criminal cases as to the admissibility of evidence to prove the genuineness of handwriting. *De la Motte's Case*, 21 *How. St. Trials* 810; *Rex v. Caton*, 4 *Esp.* 117; *Hammond's Case*, 2 *Greenl. (Me.)* 33; s. c., 11 *Am. Dec.* 39. The principles established have been applied in most, if not all, the United States, equally to civil and criminal cases, as will appear by the cases hereinafter cited. In criminal cases, however, the rule that the accused is to be considered innocent until proved guilty, and that he is to have the benefit of every reasonable doubt, makes the weight of any given evidence stronger in a civil than in a criminal case, but the weight of evidence proving handwriting is for the jury. See *infra*, notes under 5. (a) **COMPETENCY OF WITNESS—AMOUNT AND PROOF OF KNOWLEDGE—WEIGHT OF TESTIMONY**, and 11. **VALUE AND WEIGHT OF EXPERT TESTIMONY BY COMPARISON.**

Reasonable Doubt for Prisoner's Benefit in Forgery Case.—See the fol-

lowing authorities: *State v. Newman*, 7 *Ala.* 69; *People v. Woody*, 45 *Cal.* 289; *People v. Milgate*, 5 *Cal.* 127; *Clark v. State*, 37 *Ga.* 191; *Peri v. People*, 65 *Ill.* 17; *Date v. People*, 8 *Ill.* (Gillm.) 661; *Sulliva v. State*, 52 *Ind.* 309; *Hiler v. State*, 4 *Blackf. (Ind.)* 552; *Tweedy v. State*, 5 *Iowa* 433; *Wise v. State*, 2 *Kan.* 419; *Com. v. Tuttle*, 66 *Mass.* 609; *State v. Fygate*, 27 *Mo.* 535; *State v. Dunn*, 18 *Mo.* 419; *Gardiner v. State*, 14 *Mo.* 97; *People v. Thayer*, 4 *Park. Cr. Cas. (N. Y.)* 595; *White v. State*, 36 *Tex.* 347; *Connor v. State*, 34 *Tex. App.* 659; *Brown v. State*, 23 *Tex.* 195; *Shultz v. State*, 13 *Tex.* 401; *Campblin v. State*, 1 *Tex. App.* 108.

This doctrine applying to the smaller offences, as well as to the larger, includes the offence of forgery. *Satterwhite v. State*, 28 *Ala.* 68, 71; *State v. King*, 20 *Ark.* 166; *Wasden v. State*, 18 *Ga.* 264; *Stewart v. State*, 44 *Ind.* 237; *Com. v. Intoxicating Liquors*, 115 *Mass.* 142; *Fuller v. State*, 4 *Ohio St.* 433.

Forgery—Inspection of Another Note in Possession of Accused.—On a trial for forgery, the witness was permitted to testify that defendant, at about the time of the forgery, had in his possession another note, which witness, who had inspected it, believed to be in the same handwriting as the note on which the indictment was based. The note thus described, being in possession of the accused, could not be produced at the trial. *Held*, that the testimony was competent notwithstanding. *State v. Brackenridge*, 67 *Iowa* 204.

Forgery—Best Evidence—Opinion of Witness as to Third Person's Writing.—It was in proof that the signatures alleged to have been forged were not in the defendant's handwriting, but apparently in the handwriting of a lady. The theory of the defense was that the signatures were written by the daughter of one of the parties whose signature was alleged to have been forged. To meet this theory the other was permitted over objection to introduce the father of the lady, who testified that the handwriting was not hers. *Held*, error, because [1] the rule requires the protection (unless its absence be accounted for), of the best evidence of the fact obtainable, which

3. Production of Paper.—*Lost and Destroyed Papers; Public Records.*—The paper, the handwriting of which is sought to be proved, must ordinarily be produced in court, but such production will be excused when the paper has been lost or destroyed,¹ and when it is a public record, which cannot be brought into court.²

in this case would have been the testimony of the lady herself; and because [2] it was not done in this case witness should have qualified himself as an expert, or by showing that he had seen the person write. *Hahn v. State*, 13 Tex. App. 383.

Forgery of Deed.—On trial of R for forging a deed purporting to be signed by G, *held*, that the State must adduce for comparison signatures purporting to be those of G to documents shown to be archives of the general land office at Austin. *Rogers v. State*, 11 Tex. App. 608.

Forgery—Standard of Comparison.—In criminal trial, for an indictment for forgery, a police officer testified that while the defendant was in duress for some other offence, the officer handed the defendant a pencil and paper, and ordered him to write down such words as the officer would dictate, which the defendant did, and the paper was offered to the jury for the purpose of instituting a comparison of handwriting. *State v. Fritz*, 23 La. Ann. 55.

Forgery—Criminal Powder.—On trial for forgery committed by altering a check, by extracting writing therefrom and writing new words for figures in place thereof, a witness was not called, as scientific expert may testify as to the criminal effect of powder found in the possession of the defendant, on the writing in the check similar to that by the alteration of which the forgery was committed, and the check upon which the effect testified to by the witness was produced may be exhibited to the jury. *State v. Brotherton*, 47 Cal. 388; s. c., 2 Cr. L. Rep. 444.

1. Thus in a criminal case where the accused had destroyed a page from a hotel register. *State v. Shinbone et al.* 46 N. H. 497.

And on the trial for indictment for forgery of a check the State was allowed to prove the handwriting even though unable to produce the check. *Koons v. State*, 36 Ohio St. 195.

On a trial for forgery the witness was permitted to testify that the defendant, at about the time of the

forgery, had in his possession another note, which witness, who had inspected it, believed to be in the same handwriting as the note on which the indictment was based. The note thus described, being in possession of the accused, could not be produced at the trial. *Held*, that the testimony was competent notwithstanding. *State v. Brackenridge*, 67 Iowa 204.

So, also, in civil cases. *Abbott v. Coleman*, 22 Kans. 250. It has been *held* that the fact that a note had been destroyed will dispense with strict proof of the handwriting. *Bradley, Admr. v. Long*, 2 Strobb. (S. Car.) 160. But the witness must have seen the lost paper, and *at that time* been acquainted with the handwriting in question. *Bruce v. Crews*, 39 Ga. 544; *Power v. Frick*, 2 Grant (Pa.) 306. It has been intimated, however, that after-acquired knowledge might suffice if the proof was unequivocal and positive. *Porter v. Wilson et al.* 13 Pa. St. 641.

In a case of probate, a witness unable to attend the court was examined by deposition as to the handwriting of a testamentary paper which had been shown to him by the propounder of the will, but which was not before him at the time he gave his deposition. *Held*, that the testimony is admissible, its weight depending upon the certainty of the proof that the paper propounded for probate is the paper that was shown to the witness. *Nuckols' Admr. v. Jones*, 8 Gratt. (Va.) 267.

2. The production of an original marriage register was dispensed with in *Sayer v. Glossop*, 12 Jurist 465. So, also, public documents on file in the departments at Washington, or in the offices of a State. *Leathers v. Salvor Wrecking and Trans. Co.*, 2 Woods (U. S.) 680; *Houston v. Blythe*, 60 Texas 506. So, also, papers on file in another court, in which cases it was decided that any one who has seen an original paper filed in the court of another county or State, and knew the handwriting thereon may testify thereto. *Bigham v. Coleman*, 71 Ga. 176; *Eborn v. Zimpelman*, 47 Tex. 503.

4. Proof of Genuineness. — (a) When not Allowed; When not Necessary.—The genuineness of handwriting may be proved in all cases,¹ except where the paper is required to be identified by an official seal,² and except as controlled by the law applicable to attested instruments.³ But proof of such genuineness is not necessary where by statute handwriting duly and lawfully acknowledged is made evidence,⁴ and when its genuineness is not denied,⁵

1. It was at one time *held* that business entries could not be proved by proof of handwriting. *Cooper v. Marsden*, 1 Esp. 1; *Calvert v. Archbishop of Canterbury*, 2 Esp. 646; *Sikes v. Marshall*, 2 Esp. 705. But these decisions have long since been overruled and the principle established that such entries so proved are evidence, "subject, however, to be excluded if it appear that in making the entries he was not registering, but manufacturing, current facts; and provided such entries were original, contemporaneous, and in the line of the writer's duty, and not self-serving." *Wharton on Evidence* (3d ed.) Vol. 1, §§ 238, 239; *James v. Wharton*, 3 McLean (U. S.) 492; *Hodge v. Higgs*, 2 Cranch (U. S. C.) 552. And proof that the entries are in the handwriting of the party is, *prima facie* sufficient. *Holliday v. Butt*, 40 Ala. 178; see *BOOKS AS EVIDENCE*, 2 Am. & Eng. Ency. of Law 467 n.

2. The signature of a notary may not be proved by anything except his seal. Proof of his handwriting will not validate his certificate if the seal is wanting. *Stephens v. Williams* 46 Iowa 540.

Where, however, an affidavit is sworn to before a notary in a foreign country, it has been *held* in *England* that the signature of the notary must be proved before the affidavit can be admitted in evidence. *In re Earl's Trust*, 4 Kay & J. Ch. 300; *In re Davis' Trust*, L. R. 8 Eq. 98; *Nye v. Macdonald*, L. R. 3 P. C. 331. This rule was, however, relaxed in a case where the fund in controversy was very small. *Mayne v. Butter*, 13 Weekly Rep. 128.

The proceedings before a justice of the peace may be proved by proving the justice's handwriting. *McCaskle v. Amarine*, 12 Ala. 17; *Ainsworth v. Greenlee*, 1 Hawks (N. Car.) 190. But court records can only be proved by exemplified copies. *Bigham v. Coleman*, 71 Ga. 176.

It has been *held* competent, however, in *North Carolina* to prove the hand-

writing and signature of a register of deeds in that State to a certificate of registration, as *prima facie* evidence of his official character. *Thompson v. Justice*, 88 N. Car. 269. [It does not appear that the register of deeds in *North Carolina* is required or allowed to have a seal.]

3. See ATTESTATION.

4. When by statute deeds and other instruments in writing when duly acknowledged are made evidence, such instruments when so acknowledged are admissible in evidence without proof of execution. *Wharton on Evidence* (3d ed.), Vol. 1, § 740. But the fact of such execution may be denied and disproved by direct or positive evidence. *Borland v. Wolrath*, 33 Iowa 131; *Mixer v. Bennett*, 70 Iowa 329. These statutes are not always limited to deeds and conveyances. Thus under the *New York* statute, assignments of patents and transfers of stock have been held sufficiently proved, when duly acknowledged and admissible in evidence without proof of execution. *Houghton v. Jones*, 1 Wall. (U. S.) 702; *New York Pharmaceutical Association v. Tilden*, 14 Fed. Rep. 740; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 624.

But an acknowledgment before a justice of the peace or notary public does not make the acknowledged paper evidence without proof of execution unless there be an enabling act to that effect. *Ravies v. Alston*, 5 Ala. 297; *Mullis v. Cavins*, 5 Blackf. (Ind.) 77. The execution may, however, be proved by the person who took the acknowledgment. *Eichelberger v. Sifford*, 27 Md. 320; *Kidd's Admr. v. Alexander's Admr.*, 1 Rand. (Va.) 456.

As to the admissibility of such duly acknowledged papers as a standard of comparison, see *infra*, notes under 9. (b) STANDARD OF COMPARISON, GENERALLY.

5. When suit is brought on a writing alleged to have been signed by the defendant, and no proof of its genuineness is asked for in the trial court, it is too late to object in the appellate court to

or results as a necessary implication.¹

(b) *By Writer Himself and by his Admissions.*—The genuineness of handwriting may be proved by the testimony of the writer himself,² and in case of denial by him,³ it may also be proved by the testimony of witnesses who saw him write the document

the lack of such proof. *Anderson v. DeSoer*, 6 Gratt. (Va.) 363; *James River and Kanawha Co. v. Little John*, 18 Gratt. (Va.) 53; *Harnsberger v. Cochran*, 82 Va. 727. This principle was held applicable to a letter put in evidence without objection in a suit before a justice of the peace. *Overholtzer v. McMichael*, 10 Pa. St. 139.

In many of the States execution must be denied by a sworn plea, or proof of genuineness will not be required. *Besitor v. Roberts*, 58 Ala. 331; *Haney v. Tempest*, 3 Metc. (Ky.) 95; *Duncan v. Brown*, 15 B. Mon. (Ky.) 186; *Penna. Ins. Co. v. Murphy*, 5 Minn. 36; *Smith v. Elmert*, 47 Wis. 479; *Sayles' Texas Civil Stat. art. 2262*; *Code of West Virginia*, § 40, ch. 125.

In some States the denial need only be in writing, and not under oath. *Clark's Exrs. v. Cochran*, 3 Mart. (La.) 353, 360; *National Union Bank of Swanton v. Marsh*, 46 Vt. 443.

1. When letters had been sent to A at his address, and answers thereto had been received purporting to be signed by A, the practice has been uniform to admit such letters in evidence without proof of handwriting. *Harrington v. Fry*, 1 C. & P. 289 (11 E. C. L.); s. c., 1 R. & M. 90; *Overstone v. Wilson*, 2 C. & K. 1 (61 E. E. L.); *Lyon v. Railway Pass Ass. Co.*, 46 Iowa 631; *McClain v. Esham*, 17 B. Mon. (Ky.) 146, 155; *Gartrell v. Stafford*, 12 Neb. 545; *Ullman v. Babcock*, 63 Tex. 68. (As to the admissibility of such letters as a standard of comparison, see *infra*, notes under 9. (b) STANDARD OF COMPARISON, GENERALLY).

In one case where it was proved that A had admitted that he had replevied, that fact was held sufficient to prove A's identity with a signer of the same name to a replevin bond in the case without proof of his handwriting. *Middleton v. Sandford*, 4 Campb. 34.

So when a surety on a bond justifies, his execution of the bond is thereby admitted, and proof of such execution was held unnecessary in *State v. Byrd*, 93 N. Car. 624.

As to the presumption of the validity of the signature of public officials, see *infra*, notes under 4. (h) PROOF OF

GENUINENESS, WHEN WRITER HOLDS AN OFFICIAL POSITION.

2. This is evidently the simplest mode of proof, but the testimony of the writer himself is not better evidence than that of any one acquainted with his handwriting. *Taylor on Evidence*, (8th ed.) § 1862; *Rex v. Amarine*, 2 Campb. 508; *Regina v. Hurley*, 2 Moody & Rob. 473; *McCaskle v. Amarine*, 12 Ala. 17; *Royce v. Gazan*, 76 Ga. 79; *Smith v. Prescott*, 17 Me. 277; *Lefferts v. State*, 49 N. J. Law 26; *Ainsworth v. Greenlee*, 1 Hawk. (N. Car.) 190; *Foulkes v. Com.*, 2 Rob. (Va.) 836; *McCully v. Malcolm*, 9 Humph. (Tenn.) 187. The cases of *Cheitree v. Roggen*, 67 Barb. (N. Y.) 124, and *Halm v. State*, 13 Tex. Ct. of App. 383; *M'Kee v. Myers*, Add. (Pa.) 31, if not distinguishable are clearly overborne by the weight of authority.

Proof of handwriting by one acquainted with a party's signature is not secondary evidence, even though the party whose signature is in question is not a party to the suit. *Chaffee v. Taylor*, 3 Allen (Mass.) 598. Prior to the enactment of the statutes which now prevail both in England and the United States, making parties interested in a suit competent witnesses, there was considerable difference of opinion as to whether parties were competent to prove or disprove what purported to be their handwriting. See *Com. v. Snell*, 3 Mass. 82; *Com. v. Waite*, 5 Mass. 261; *Com. v. Peck*, 1 Metc. (Mass.) 428; *Hess v. State*, 5 Ohio 5; s. c., 22 Am. Dec. 767, and the cases there cited. The enactment of the statutes above referred to has rendered this branch of the law obsolete.

3. The sworn statement of a man of admitted truth that he did not write certain memoranda will outweigh the conflicting testimony of witnesses, some of whom recognize a resemblance to his handwriting in that of the memoranda and some of whom do not. *Bayly et al. v. Fourchy*, 32 La. Ann. 136.

The weight to be attached to a party's denial of his handwriting depends in all cases upon the positiveness of his denial and upon his credibility.

in question, and by extra judicial admissions made by him concerning it,¹ except in Louisiana.² The alleged writer's inability to write may also be proved.³

(c) *By Witnesses Personally Acquainted with Party's Handwriting, Generally.*—The genuineness of disputed handwriting may also be proved by the testimony of witnesses who are personally acquainted with the handwriting of the person supposed to have written it.⁴

Doe dem. Mudd v. Suckermore, 5 Ad. & El. 703. (31 E. C. L. 406, 423); *Com. v. Nefus*, 135 Mass. 533; *National Union Bank of Swanton v. Marsh*, 46 Vt. 443; *Robinson v. Amet*, 15 La. 262.

1. The instrument in question must have been produced, or at least identified at the time of the admission to make the admission evidence. *Glazier v. Streamer*, 57 Ill. 91; *Shaver v. Ehle*, 16 Johns. (N. Y.) 201; *Palmer v. Manning*, 4 Den. (N. Y.) 131. And it seems immaterial whether such admissions were made before or after the suit was brought. *Phila. & West Chester R. R. Co. v. Hickman*, 28 Pa. St. 318.

But an oral offer to compromise a claim on a promissory note accepted and subsequently withdrawn, was held not to be evidence of an admission of the genuineness of the signature to the note, even though the offer was made under the advice of a friend to make such an offer if the note was genuine, otherwise not. *Rideout v. Newton*, 17 N. H. 71.

But notwithstanding an admission of the genuineness of a writing the party making it may prove that he had been mistaken and that his name had been forged. *City Bank of New Orleans v. Foucher*, 9 La. 405; *Plicque et al. v. Labranche*, 9 La. 559; *Hall et al. v. Huse*, 10 Mass. 39; *Salem Bank v. Gloucester Bank*, 17 Mass. 1, 27; *Bell v. Shields*, 4 Harr. (19 N. J.) 93.

He cannot do so, however, when he has accredited the bill and induced another to take it, or knew of the forgery when he made the admission. *Helmsley v. Loader*, 2 Campb. 450; *Leach v. Buchanan*, 2 Esp. 226; *Cohen v. Teller*, 93 Pa. St. 123. So he may be estopped from denying his signature, though admittedly made by another, in a case where he by his admissions, express or implied, may be presumed to have given said other party power to sign his name. *Barber v. Gingell*, 3 Esp. 60; *Dow's Exr. v. Spenny's Exr.*,

29 Mo. 386; *Weed et al. v. Carpenter*, 4 Wend. (N. Y.) 219; *Same v. Same*, 10 Wend. (N. Y.) 403; *Hammond v. Varian*, 54 N. Y. 398. But see *Cohen v. Teller*, 93 Pa. St. 123.

And it follows *a fortiori* that express authority and direction to sign makes the party authorizing liable. *Mutual Ben. Life Ins. Co. v. Brown et al.*, 30 N. J. Eq. 193, and note thereto on p. 194. See DEEDS, WILLS.

2. Evidence that a party admitted his signature was held to be inadmissible under the Louisiana code in *Plicque et al. v. Labranche et al.*, 9 La. 559.

3. Upon the question as to whether writings offered in evidence were signed by the person purporting to have executed them, who is not a party to the suit, evidence that such person was unable to write, or that he did not sign his name at certain definite times is admissible, but hearsay evidence such as that the party had employed others to write for him, that he did not keep his accounts in writing, and had said that he could not write, is inadmissible. *Van Horn v. Redmon*, (Ia.) 39 N. W. Rep. 679.

4. Familiarity with A's signature makes a witness competent to testify to such signature, though the witness is not familiar with A's general handwriting. *Whitley, McKonkey & Co. v. Gaylord*, 1 Jones L. (N. C.) 94. And see *Richardson v. Newcomb*, 21 Pick. (Mass.) 315; *Com. v. Williams*, 105 Mass. 62.

Familiarity with a party's surname was held sufficient to make the witness competent to testify as to the genuineness of the writing of the party's full name in *Lewis et al. v. Sapio*, 1 M. & M. 39 (22 E. C. L.) In this case the court refused to follow the earlier case of *Powell v. Ford*, 2 Stark. 164 (3 E. C. L.) where the witness had only seen party's surname written once and was held incompetent. See, also, *Smith v. Walton*, 8 Gill (Md.) 77, 84.

A witness may be familiar with a

(d) *By Witnesses who had Seen Party Write.*— This personal acquaintance may be acquired, *first*, by having seen the party write, called the *præsumptio ex visu scriptiois*.¹ The number of times the witness had seen the party write,² what he saw him write,³

firm's signature, and be competent to testify as to its genuineness, though not familiar with the signatures of the members of the firm. *Brigham v. Peters*, 1 Gray (Mass.) 139; *Gordon v. Price*, 10 Iredell (N. C.) 385; see, also, *Utica Ins. Co. v. Badger*, 3 Wendell (N. Y.) 102.

When a holograph-will is alleged to be a forgery, and forged by its propounder, a witness who is acquainted with the handwriting of said propounder is competent to testify that the will is in his handwriting, though such witness is not acquainted with the decedent's handwriting. *Brown v. Hall*, 7 S. E. Rep. (Va.) 182.

1. The law on this point is accurately stated by Patterson, J., as follows: "All evidence of handwriting, except where the witness sees the document written in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge. That knowledge may have been acquired either by seeing the party write, in which case it will be stronger or weaker according to the number of times and the periods, and other circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases) even if he has seen him write but once, and then merely sign his surname. *Doe dem. Mudd v. Suckermore*, 5 Ad. & E. 703.

2. See on this subject generally: *Hensley's Case*, 19 How. St. Trials 1341; *De la Motte's Case*, 21 How. St. Trials 688, 810; *Rex v. Horne Tooke*, 25 How. St. Trials 1, 71, 72; *Rex v. Hensley*, 1 Burrows 642; *Eagleton et al. v. Kingston*, 8 Vesey 438, 473, etc. *Buller's Nisi Prius* p. 236. In the following cases witness testified to having seen party write several times. *Long v. Little*, 119 Ill. 600; *Haynes v. Thomas*, 7 Ind. 38; *Hopkins v. Meguire*, 35 Maine 78; *State v. Stair*, 87 Mo. 268; *Lachance v. Loeblein*, 15 Mo. App. 460; *The State v. Gay*, 94 N. C. 814; *Hoitt v. Moulton*, 21 N. H.

586; *Cook v. Smith*, 1 Vroom (30 N. J.) 387; *Hartung v. People*, 4 Park. C. C. (N. Y.) 319; *Donoghoe v. People*, 6 Park. C. C. (N. Y.) 120; *State v. Hooper*, 2 Bailey (S. C.) 37; *State v. Anderson*, 2 Bailey (S. C.) 567; *State v. Stalmaker*, 2 Brev. (S. C.) 1; *Comr. of the Poor v. Hanion*, 1 Nott & McC. (S. C.) 554. If the witness has only seen the party write once, but believes that he can identify his handwriting, the witness is competent. *Willman v. Worrall*, 8 C. & P. 380, (34 E. C. L.); *Hopper Admr. v. Ashley*, 15 Ala. 457; *Woodford v. McClenahan*, 4 Gilm. (9 Ill.) 85; *Cross v. People*, 47 Ill. 152; *Massey v. Farmers' Nat. Bank of Va.*, 104 Ill. 327; *Smith v. Walton*, 8 Gill (Md.) 77; *Edelen v. Gough*, 8 Gill (Md.) 87; *Com. v. Nefus*, 135 Mass. 533; *Worth v. McConnell*, 42 Mich. 473; *Rideout v. Newton*, 17 N. H. 71; *Bowman v. Sanborn*, 25 N. H. 86; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144; *Magee v. Osborn*, 32 N. Y. 669; *Hammond v. Varian*, 54 N. Y. 398; *McNair v. Com.*, 26 Pa. St. 388; *Means et al. v. Means et al.*, 7 Rich. (S. C.) 533; *Demonheun v. Walker*, 4 Baxt. (Tenn.) 1999; *Haynie v. The State*, 2 Texas App. 168, 173; *Walker v. State*, 14 Texas App. 609, 627; *Pepper v. Barnett*, 22 Gratt. (Va.) 405.

In *U. S. v. Crow*, 1 Bond (U. S.) 51, a witness who had seen party write but once and said he could identify his writing was held incompetent. The facts of the case are not given, but the court said: "It is not enough that he (the witness) had seen the person, as is the proof in this case, write but once, and then under circumstances showing that the attention of the witness was not specially directed to the peculiarities of the penmanship." This case may on that ground be distinguished from the others; if not, it is certainly against the weight of authority.

3. When a witness had seen party write his surname once he was held incompetent to testify as to the genuineness of the writing of the party's full name. *Powell v. Ford*, 2 Stark. 164 (3 E. C. L.). But the court refused to follow this decision in a case where witness had seen party write his sur-

and when he saw him write it,¹ are matters going to the weight of his testimony, not to his competency. But manufactured testimony is inadmissible.²

(e) *By Witnesses who had Corresponded with Party.*—This personal acquaintance may also be acquired, *secondly*, by having corresponded with the party called the *præsumptio ex scriptis olim visis*,³ but an acknowledgment by the party that he wrote the

name several times. *Lewis et al. v. Sapio*, 1 *Moody & Malkin* 39 (22 E.C. L.) See *Smith v. Walton*, 8 *Gill* (Md.) 77, 84.

1. In an action against the indorser of a note, a witness testifies that he had seen the defendant sign a receipt twelve years ago. He was held to be a competent witness, though another witness testified that defendant always signed his name to and upon notes backhanded, while his signature to receipts, etc., was always forward. *Brachman v. Hall*, 1 *Disney* (Ohio) 539.

That the witness has only seen the party write subsequent to the time when the disputed paper was given goes to the weight of his testimony, not to his competency. *Keith v. Lothrop*, 10 *Cush.* (Mass.) 453; *Philadelphia and West Chester R. R. Co. v. Hickman*, 28 *Pa. St.* 318. Under similar circumstances, however, the witness was held incompetent in a case where the signature was that of a firm composed of A and B, and alleged to have been written by A and the witness was in doubt as to the B part of the signature. *Utica Ins. Co. v. Badger*, 3 *Wend.* (N. Y.) 102. See, also, *Pate v. People*, 8 *Ill.* 644.

3. But a party whose signature is in question cannot make a witness competent to testify thereof by writing for him either at the trial or previous thereto for the purpose of enabling him to testify from the knowledge so acquired. *Stanger v. Searle*, 1 *Esp.* 14; *Whitmore v. Corey*, 16 *N. J. Law* 267; *Reese v. Reese*, 90 *Pa. St.* 89. (See *infra*, notes under 9. (c) STANDARD OF COMPARISON—WRITING BY WITNESS ON THE STAND).

But that the witness got the party to write to get a specimen of his handwriting has been held to be immaterial. *Reid v. State*, 20 *Ga.* 681; *Philadelphia & West Chester R. R. Co. v. Hickman*, 28 *Pa. St.* 318; *Haynie v. State*, 2 *Tex. App.* 168, 173. See *Hammond's Case*, 2 *Greenl.* (Me.) 83, and *contra*, *Reg. v. Crouch*, 4 *Cox Cr.* C. 163.

3. This method of proving handwriting

is a corollary to the principle which authorizes the admission of answers to letters in evidence without proof of handwriting referred to in note 1, p. 267. Evidence based on familiarity acquired from correspondence was first admitted by Lord Mansfield in 1761, to prove the signature of a party residing abroad. *Gould v. Jones*, 1 *Wm. Bl.* 384; s. c., *Bull. N. P.* 236. Such evidence was at first held inadmissible when the party in question resided in the kingdom. *Willis v. Singer*, *Supp. Vin. Abr.* evidence (T. V. 48), but this distinction was soon rejected. *Lord Ferrers v. Shirley*, *Fitzgibbon* 195 (decided in 1763). *Vide* also *Laver's Case*, 6 *Harg. St. Trials* 279. In 1814 Lord Eldon refers to this method of proof as follows: "Where there has been correspondence by letters, the contents of which are such as to render it probable that they were received, perhaps impossible to suppose the contrary, that course of correspondence will do (to render the witness competent to prove his correspondent's handwriting); and that has grown up in modern times; but the comparison of a single letter will never do for commitment." *Wade v. Broughton*, 3 *V. & B.* 172.

The decisions in the United States are uniform in admitting this method of proving handwriting by witnesses whose knowledge is acquired from written correspondence. *Reid v. Hodgson*, 1 *Cranch* (U. S.) 491; *Campbell v. Woodstock Iron Co.*, 83 *Ala.* 351; *Atlantic Ins. Co. v. Manning*, 3 *Col.* 224; *Pearson & Co. v. McDaniel*, 62 *Ga.* 100; *Thomas v. State*, 103 *Ind.* 419; *Russell v. Coffin*, 8 *Pick.* (Mass.) 143; *Chaffee v. Taylor*, 3 *Allen* (Mass.) 598; *Empire Man. Co. v. Stuart*, 46 *Mich.* 482; *Southern Express Co. v. Thornton*, 41 *Miss.* 216; *Gartrell v. Stafford*, 12 *Neb.* 545; *Whitley McKonkey & Co. v. Gaylord*, 1 *Jones L.* (N. C.) 94; *Com. v. Smith*, 6 *S. & R.* (Pa.) 567; *U. S. v. Simpson*, 3 *P. & W.* (Pa.) 437; *Clark v. Freeman*, 25 *Pa. St.* 133; *Parker v. Amazon Insurance Co.*, 34 *Wis.* 363.

letters, or such acquiescence as amounts to an acknowledgment must be proved.¹ The cases are conflicting upon the question who may prove such acknowledgment or acquiescence.²

(f) *By Witnesses who had Seen Papers Acknowledged by Party.*—This personal acquaintance may be acquired, *thirdly*, by having seen papers acknowledged by the party to be in his handwriting, or which he is estopped from denying.³

1. There has been some disagreement in the cases as to what evidence is necessary to prove that the letters received by the witness were written by the party. Thus in one case decided in 1849, where the party's address in London was first proved, and then witness testified that he had written to him at that address, and received answers, he was *held* competent without anything further. *Murieta v. Wolfhagen*, 2 C. & K. 744 (61 E. C. L.) And in another case decided in 1825, where witness testified to having received letters from the party, and having acted on them he was *held* competent. *Tharpe v. Gisburne*, 2 C. & P. 211 (12 E. C. L.). See *Rex v. Slaney*, 5 C. & P. 213 (24 E. C. L. 1832). It has, however, been intimated that the writer must in some way have recognized such acts. *Greaves v. Hunter*, 2 C. & P. 477 (12 E. C. L.); *Drew v. Prior*, 5 M. & G. 264. And this is the law in the United States. *Putnam v. Wadley*, 40 Ill. 346; *Mines v. Perry*, 113 Mass. 274; *Cunningham v. Hudson River Bank*, 21 Wend. (N. Y.) 557; *Sartor v. Bolinger*, 59 Tex. 411; *Guyette v. Town of Bolton*, 46 Vt. 228.

So where A received letters from B and answered them, but received no reply to his answers, he was *held* incompetent to prove B's handwriting. *Webb & Thurston v. Mauro*, Morris (Ia.) 329; *Nunes v. Perry*, 113 Mass. 274. And where A wrote to B in C's name and C afterwards showed A the reply which he said he had received from B, a similar decision was made. Assignee of *Desbrow v. Farron*, 3 Rich. (S. C.) 382. And likewise where A sent receipts to B which were returned to him apparently signed by B, but enclosed in a letter from C to A, it was *held* that A was not competent to prove the handwriting of B. *Brant v. Dennison*, (Pa.) 5 At. Rep. 869.

And a witness cannot prove that the contents of the letters were such as to enable him to judge certainly that the letters were written by the party whose handwriting was in question, and thus

render himself competent. *Phil. etc., R. Co. v. Hickman*, 28 Pa. St. 318.

The following language used by *Patteson, J.*, in *Doe dem. Mudd v. Suckermore*, 5 A. & E. 703, 731 (31 E. C. L.); s. c., 2 N. & P. 16, 46, decided in 1837, is frequently quoted as accurately stating the law on this point. "The knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing other correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness, which in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party. Evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him."

2. It has been *held* in a late case that a witness who testifies from familiarity derived from correspondence, may be corroborated by proof by a third party that the signatures to the letters received by him were genuine. *Thomas v. State*, 103 Ind. 419.

But where a witness had received but one letter and could not prove such facts as amounted to an acknowledgment by the party that he had written the letter, it was *held* that he could not be made competent by proof by a third party of the alleged writer's admission that he wrote the letter. *Pope v. Askeu*, 1 Ired. Law (N. C.) 16, 17. And a similar decision was made in *Power v. Frick*, 2 Grant (Pa.) 306.

3. As where the witness *held* the party's obligations which the party paid or admitted to be genuine. *Woodman v. Dana*, 52 Me. 9; *Johnson v.*

(g) *By Witnesses Having Personal Relations with Writer.*—This personal acquaintance may be acquired, *fourthly*, by holding certain relations to the party whose handwriting is in question, as A, clerks through whose hands correspondence with him has passed in the ordinary course of business,¹ and B, the acquaintance will

Daverne, 19 Johns. Ch. (N. Y.) 134; Hammond v. Varian, 54 N. Y. 398; Donoghoe v. People, 6 Park. C. C. (N. Y.) 120; Gordon v. Price, 10 Ired. L. (N. C.) 385; see, also, Hopper v. Ashley, 15 Ala. 457. This rule also applies to bank notes. Allen v. State, 3 Humph. (Tenn.) 367.

It is sufficient if the paper was acknowledged expressly, or the evidence is such that the party is estopped from denying it. State to use of Medford v. Spence, 2 Harr. (Del.) 348; Hammond's Case, 2 Greenl. (Me.) 33; Page v. Homans, 14 Me. 478; Bowman v. Sanborn *et al.*, 25 N. H. 87; State v. Hastings, 53 N. H. 452, 458; Cabarga v. Seeger, 17 Pa. St. 514; Cody v. Conly, 27 Gratt. (Va.) 313. But see Hynes v. McDermott, 82 N. Y. 41; s. c., 37 Am. Rep. 538.

In one case, where the plaintiff had filed an affidavit purporting to be signed and sworn to by him, the defendant's attorney who had seen and examined the signature appended to the affidavit, was held competent to prove the plaintiff's handwriting. Smith v. Sainsbury, 5 C. & P. 196; (24 E. C. L.)

And in a similar case a witness was held competent where papers had passed through his hands apparently signed by A, to which were annexed official certificates by a U. S. consul that the subscriber was A. *Ex parte* 3109 Cases of Champagne, 1 Ben. (U. S.) 241.

But the evidence must show that the paper was acknowledged or prove the estoppel, evidence indicating it, or creating a possible presumption of it, is insufficient. Putnam v. Wadley, 40 Ill. 346; Brigham v. Peters, 1 Gray (Mass.) 139; Philadelphia & West Chester Ry. Co. v. Hickman, 28 Pa. St. 318; National Union Bank of Swanton v. Marsh, 46 Vt. 443.

The acknowledgment must be by the party himself. An acknowledgment by his attorney or any third party is insufficient. Greaves v. Hunter, 2 C. & P. 477; (12 E. C. L.); Goldsmith v. Bane, 3 Hal. (8 N. J. L.) 87.

When the acknowledgment made was held to be immaterial in Hammond's

Case, 2 Greenl. (Me.) 33. But an acknowledgment in the court room at the trial was held insufficient in Haynie v. The State, 2 Texas Ct. of App. 168. See Doe *dem.* Mudd v. Suckermore, 5 A. & E. 703; (31 E. C. L.)

The witness must have seen the papers so acknowledged long enough to give him knowledge of them. Fifteen minutes was held not long enough in U. S. v. Johnson, 1 Cranch (U. S.) 371. See, also, Stone v. Thomas, 12 Pa. St. 209.

1. A clerk employed by A, through whose hands correspondence between A & B passes, may prove B's handwriting. Rex v. Slaney, 5 C. & P. 213; (24 E. C. L.); Reid v. Hodgson, 1 Cranch (U. S.) 491; Reyburn v. Belotti, 10 Mo. 597; Titford v. Knott, 2 Johns. Ch. (N. Y.) 211. But under similar circumstances where a clerk had only seen B's letters, he was held incompetent. Ferrers v. Shirley, Fitzgibbon 195; Bruce v. Crews, 39 Ga. 544; Porter v. Wilson, 13 Pa. St. 641. There can be no doubt, however, if it were proved that these letters had been acted on, and acquiesced in by B, the clerk would have been competent. Rex v. Slaney, 5 C. & P. 213; (24 E. C. L.)

A clerk in a bank where A keeps an account, A having written his signature in their book, and drawn checks which the clerk paid, is competent to prove A's handwriting. Murieta v. Wolfhagen, 2 C. & K. 744 (61 E. C. L.) Likewise a cashier who had A's bank book and had seen his checks which were received and paid. Coffey's Case, 4 City Hall Rec. (N. Y.) 52; and to same effect is Snell *et al.* v. Bray, 56 Wis. 156. But not if it is proved that some of the checks so paid were forged. Brigham v. Peters, 1 Gray (Mass.) 139. Nor is an officer in a bank which had discounted A's checks on another bank in favor of one of its depositors, A not depositing with witness's bank. Cunningham v. Hudson River Bank, 21 Wend. (N. Y.) 557.

An officer in a corporation who takes charge of and attends to the correspondence of an agent of the cor-

be presumed in the case of the personal relations, between members of the same family,¹ administrator and decedent, and attorney and client.²

(h) *When Writer holds an Official Position.*—Finally, the writer may hold such an official position that his official papers are preserved in a public office, and witnesses acquainted with such official papers are competent to testify to the official's handwriting.³ Or official papers executed by the writer pass through the witness' hands in the ordinary course of business, and he is thus rendered competent.⁴ It seems that the judge may act

poration, can prove that agent's handwriting. *Robinson Consolidated Mining Co. v. Craig*, 4 N. Y. St. Rep. 478.

But the letters must pass through the clerk's hands in the ordinary course of business. So in a case where A wrote once to B in C's name, at C's request, and C subsequently showed A a letter purporting to be a reply from B, A was held incompetent to prove B's handwriting. *Assignees of Desbrow v. Farrow*, 3 Rich. (S. C.) 382.

In a very early case decided in 1797, it was held that an inspector of franks who had frequently seen franks pass through the postoffice in A's name was not competent to prove A's handwriting, because the franks might have been forgeries, the inspector having had no communication with A on the subject. *Carey v. Pitt*, Peake's Add. N. P. C. 130. [The authority of this case seems very doubtful to the writer.]

1. A member of a family who is acquainted with a family correspondence while it was in progress, can prove the signatures of the correspondents, though he took no part in it. *Tuttle v. Rainey*, 98 N. C. 513. A member of a family who is familiar with family papers is thereby made competent. *Moody v. Rowell*, 17 Pick. (Mass.) 490; *Sweigart v. Richards*, 8 Pa. St. 437. See to a contrary effect, the earlier case of *Slaymaker v. Wilson*, 1 P. & W. (Pa.) 216.

2. An administrator who has had possession of his decedent's papers was held competent to prove the decedent's handwriting in *Sharp v. Sharp et al.*, 2 Leigh (Va.) 249.

A solicitor into whose hands family papers were put may prove the handwriting of the parties thereto. *Fitzwalter Peerage Case*, 10 Cl. & Fin. 193. In like manner an attorney at law who was an attesting witness to certain papers, is competent to prove that his client signed them, on testifying that he

either saw them signed, or that his client had admitted his signature. *Costello v. Crowell*, 139 Mass. 588.

3. A witness is competent to prove the handwriting of one who was once a public officer from knowledge derived from an examination of official documents in official custody purporting to be signed by said official. See *Rogers v. State*, 11 Tex. App. 608. By evidence thus acquired it has been held possible to prove the handwriting of county judge and clerk. *Willson v. Betts*, 4 Den. (N. Y.) 210.

Justices of the Peace and Their Official Clerks.—*Rogers v. Ritter*, 12 Wall. (U. S.) 317; *Sill v. Reese*, 47 Cal. 294; *Amherst Bank v. Root*, 2 Metc. (Mass.) 522; *Doe v. Roe*, 31 Ga. 593, 599.

Notary Public.—*Duncan v. Beard*, 2 N. & McC. (S. C.) 400.

Clerk in Land Office.—*Goddard v. Gloninger*, 5 Watts (Pa.) 209.

Surveyor General.—*Cantey v. Platt*, 2 McC. (S. C.) 260.

Surveyors and County Surveyors.—*Jackson v. Murray*, Auth. N. P. (N. Y.) 143; *Jones v. Huggins*, 1 Dev. Law (N. C.) 223; *Turnipseed v. Hawkins*, 1 McC. (S. C.) 272; *Goddard v. Gloninger*, 5 Watts (Pa.) 209, 214. But see *Lessee of Thomas v. Horlocker*, 1 Dall. (Pa.) 14.

Deputy Surveyors.—*Goddard v. Gloninger*, 5 Watts (Pa.) 209, 214; *Sweigart v. Richards*, 8 Pa. St. 436. But see *Vickroy v. Skelley*, 14 S. & R. (Pa.) 372.

Steward of a Manor.—*Tilman v. Tarver*, *Moody & Ryan* 141.

Church Rector.—*Taylor v. Cook*, 8 Price 650; *Jenkins v. Davies*, 10 Ad. & Ell. N. S. or Q.B. 314 (59 E. C. L.)

4. A chemist's certificate as to the quality of a drug may be proved to be genuine by witnesses who testify that a great number of such certificates had been received in the trade as genuine. *Baker v. Squier*, 1 Hun (N. Y.) 448.

upon his own knowledge of an official signature.¹ The genuineness of bank notes is determinable by those experienced in handling them.²

5. Competency of Witness.—(a) Amount and Proof of Knowledge—Weight of Testimony.—A witness who swears that he knows a party's handwriting is *prima facie* competent to testify in rela-

The signature of the agent of an express company to a receipt for goods is sufficiently proved by a witness who knew the agent and had seen a large number of receipts purporting to be signed by him for property delivered to other express companies. *Armstrong v. Fargo*, 8 Hun (N. Y.) 175.

An assistant appraiser in the custom house, through whose hands papers signed by the deputy collector pass in due course of business, may prove the deputy collector's signature. *Bank of the Commonwealth v. Mudgett*, 44 N. Y. 514, 523. And a custom house officer, through whose hands invoices have passed signed by A, with the certificate of a U. S. consul the signer was A, may prove A's signature. *Re 3109 Cases of Champagne*, 1 Ben. (U. S.) 241.

The signatures to a diploma may be proved by one who had received a diploma from the same institution with the same signatures. *Finch v. Gridley's Exrs.*, 25 Wend. (N. Y.) 466. Or had been employed to fill up the blanks in diplomas of same institution after they had been signed. *Com. v. Webster*, 5 Cush. (Mass.) 295, 301.

But the fact that witness has seen the signature of an accountant to an account filed, is not sufficient to render him competent to prove the accountant's signature. *Board of Trustees of Twp. v. Misenheimer*, 78 Ill. 22.

1. In a case where a paper with an official signature was offered in evidence, the official being no party to the suit, and proof of the official signature was necessary to make the paper competent evidence, it has been held that if the trial judge is acquainted with the signature of the officer, and is satisfied that the signature in question is genuine, that is sufficient *prima facie* evidence without other proof. *Brown et al. v. Lincoln*, 47 N. H. 468.

2. **Bank Notes.**—In an early case decided in 1820, a witness was held incompetent to testify as to the genuineness of a bank note, unless it was proved that the witness had passed a great many such notes, so as to have become an expert, or had passed them

so long prior to the action that they would have been returned if spurious. *State v. Allen*, 1 Hawk (N. C.) 6; s. c., 9 Am. Dec. 616.

In the above case the court evidently required that bank notes should be proved by proving the handwriting of the officers of the bank. Of course, such evidence would be admissible, if the witness proves that he knows the handwriting of said officials. *State v. Ravelin*, 1 D. Chip. (Vt.) 295; *State v. Stalmaker*, 2 Brev. (S. Car.) 1. The later cases in the same courts and the *consensus* of opinion in other courts have settled that familiarity with the notes of a bank makes one a competent witness to testify as to their genuineness, even though the witnesses have no other knowledge of the signatures of the officers, and do not personally know that the notes which passed through their hands have been redeemed. *U. S. v. Keen*, 1 McLean 429; *Corbett v. State*, 31 Ala. 329; *Johnson v. State*, 35 Ala. 370; *Kirksey v. Kirksey*, 41 Ala. 626; *Com. v. Riley*, *Thatch. Cr. C.* (Mass.) 67; *Com. v. Carey*, 2 Pick. (Mass.) 47; *Furber v. Hilliard*, 2 N. H. 480; *State v. Carr*, 5 N. H. 367; *Johnson v. People*, 4 Denio (N. Y.) 364; *Hess v. State*, 5 Ohio 1; *May v. State*, 14 Ohio 461; *State v. Harris*, 5 Ired. L. (N. C.) 287; *Com. v. Smith*, 6 S. & R. (Pa.) 567; see *Penna. Act of March 31, 1860*, (P. L. 284, § 55); *State v. Candler*, 3 Hawks. (S. C.) 393; *State v. Hooper*, 2 Bailey (S. C.) 37; *State v. Tutt*, 2 Bailey (S. Car.) 44; *State v. Anderson*, 2 Bailey (S. Car.) 565; *Allen v. State*, 3 Humph. (Tenn.) 367; *Martin v. Com.*, 2 Leigh (Va.) 745.

Even if the witness cannot testify as to the genuineness of the handwriting of the officers of the bank, he may testify as to the genuineness of the note, basing his opinion on the engraving, etc. *Johnson v. State*, 35 Ala. 370; *Johnson v. State*, 2 Carter (Ind.) 652; *Conrad v. Louisiana Bank*, 10 Mart. (La.) 700.

But the witness must be acquainted with genuine bills of the bank. Acquaintances with the descriptions or *fac similes* thereof published in Bank Reporters and Bank Directories is not

tion to it without stating the sources of his knowledge. He may be cross-examined as to the sources of his knowledge, but if he is not, it will be presumed that his knowledge is admitted.¹ The extent of the witness' knowledge may be inquired into, and goes to the weight of his testimony.² But the court may reject his testimony if he has no knowledge, or if the testimony is insufficient to establish the disputed fact.³

sufficient. *State v. Brown*, 4 R. I. 528.

1. *Goodhue v. Bartlett*, 5 McLean (U. S.) 186; *Henderson v. Bank at Montgomery*, 11 Ala. 855; *Arthur v. Arthur*, (Kan.) 17 Pac. Rep. 187; *Berryman v. Dahlgren*, 6 Rob. (La.) 189; *Smith v. Walton*, 8 Gill (Md.) 77; *Moody v. Rowell*, 17 Pick. (Mass.) 490; *Empire Manufacturing Co. of Grand Rapids v. Stuart*, 46 Mich. 482; *Bulen v. Granger*, (Mich.) 29 N. W. Rep. 718; *First National Bank of Omaha v. Lierman*, 5 Neb. 247; *Stevens v. Seibold*, 5 N. Y. St. Rep. 258; *Whittier v. Gould*, 8 Watts (Pa.) 485; *Pradiere v. De la Combe*, 2 Const. (S. Car.) 625; s. c., 3 Brev. (S. Car.) 481. To the contrary effect are *McCracken v. West*, 17 Ohio 16; *Pate v. People*, 8 Ill. 644.

So in a series of *North Carolina* cases it was held sufficient if witness swore that he was well acquainted with the party's handwriting. *Barwick v. Wood*, 3 Jones Law (N. Car.) 306; *Davis v. Higgins*, 91 N. C. 382; *Anderson v. Logan*, 99 N. C. 474.

But the witness must state that he is acquainted with the party's handwriting. To simply swear that the signature was his is insufficient. *Pate v. People*, 8 Ill. 644; *Watson v. McAllister*, 7 Mart. (La.) 368; *Boyle v. Colman*, 13 Barb. (N. Y.) 42; *Carrier v. Hampton*, 11 Ired. L. (N. Car.) 307; *Slaymaker v. Wilson*, 1 Pa. & W. (Pa.) 216; *Kinney v. Flynn*, 2 R. I. 319; *Mapes v. Leals' Heirs*, 27 Tex. 345; *Hann v. State*, 13 Texas Ct. of App. 383.

In one case a witness was allowed to testify when he swore that he did not know that he had seen the party write, but thought he had, that he was satisfied he had seen his writing and thought he knew it. *Fash v. Blake*, 38 Ill. 363.

2. The extent of the witness' knowledge goes to the weight of his testimony, and to his competency. *Moon's Admr. v. Crowder*, 72 Ala. 79, 88; *Sarvent v. Hesdra*, 5 Redf. (N. Y.) 47.

And all questions showing the extent of his knowledge are admissible if that knowledge is inquired into. *Bardin v. Stevenson*, 75 N. Y. 164; *Snell et al. v. Bray*, 56 Wis. 156.

The witness may be cross-examined as to the opportunities he had of examining the signature in dispute. *Herrick v. Swomley*, 56 Md. 439; and may be asked to state wherein the difference or resemblance between the signature in dispute and a genuine signature exists. *Winnie v. Tonsley*, 36 Hun. (N. Y.) 190; *Massey v. Farmers' National Bank of Virginia*, 104 Ill. 327; *State v. Hopkins*, 50 Vt. 316. But a witness testifying to the genuineness of a party's signature to a note cannot be asked if he would take it against the party's denial of the signature. *Bank of the Commonwealth v. Mudgett et al.*, 44 N. Y. 514. Nor can he be tested with other papers. See *infra*, note under 6. TESTIMONY OF WITNESSES, OPINION AND BELIEF, RIGHT TO REFRESH MEMORY, TESTING WITNESS, CORROBORATION OF WITNESS.

In the case of conflicting testimony the number of witnesses will not always control. *Long et al. v. Little et al.*, 119 Ill. 600; *Merchant's Will*, 1 Tuck. (N. Y.) 151, 168.

3. If the witness has no knowledge whatever, he may be rejected. *Allen v. State*, 3 Humph. (Tenn.) 367; *Sartor v. Bolinger*, 59 Tex. 411; *Guyette v. Town of Bolton*, 46 Vt. 228; *Arthur v. Arthur*, 38 Kan. 691.

And though a witness may be competent, the court may hold his evidence insufficient to prove a disputed fact. *Wade v. Broughton*, 3 V. & B. 172; *Brown v. Piatt*, 2 Cranch (U. S.) 253; *Bell v. Shields*, 19 N. J. Law 93; *Cook, Exr. of Smith v. Smith*, 30 N. J. Law 387; *Mapes v. Leal's Heirs*, 27 Tex. 345; *Robinson v. Amet*, 15 La. 262.

But it has been held that if one witness deposes positively to the handwriting of a party, that is sufficient to take the paper to the jury, however his testimony may be contradicted. *Krise v. Neason*, 66 Pa. St. 253. See *Magee*

(b) *Interest in Cause—When Knowledge was Acquired.*—Whether a witness incompetent to testify in a case on account of interest may yet prove handwriting, has been disputed,¹ but the witness' inability to read or write does not render him incompetent.² When a witness acquired his knowledge is, as a rule, immaterial, but if acquired in order to testify, the witness is incompetent.³

6. *Testimony of Witnesses.—Opinion and Belief—Right to Refresh Memory—Testing Witness—Corroboration of Witness.*—The witness may give his opinion as to the genuineness of the handwriting, though he has no belief on the subject,⁴ but his opinion

v. Osborn, 32 N. Y. 669; *Rev. v. Rob.* (N. Y.) 689; *Ballard v. Perry*, 28 Tex. 347.

By the Code of *Georgia*, § 3838, it is expressly provided that in proving handwriting "any witness is competent to testify as to his belief who will swear that he knows or would recognize the handwriting. The source of his knowledge is a question for investigation, and goes entirely to the credit and weight of his evidence." See *Bruce v. Crews*, 39 Ga. 544.

It would also appear that when the witness' sources of information are inquired into, the witness may be required to prove their genuineness. *Stevens v. Seibold*, 5 N. Y. St. Rep. 258; *Brigham v. Peters*, 1 Gray (67 Mass.) 139.

When a witness testified to a defendant's signature, without objection, and it subsequently appeared that he was not acquainted with the party's handwriting, a motion to direct a verdict for the defendant was *held* to have been properly denied in a case where subsequent testimony on part of both plaintiff and defendant abundantly proved the defendant's signature. *Bulen v. Granger*, (Mich.) 29 N. W. Rep. 718.

1. Although a witness may be disqualified from testifying as to transactions with a decedent, they have, nevertheless, been held competent to prove the decedent's handwriting, but not to prove the fact that he signed the paper or the contents of the paper if lost. *People v. Maxwell*, 64 N. C. 313; *Rush v. Steel*, 91 N. C. 226; *Hussey v. Kirkman*, 95 N. C. 63; and a party disqualified from interest was nevertheless *held* competent to prove handwriting in *Daniels v. Foster*, 26 Wis. 686.

But an interested witness was *held* incompetent to deny the genuineness of letters apparently written from him to the decedent in *Ford v. Holmes*, 61 Ga.

419. While the right of an interested witness to prove handwriting has been entirely denied in *Kirksey v. Kirksey*, 41 Ala. 626; *Rideout v. Newton*, 17 N. H. 71; *Truitt's Estate*, 10 Phila. (Pa.) 16; and by implication in *Robinson v. Robinson*, 20 S. Car. 567.

2. The fact that a witness who testifies from familiarity with party's signature cannot read or write, was *held* to go to the weight of his testimony, not to his competency, in *Foye v. Patch*, 132 Mass. 105.

3. When a witness acquired his familiarity with the party's handwriting is as a rule immaterial. But where A copies a paper purporting to be signed by B, and A is then ignorant of B's signature, if the paper was lost A cannot prove that it was genuine by subsequently acquired knowledge of B's handwriting. *Porter v. Wilson*, 13 Pa. St. 641; *Bruce's Admx. v. Crews*, 39 Ga. 544. See, also, *Abbott v. Coleman*, 22 Kan. 250; s. c., 31 Am. Rep. 186, and *State v. Shinborn*, 46 N. H. 497.

And a witness is incompetent if his knowledge was only acquired in order to testify. *Fitzwalter Peerage Case*, 10 Cl. & Fin. 193; *Doe dem. Mudd v. Suckermore*, 5 A. & E. 703 (31 E. C. L.); *Board of Trustees of Twp. v. Misenheimer*, 78 Ill. 22; *Snyder v. McKeever*, 10 Brad. (Ill.) 188; 7 *Tome v. Parkersburg Branch R. R. Co.*, 39 Md. 36; *Herrick et al. v. Swomley*, 56 Md. 439, 460; *Hynes v. McDermott*, 82 N. Y. 41; s. c., 37 Am. Rep. 538.

4. Whether a witness who testifies from familiarity with the party's signature must swear that he believes he can identify the party's handwriting has been questioned. In *Garrells v. Alexander*, 4 Esp. 37, a witness was *held* competent who *thought* the writing in question was the party's, but swore he had no *belief* on the subject. The

must be formed from the writings in dispute, and not from extrinsic circumstances.¹ The witness may refresh his memory by reference to the papers on which his knowledge is based.² Other papers not pertinent to the case may not be shown the witness to test his knowledge by requiring him to testify whether they are genuine or not, to be followed by positive proof as to their genuineness.³ And *it seems* that the witness may be corroborated

authority of this case was doubted in *Eagleton et al. v. Kingston*, 8 Vesey 438, 476. But in a later case such a witness was *held* competent. *Warren v. Anderson*, 8 Scott 384.

That a belief or at least an opinion is necessary is intimated in *Hopper, Admr. v. Ashley*, 15 Ala. 457, 466; *Foster v. Jenkins*, 30 Ga. 476; *Putnam v. Wadley*, 40 Ill. 346; *Salmon v. Feinour*, 6 Gill & J. (Md.) 60; *Smith v. Walton*, 8 Gill (Md.) 77; *Hoitt v. Moulton*, 21 N. H. 586; *Wiggin v. Plumer*, 31 N. H. 251; *Burnham v. Ayer*, 36 N. H. 182; *Johnson v. Daverne*, 19 Johns. (N. Y.) 134; *Carter v. Connell*, 1 Whart. (Pa.) 392; *Guyette v. Town of Bolton*, 46 Vt. 228; *Pepper v. Barnett*, 22 Gratt. (Va.) 405.

But the tendency of the courts, both English and American, is to admit the testimony, and allow this question to affect only the weight of it. *Lyon v. Lyman*, 9 Conn. 55; *Fash v. Blake*, 38 Ill. 363; *Massey v. Farmers' National Bank of Virginia*, 104 Ill. 327; *Haynes v. Thomas*, 7 Ind. 38; *Hopkins v. Meguire*, 35 Me. 78; *Com. v. Andrews*, 143 Mass. 23; *State v. Stair*, 87 Mo. 268; *Stevens v. Seibold*, 5 N. Y. St. Rep. 258; *Magee v. Osborn*, 32 N. Y. 669; *Rev. v. Rob. (N. Y.)* 689; *Watson v. Brewster*, 1 Pa. St. 381; *Shitler v. Bremer*, 23 Pa. St. 413; *Clark v. Freeman*, 25 Pa. St. 133; *Smyth v. Caswell*, 67 Tex. 567; *Chahoon v. Com.*, 20 Gratt. (Va.) 733. But see *Utica Ins. Co. v. Badger*, 3 Wend. (N. Y.) 102.

Under the *Louisiana* code it is necessary that the witness should declare they *know* the disputed signature to be the party's in question. But it has been *held* that if the witness states his belief that will be sufficient. *Bradford et al. v. Cooper*, 1 La. Ann. 325.

1. A witness must form his opinion from the writing in dispute, and not from extrinsic circumstances. *Mendes Da Costa v. Pym*, Peake's Add. N. P. C. 144; *Taylor v. Sutherland*, 24 Pa. St. 333. He must testify as to the genuineness of the writing and not as to the party's ability to write it.

Burress v. Com., 27 Gratt. (Va.) 934. He may, however, testify as to whether the party's handwriting had or had not changed. *Yates v. Waugh*, 1 Jones Law (N. Car.) 483; *State v. Henderson*, 29 W. Va. 147; *Armstrong v. Thurston*, 11 Md. 148.

2. A witness who proves himself to be acquainted with a party's handwriting in any of the above established ways, need not produce at the trial the papers on which his knowledge is based, but he may refer to those papers prior to the trial to refresh his memory, and may also produce them at the trial and compare them with the disputed paper. *Burr v. Harper*, 1 Holt. 120; *Hopkins v. Simmons*, 1 Cranch (U. S.) 250; *U. S. v. Larned*, 4 Cranch (U. S.) 312; *Clark v. Wyatt*, 15 Ind. 271; *Thomas v. State*, 103 Ind. 419; *Massey v. Farmers' National Bank of Virginia*, 104 Ill. 327; *Smith v. Walton*, 8 Gill (Md.) 77; *National Bank of Chester County v. Armstrong*, 66 Md. 113; *Worth v. McConnell*, 42 Mich. 473; *Bank of Pennsylvania v. Jacobs*, 1 P. & W. (Pa.) 161, 179; *McNair v. Com.*, 26 Pa. St. 388; *Redford's Admr. v. Peggy*, 6 Rand. (Va.) 316.

But he may not refer to papers in the case not hitherto seen by him, unless an expert. *Woodman v. Dana*, 52 Me. 9.

3. The doctrine in the text is supported by a long line of cases. *Doe dem. Perry v. Newton*, 5 A. & E. 514 (31 E. C. L.); *Griffits v. Avery*, 11 A. & E. 322 (39 E. C. L.); *Massey v. Farmers' National Bank of Virginia*, 104 Ill. 327; *Armstrong v. Thurston*, 11 Md. 148, 150; *Bacon v. Williams*, 13 Gray (Mass.) 525; *Howard v. Patrick*, 43 Mich. 121; *Rose v. First National Bank*, 91 Mo. 399; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Bank of the Commonwealth v. Mudgett*, 44 N. Y. 514, *affirming s. c.*, 45 Barb. (N. Y.) 663; *Fogg v. Dennis*, 3 Humph. (Tenn.) 47; *Pierce v. Northey*, 14 Wis. 9.

The admission of such a test was, however, *held* to be no sufficient ground for reversal in *Page v. Homans*, 14 Me.

by proof that the sources of his knowledge were genuine.¹

7. Comparison of Handwriting.—(a) *Definition.*—Comparison of handwriting, technically speaking, also called *presumptio ex scripto nunc viso*, is where a paper or papers are proved or admitted to be in a party's handwriting, and a witness entirely unacquainted with the party's handwriting, or the jury, is allowed to make a comparison by juxtaposition of the writing so proved or admitted, and the writing disputed.²

(b) *History*—*Roman Law*—*Code Napoleon*—*English Law.*—Comparison of handwriting thus defined, was admissible in the

478. See, also, *Kirksey v. Kirksey*, 41 Ala. 626. And such a test was allowed in a case where the witness denied the genuineness of a signature only because of a peculiarity in the way the signature was written. *Young v. Horner*, 2 M. & R. 536. Dr. Wharton, in his "Law of Evidence," (3d ed.) Vol. I. § 710, says: "There is little question that a witness may on cross-examination be tested by putting to him other writings, not admitted in evidence in the case, and asking him whether such writings are in the same hand with that in litigation. The tendency, also, is to hold that the test writings, if declared by the witness to be genuine, may be shown by the cross-examining party to be not genuine, and may be given to the jury for comparison." The doctrine in the text is, however, the one that results from the decisions.

1. When a witness testifies from familiarity derived from correspondence, it has been held that he may be corroborated by proof by a third party that the signature to the letters received by him were genuine. *Thomas v. State*, 103 Ind. 419. But see notes *supra*, under 4. (c) **PROOF OF GENUINENESS—BY WITNESSES WHO HAD CORRESPONDED WITH PARTY.**

2. Definition of Comparison of Handwriting.—"All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge." *Patteson, J.*, in *Doe dem. Mudd v. Suckermore*, 5 A. & E. 703, 730 (31 E. C. L.).

"Comparison of handwriting, a mode of deducing evidence of the authenticity of a written instrument by showing the likeness of the handwriting to that of another instrument proved to be

that of the party whom it is sought to establish as the author of the instrument in question. 1 Green. Ev. § 578;" *Bouv. Law Dic.* (15th ed.) p. 351. "In the cases which we have thus far stated the witness testifies from the knowledge of the handwriting of the party which he has, in some of the modes indicated, previously acquired. There is not in these cases, in any proper sense, a comparison of handwritings. By a comparison is meant an actual production and comparison of two or more instruments or signatures as a means of ascertaining whether they were written by the same person. It may be true, as stated by Prof. Greenleaf, that all evidence of handwriting, except where the witness saw the document written, is, in its nature, comparison. But this is not the meaning of the word in its strict and proper sense." *Donney, C. J.*, in *Burdick v. Hunt*, 43 Ind. 381, 386. "Comparison of handwriting is when other witnesses prove a paper to be in the handwriting of a party and the witness is desired to take the two papers in his hand, compare them, and say whether they are or are not the same handwriting. There the witness collects all his knowledge from comparison only; he knows nothing of himself; he has not seen the party write, nor held any correspondence with him." *Duncan, J.*, in *Com. v. Smith*, 6 S. & R. (Pa.) 568, 571.

"Now this [technical comparison of handwriting] is as distinct and separate a thing from that comparison which a witness called to testify to handwriting makes between the writing in question and the exemplar in his mind, as an external, visible, and tangible object is distinct from a mental impression or memory. It is the distinction between what is objective and what is subjective." *Woodward, J.*, in *Travis v. Brown*, 43 Pa. St. 9, 12.

Roman Law,¹ under the Code Napoleon,² in the English ecclesiastical courts,³

1. **Roman Law.**—"By the Roman law, the genuineness of a contested writing may be sustained by witnesses comparing such writing with other writings acknowledged to be genuine. Some fluctuation of opinion, however, was exhibited as to the writings to be taken as a basis for such comparison. It was first held, that in order to put a greater check on forgery, writings to be thus accepted must be either publicly registered, or should be attested by three witnesses. Subsequently it was declared that for the same purpose might be used private papers acknowledged by the writer, or deposited by him in public archives. The substantial result, however, finally reached, is, that to enable a writing to be adopted as a standard of comparison, it must be demonstrated to be genuine. It makes no matter what is the writing thus adopted. It may be, as Gensler remarks, "a love letter, or it may be a testament. If genuine, it may be received as a standard." Wharton on Evidence (3rd ed.), Vol. 1, § 711, citing Buchner, *De Probatione de Literarum Comparationem*, L. 20 ch. IV, 21. Nov. 49. Cap. 2. Gensler in Archiv. II. 330. Langenberg, Beweils, II, 653.

Handwriting is the subject of the 73rd novel of Justinian.

2. **French Law.**—"The French law is more precise. It defines, not only the persons who are to make the comparison, sworn *experts*, three in number, appointed by the court or agreed on by the parties, but the writings to be submitted to them. In the Code de Procedure Civile, Part. 1. l. 2. tit. 10, s. 200, are found the provisions on this latter point. The writings must either be of a public nature, such as signatures made before a notary, or judge, etc., or papers written and signed in some public capacity; or, if private writings, they must be admitted in the *cause*, by the party to whom they are attributed, to be of his own handwriting; a previous admission of them, or previous proof, will not make them admissible. These latter restrictions are evidently framed at once to secure the genuineness of the specimens, and to meet the inconvenience of contradictory testimony as to this point; but they do not tend to the production of writing in the most natural character, and in a great many cases put it in the

power of the party to exclude such from the comparison. Pothier, indeed, in his *Traite de la Procedure Civile*, Part 1, ch. 3, § 2, Art. 1, § 2, Oeur Posth. tom. III. p. 46 (ed. 1809), seems to consider private writings or signatures as practically forming no standard of comparison on this last ground. It is obvious in how many cases it would be impossible to produce writings of an individual answering to the description here given of public writings." Coleridge, J., in *Doe dem. Mudd v. Suckermore*, 5 A. & E. 703, (31 E. C. L.)

3. **Comparison in the English Ecclesiastical Courts.**—As early as the beginning of the eighteenth century the proof of handwriting by comparison was admissible in the English ecclesiastical courts. Any instruments, whether pertinent to the issue being tried or not, could, when duly proved, be made the basis of the comparison, but such instruments could only be proved by witnesses who had seen them written. Under existing laws such witnesses would be competent to testify directly as to the genuineness of the writing, but it seems they were not so competent at that time in the English ecclesiastical courts. It was for the judge to decide whether the instruments offered as the basis of the comparison were duly proved. He having decided that question in the affirmative, the comparison was then made by sworn comparitors whom he appointed to the number of four or six *e senioribus procuratoribus et peritioribus in arte scribendi*. 1 Oughton's *Ordo Judiciorum*, tit. 225, *De Comparatione Literarum*, etc., §§ 1, 2, 3, 10, 11, published in 1728. This mode of procedure has long been obsolete, and the tendency of the later decisions has been to limit the admissibility of this mode of proof. This is illustrated by a case decided in 1813, involving the genuineness of alterations in a will where the party denying their genuineness filed an allegation that upon an examination of the will by experts it appeared that the alterations were not in the handwriting of the person who wrote the will. The court directed this allegation to be reformed so as to read, "That upon an examination of the said will it appears that the words and letters of the alteration aforesaid are not of the

and, after a long controversy¹ and many conflicting decisions, in the common law courts,² was finally rendered competent testi-

handwriting of the person who wrote the will, but are in a feigned handwriting, and that the same is well known to persons skilled in handwriting." *Spear v. Bone*, cited by Coleridge, J., in *Doe dem. Mudd v. Suckermore*, 5 A. & E. 703 (31 E. C. L.). An allegation similar to this one as reformed was admitted in *Beaumont v. Perkins*, 1 Philim. 78 (1809). See *Machin v. Grindon*, 2 Addams 91, note *a* (1756); *Saph v. Atkinson et al.*, 1 Addams 162, 214, 216 (1822); *Robson v. Roche*, 2 Addams 53, 79 *et seq.* (1824).

1. **Objection to Comparison of Handwriting and the Answers Thereto.**—The objections to the admissibility of this species of proof have been (*a*), that illiterate jurors could not make the comparison. (*b*) The writings offered in evidence may be spurious or manufactured for the occasion. (*c*) Fraud may be practiced in the selection of the writings offered in evidence as specimens. (*d*) The other party may be surprised; he may not know what documents are to be produced, and therefore he may not be prepared to meet the inferences sought to be drawn from them. (*e*) The handwriting of a person may be changed by age, health, habits, state of mind, position, haste, penmanship, and writing materials. (*f*) The genuineness of the specimens of handwriting offered in evidence may be contested, and others successively introduced, to the infinite multiplication of collateral issues, and the subversion of justice.

The answers to these objections have been: (*a*) Jurors are now educated men. (*b*) The identity of the party who wrote the specimen with the party whose signature is in dispute must be proved. (*c*) It is not easy to make an unfair selection of specimens. Both parties are entitled to introduce specimens, and a knowledge of handwriting acquired for the purpose of testifying will not render witness competent. See 5. (b) **COMPETENCY OF WITNESS—INTEREST IN CAUSE—WHEN KNOWLEDGE WAS ACQUIRED.** (*d*) The party himself should not be surprised. He above all others should know what evidence might be introduced concerning his own signature. (*e*) He ought also to know all the changes in his own signature; and be able to prove and explain them. (*f*) The objection as to

collateral issues is usually met by making the court the judge of the genuineness of the standard. See 9. (d) **STANDARD OF COMPARISON. PROOF OF GENUINENESS. PROOF IS FOR THE COURT.** *Macomber v. Scott*, 10 Kan. 335, 342.

Patteson, J., says in *Doe dem. Mudd v. Suckermore*, 5 A. & E. 703: 31 E. C. L.: "There is an essential difference between casting our eye at the same moment on two objects placed before us in order to judge of their resemblance, and acquiring familiarity with a certain character of handwriting in order to judge afterwards whether a document bears that character. Mr. Starkie thinks the former a much more satisfactory method; but I cannot agree with his remark. An ingenious forger might counterfeit every line and angle so correctly that, to a common eye, no discrepancy should betray itself; and yet one who has an intimate knowledge of the individual might detect a striking difference in the general character of the handwriting, as twins may present no observable diversity to a stranger, and yet be distinguished at a glance by their parents. Besides, in taking a witness' opinion on such a point, an appeal seems to be made to his experience and skill, while the mere ocular comparison of two documents in juxtaposition looks like a mechanical proceeding, a mere act of measurement.

Lord Eldon, in *Eagleton v. Kingston*, 8 Ves. 438, 476, states a case where he was apparently a witness to a deed, and an expert was ready to swear that his signature was genuine, from a comparison of it with admitted signatures, while *Lord Eldon* himself could undertake to declare to a certainty that the signature was not his, having never attested a deed in his life.

The objections to technical comparison of hands applies mainly to the weight of the evidence. As is frequently said in the reported cases, if a witness who has once seen a party write, no matter how long since, is competent, as the consensus of the decisions determine, an expert, skilled in an examination of handwritings, ought to be allowed to testify, and the objections to his testimony ought to go to its weight and not to its competency.

2. **English Common Law Decisions.**—The first reported cases where hand-

writing was allowed to be proved by comparison are to be found in the State Trials. It is difficult to determine from the reports whether what is now known technically as comparison of hands was then admitted or not. But the act of parliament reversing the attainder of Algernon Sidney (Stat. 1 W. & M. Sess. 1 ch. 7, 1700, 1701) recites that he was unjustly convicted and attainted "without sufficient legal evidence of any treasons committed by him; there being at that time produced a paper found in the closet of the said Algernon, supposed to be his handwriting, which was not proved by the testimony of any one witness to be written by him; but the jury was directed to believe it by comparing it with other writings of the said Algernon." Sidney was tried before C. J. Jeffries in 1683. It does not appear in the report of the case (9 How. St. Trials 818; s. c., 3 Harg. St. Tr. 794) that the above recital is correct, but Jeffries is charged with falsifying these reports, and the memory of this atrocious trial was still fresh when the above act was passed. Further such evidence was admitted in 1684 in Hayes' Case, and there Jeffries himself says, "Comparison of hands was allowed for good proof in Sidney's case." See Hayes' Case, 10 How. St. Trials 312; s. c., 3 Harg. St. Trials 1067; Rex v. Crosby, 12 Mod. No. 72; The Seven Bishops' Case, 12 How. St. Tr. 183, 306.

But however that may be the above statute is, as is well said by Lord Denman, C. J.: "A legislative declaration, sanctioned, as we must believe, by Somers and the other great lawyers then in office, that comparison of hands, in the sense in which they understood it, was not a legitimate mode of judging of handwriting." Doe *dem.* Mudd v. Suckermore, 5 A. & E. 703 (31 E. C. L.)

In the civil courts it appears that in 1746 in a case where a parson's book was produced to prove a modus, the parson having been long dead, Lord Hardwicke allowed a witness, who had examined the parish books in which was the same parson's name, to swear to the similitude of the handwriting, because it was the best evidence in the nature of the thing, for the parish books were not in the plaintiff's power to produce. Buller's Nisi Prius, p. 236. In a similar case in 1770, evidence of entries made by the rector were offered in evidence for the jury to make the com-

parison, but rejected. Brookbard v. Woodley, Peake's N. P. C. No. 20, note a. This decision, however, is clearly overruled by the subsequent cases of Taylor v. Cook, 8 Price 650; and Jenkins v. Davies, 10 Ad. & El. N. S. (Q. B.) 314. (59 E. C. L.) where such proof by comparison was held to be admissible.

As early as 1792 the doctrine that ancient writings could be proved by comparison was laid down in Morewood v. Wood, 14 East 327, note a. which case was followed by Brune v. Rawlings, 7 East 279, 282; Tilman v. Tarver, Moody & Ryan 141; The Fitzwalter Peerage Case, 10 Cl. & Fin. 193, and the Crawford & Lindsay Peerage Case, 2 H. of L. C. 534, 557.

The right of the jury to make a comparison was denied by Lord Kenyon, in 1791, because many jurors could not read or write, and therefore could not make the comparison. MacFerson v. Thoytes, Peake's N. P. C. No. 20. He, however, allowed such a comparison by a literate jury in 1795. Allesbrook v. Roach, Peake's Add. N. P. C. 27; s. c., 1 Esp. 351. And the subsequent cases clearly established the right of the jury to make the comparison, but only with the papers properly in evidence in the case. Allport v. Meek, 4 Carr & Payne, 267 (19 E. C. L.); Griffith v. Williams, 1 Cromp. & Jer. 47; Solita v. Yarrow, 1 Moody & Rob. 133; Bromage v. Rice, 7 Carr. & Payne 548 (32 E. C. L.); and in a carefully considered case, Perry v. Newton, 1 N. & P. 1; s. c., 5 Ad. & El. 514 (31 E. C. L.)

But in one case, letters not otherwise evidence in the case, proved to have been written by the party whose handwriting was in question, and in which the defendant's name was spelled in a peculiar manner, were admitted to prove that the plaintiff wrote the paper which contained the defendant's name spelled with the same peculiarity. Brookes v. Tichborne, 5 Exch. 929.

As to expert testimony it was decided in an early case (1792) that an inspector of franks could testify that a writing was in a feigned hand, and also compare it with a paper, the handwriting of which was admitted. Revett v. Braham, 4 Term Rep. 497. The subsequent cases, however, held that the expert could testify as to whether the hand was feigned or not. Rex v. Cator 4 Esp. 117; Eagleton v. Kingston, 8 Vesey 438, 473, but could not make the comparison. Stanger v. Searle, 1 Esp.

mony by statute in England in 1854.¹

(c) *Law in California, Connecticut, Kansas, Maine, Massachusetts, Mississippi, New Hampshire, Ohio, Vermont and Virginia.*—Comparison of handwriting as thus defined is admissible in California, Connecticut, Kansas, Maine, Massachusetts, Mississippi, New Hampshire, Ohio, Vermont and Virginia.²

15; *Carey v. Pitt*, Peake's Add. N. P. C. 130; *Gurney v. Langlands*, 5 B. & Ald. 330 (7 E. C. L.); *Clermont v. Tullidge*, 4 Carr. & Payne, 1 (19 E. C. L.); *Doe dem. Mudd v. Suckermore*, 5 A. & E. 703 (31 E. C. L.); but see *Smith v. Sanisbury*, 5 Carr. & Payne 196 (24 E. C. L.)

1. The law was finally settled in 1854. by the statute of 17 and 18 Victoria ch. 125, § 27, which provides as follows: "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

And under this act it has been decided that the jury may also make a comparison of the disputed paper with any papers duly proved to be genuine, whether they are pertinent to the issue being tried or not. *Birch v. Ridgway*, 1 F. & F. 270; *Cresswell v. Jackson*, 2 F. & F. 24; and with writing made by the party at the trial in the course of his cross-examination. *Cobbett v. Kilminster*, 4 F. & F. 490. This act has also been held applicable to cases before the committee for privileges in the House of Lords. *The Shrewsbury Peerage*, 7 H. of L. Cas. 1, 15.

The genuineness of the document offered as a standard of comparison is a question for the judge, and not for the jury. His decision that the document is genuine may be reviewed by the appellate court. *Egan v. Cowan*, 30 Law Times 223. But objection to the admissibility of the document as a standard of comparison must be taken at the trial, or the appellate court will not review the question of its admissibility. *Hughes v. Lady Dinorben*, 32 Law Times 271.

2. *Admissibility of Comparison in the United States.*—That the jury may compare the disputed paper with any relevant or irrelevant writing, the genuineness of which has been duly proved, has been decided in *State v. Nettle-*

ton, 1 Root (Conn.) 308; *Lyon v. Lyman*, 9 Conn. 55; *Macomber v. Scott*, 10 Kans. 335; *Page v. Homans*, 14 Me. 482; *Hall v. Huse*, 10 Mass. 39; *Homer v. Wallis*, 11 Mass. 309; s. c., 6 Am. Dec. 169; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Moody v. Rowell*, 17 Pick. (Mass.) 490; s. c., 28 Am. Dec. 317; *Com. v. Andrews*, 143 Mass. 23; *Garvin v. State*, 52 Miss. 207, 209; *Murphy v. Hagerman*, *Wright (Ohio)* 293; *Gifford v. Ford*, 5 Vt. 532; *Adams v. Field*, 21 Vt. 256. And that such comparison may be made by experts has been decided in *State v. Brunson*, 1 Root (Conn.) 307; *Lyon v. Lyman*, 9 Conn. 55; *Macomber v. Scott*, 10 Kan. 335; *Withers v. Rowe*, 45 Me. 571; *Woodman v. Dana*, 52 Me. 9; *State v. Thompson*, (Me.) 13 At. Rep. 892; *Howland Will Case*, (Mass.) 4 Am. L. Rev. 625; *Moody v. Rowell*, 17 Pick. (Mass.) 490; s. c., 28 Am. Dec. 317; *Demeritt v. Randall*, 116 Mass. 331; *Wilson v. Beauchamp*, 50 Miss. 24; *Hicks v. Person*, 19 Ohio 427; *Calkins v. State*, 14 Ohio St. 222; *State v. Ward*, 39 Vt. 225; *Harriot et al. v. Sherwood et al.*, 82 Va. 1, overruling *Rowt's Admr. v. Kiles' Admr.*, 1 Leigh (Va.) 216.

In *California*, it has been decided that an expert cannot testify as to the genuineness of a disputed writing upon a comparison of a genuine writing with a press copy of the writing whose genuineness is disputed. *Spottiswood v. Weir*, 66 Cal. 525. The court in their opinion seem to intimate that if the original document had been produced, the comparison could have been made by the jury or by experts.

In *New Hampshire* the jury cannot determine the genuineness of a signature to a paper merely by comparing it with other signatures proved to be genuine. But when witnesses acquainted with the handwriting in question have testified, other signatures proved to be genuine may be submitted to the jury to corroborate or weaken their testimony. *Myers v. Toscan*, 3 N. H. 47. Note the similarity to the law of *Pennsylvania*, *infra*.

(d) *Law in Indiana, Michigan, Minnesota, Missouri, Texas, Utah, West Virginia and North Carolina.*—In Indiana,¹ Michigan,² Minnesota,³ Missouri,⁴

The jury may compare a disputed signature with others admitted or found by them to be genuine. *Carter v. Jackson*, 58 N. H. 156. Both experts and the jury were *held* competent to compare the disputed paper with other papers in the case admitted to be genuine, but irrelevant papers were *held* inadmissible for comparison, but after other evidence based on knowledge had been given, writings whose genuineness was not in dispute were admissible. *Bowman v. Sanborn*, 25 N. H. 87, quoted with approval in *Reed v. Spaulding*, 42 N. H. 114, 121; *State v. Shinborn*, 46 N. H. 497. And finally in a recent case the English statute was quoted with approval, the preceding cases were overruled, and it was *held* that experts could compare the disputed paper with the papers in the case, and also with other papers, introduced only for comparison whose genuineness was duly proved. *State v. Hastings*, 53 N. H. 452; *State v. Clark*, 54 N. H. 456.

It has, however, been *held* that a plaintiff in reply cannot offer specimens of his handwriting to prove by comparison that he did not write the note on which he has brought suit. *Keith v. Lothrop*, 10 Cush. (Mass.) 453; see also *Clay v. Alderson's Admr.*, 10 W. Va. 49. The comparison will be made by the court in case of trial without a jury or of a proceeding in equity. *Moody v. Rowell*, 17 Pick. (Mass.) 490; *Yeomans v. Petty*, 40 N. J. Eq. 495.

1. *Indiana Law.*—The decisions in *Indiana* are far from uniform, and it is impossible to make them reconcilable with each other under any general principle. It was early decided that papers not otherwise connected with the case are not admissible for the sole purpose of proving comparison. *Clark v. Wyatt*, 15 Ind. 27; *Shank v. Butsch*, 28 Ind. 19. But *Clark v. Wyatt*, 15 Ind. 27, was expressly overruled in *Chance v. Indianapolis and Westfield Gravel Road Co.*, 32 Ind. 472, and it was there decided that both jury and experts could make the comparison with papers conceded to be genuine already in case, and experts alone of papers not in case, if conceded to be genuine. This decision was followed in *Burdick v. Hunt*, 43 Ind. 381, and *Huston v. Schindler*, 46

Ind. 38. But in a criminal case where a writing had been admitted to be genuine by the defendant prior to the trial, it was *held* that it could not be submitted to an expert to make a comparison. *Jones v. State*, 60 Ind. 241. In a civil case an expert was allowed to make a comparison with an admitted signature in *Forgey et al. v. First National Bank of Cambridge City*, 66 Ind. 123; *Hazard v. Vickery*, 78 Ind. 64. Irrelevant papers are admissible only when the party *against whom they are sought to be used* admits them to be genuine. *Shorb v. Kinzie*, 80 Ind. 500. And in the latest case, an expert was allowed to compare an affidavit made by the defendant and filed in the case seeking a change of venue, with the disputed writing. *Thomas v. State*, 103 Ind. 419.

2. *Michigan Law.*—In *Michigan*, irrelevant papers have been held inadmissible for the sole purpose of comparison, but both the jury and experts can make a comparison between the disputed paper and other papers in evidence in the case for other purposes whose genuineness is not disputed. *Vinton v. Peck*, 14 Mich. 287; *Foster's Will*, 34 Mich. 21; *Worth v. McConnell*, 42 Mich. 473; *First National Bank v. Robert*, 41 Mich. 709; *People v. Parker*, (Mich.) 34 N. W. Rep. 720. But in a very recent case (1888) it was decided that where the genuineness of plaintiff's indorsement was in issue, documents foreign to the case, which he admitted on cross-examination, bore his signature, may go to the jury for the purpose of comparison. *Dietz v. Fourth National Bank*, (Mich.) 37 N. W. Rep. 220.

3. *Minnesota Law.*—In 1886 it was decided that upon the trial of an issue as to the genuineness of a certain handwriting, other instruments admitted to be genuine, but not otherwise relevant, may be received in evidence for the purpose of comparison of hands. *Morrison v. Porter et al.*, 35 Minn. 425.

4. *Missouri Law.*—In *Missouri*, irrelevant papers have also been *held* inadmissible, but both the jury and experts could make a comparison with papers in the case. *Dow's Exr. v. Spenny's Exr.*, 29 Mo. 386; *State v. Scott*, 45 Mo. 302; *State v. Clinton*, 67 Mo. 380; *State v. Tompkins*, 71 Mo. 613; *Springer v. Hall*, 83 Mo. 693. But

Texas,¹ Utah² and West Virginia,³ the tendency of the courts is to allow the jury and experts to compare the disputed paper with other papers in the case, whose genuineness is not denied, and also with such papers as the party concedes to be genuine, or which he is estopped to deny, while in North Carolina such comparison can be made by an expert, but no comparison by the jury is permitted.⁴

In two recent cases, the comparison has been extended to writings conceded to be genuine, or which the party is estopped to deny, or which belong to the witness who is acquainted with the handwriting in dispute. *Lachance v. Loeblein*, 15 Mo. App. 460 [1884]; *Rose v. First National Bank of Springfield*, 91 Mo. 399 [1886].

1. **Texas Law.**—Irrelevant papers are not admissible for the sole purpose of comparison. *Hanley v. Gandy*, 28 Tex. 211; *Matlock et al. v. Glover et al.*, 63 Tex. 231; *Smyth v. Caswell*, 67 Tex. 567. Both the jury and experts can compare papers already in case or such as party admits to be genuine or is estopped from denying. *Kennedy v. Uphaw et al.*, 64 Tex. 411; *Wagoner v. Rupy et al.*, 69 Tex. 700; *Smyth v. Caswell*, 67 Tex. 567. But comparison can only be made of papers found to be genuine or established by the most satisfactory proof. *Ebom v. Zimpelman*, 47 Tex. 503; *Phillips v. State*, 6 Tex. App. 364; *Hatch v. State*, 6 Tex. App. 384; *Walker v. State*, 14 Tex. App. 609; *Heacock v. State*, 13 Tex. App. 97; *Rogers v. State*, 11 Tex. App. 608; *Heard v. State*, 9 Tex. App. 1.

The criminal code of Texas provides that it is competent in every case to give evidence of handwriting by comparison made by experts or by jury; but proof by comparison only shall not be sufficient to establish the handwriting of a witness who denies his signature under oath. Notwithstanding the code, the value of expert testimony is feeble. *Jones v. State*, 7 Tex. App. 457; *Heacock v. State*, 13 Tex. App. 97. The expert cannot testify as to the ease with which a forgery could be committed. *Thomas v. State*, 18 Tex. App. 213. And in a criminal case the jury cannot take out with them the standards used by the experts for their own inspection and comparison. *Chester v. State*, 23 Tex. App. 577.

2. **Utah Law.**—The law of the territories ought to be that of the U. S. courts, but it has been decided in

Utah (1887) that in an action against the indorser on a promissory note testimony of experts who, since the commencement of the suit, have been given letters (admitted to have been written by the indorser,) to examine, to the effect that the signature to the letters is the same as that in the note, is admissible. *Durnell v. Sowden*, (Utah) 14 Pac. Rep. 335.

3. **West Virginia Law.**—An expert was held incompetent in a civil case, when called by the plaintiff, to prove that the handwriting of the body of a bond on which the suit was brought, and which the plaintiff had testified was in his handwriting, was not in the same handwriting as the signature to a receipt offered in evidence by the defendant, it not appearing that the defendant admitted that the bond was written by the plaintiff. *Clay v. Robinson, Admr.*, 7 W. Va. 348. And, on a subsequent trial of the same case, it was held that where a witness for the plaintiff testified without objection that the body of a receipt offered in evidence by the plaintiff was in said plaintiff's handwriting, and then plaintiff admitted that that was so, but defendant refused to admit it, an expert called by the plaintiff was incompetent to testify as to the genuineness of a disputed paper from a comparison between it and the said receipt. *Clay v. Alderson's Admr.*, 10 W. Va. 49.

In a criminal case the jury will not be permitted to receive the proved but not admitted signature of the person whose name is alleged to have been forged so as to compare the two signatures. Much less would it be proper to permit evidence to go to the jury by a witness that he had compared the alleged forged signature with one admitted to be genuine, and that they were exactly alike. *State v. Henderson*, 29 W. Va. 147.

4. **North Carolina Law.**—In North Carolina the jury cannot make a comparison even with the papers in the case. *Pope v. Askew*, 1 Ired. (N. C.) 16; *Outlaw v. Hurdle et al.*, 1 Jones

(c) *Law in Georgia, Iowa, Louisiana, New Jersey, New York and Wisconsin.*—Comparison of handwriting has been authorized by statute in Georgia,¹ Iowa,² Louisiana,³

(N. C.) 150; *Otey v. Hoyt*, Exr., 3 Jones (N. C.) 407. But an expert can make a comparison with other papers admittedly genuine, and otherwise in evidence. *Yates v. Yates*, 76 N. C. 142.

1. **Georgia Law.**—By § 3840 of the code of Georgia it is provided that "other writings, proved or acknowledged to be genuine, may be admitted in evidence for the purpose of comparison by the jury. Such other new papers, when intended to be introduced, shall be submitted to the opposite party before he announces himself ready for trial."

One competent witness testifying from knowledge, and another letter duly proved for comparison is sufficient evidence to prove genuineness. *Bogus v. The State*, 34 Ga. 275.

Writings are inadmissible unless submitted as required. *Georgia Masonic Mut. L. Ins. Co. v. Gibson*, 52 Ga. 640. But this requirement of submission may be waived. *Thomas v. The State*, 59 Ga. 784.

The court or jury may compare two documents together when properly in evidence, and from that comparison form a judgment upon the genuineness of the handwriting or the identity of the writers. *Doe dem. Henderson v. Roe et al.* 16 Ga. 521. But a witness unacquainted with the party's signature cannot make such comparison. *Piedmont & Arlington Life Ins. Co. v. Lester*, 59 Ga. 812.

2. **Iowa Law.**—By § 3655 of the code of Iowa it is provided that "evidence respecting handwriting may be given by comparison made by experts or by the jury with writings of the same person which are proved to be genuine."

The decision of the jury on all the evidence is binding. *Baker v. Mygatt*, 14 Iowa 131.

3. **In Louisiana** it was originally provided by the Civil Code that "in case the party disavows his signature, proof of it may be given under oath or affirmation by at least one credible witness declaring positively that he knows the signature as having seen the obligation signed by the person from whom payment is demanded, and if there be no such deposition, the signature of the person must be ascertained by two persons having skill

to judge of handwriting, appointed by the judge before whom the cause is pending, which two persons shall report on oath whether the signature appears to them to be that of the person whose it is alleged to be, on their having compared it with papers acknowledged to have been signed by him." Civil Code, p. 306, art. 226.

The provisions of the code must be strictly followed, and, therefore, it was held that the genuineness of a disputed signature could not be proved by a witness who had not seen the signature written, though he was acquainted with the party's handwriting. *Sauve v. Dawson*, 2 Martin (La.) 202. But after the testimony of the experts has been taken as required by the code, any other evidence contradicting or corroborating them is admissible. *Clark's Exrs. v. Cochran*, 3 Martin (La.) 353.

The experts appointed by the court must decide on comparison alone. They cannot receive other evidence. *Lecarpentier v. Delery*, 4 Martin (La.) 454. The papers with which the comparison is made must be duly proved. *Conrad v. Louisiana Bank*, 10 Martin (La.) 700. And there must be more than one paper on which to base the comparison. *Barfield v. Hewlett*, 6 Martin N. S. (La.) 78.

If the two experts disagree, the court has no power to appoint a third. *Barfield v. Hewlett*, 6 Martin N. S. (La.) 78. Though by consent of the parties a third acted in *Lecarpentier v. Delery's Exr.*, 4 Martin (La.) 454.

In a case where there was evidence that the signature had been admitted, and the court was not asked to appoint experts, the failure of the court to appoint them was held no ground of reversal in *City Bank of New Orleans v. Foucher*, 9 La. 405.

A new civil code was adopted, which provided, Art. 325, as follows: "Where the defendant denies his signature the plaintiff must prove its genuineness by witnesses who saw the defendant sign the act or who declare that they know it to be his signature because they have frequently seen him write and sign his name. But the proof by witnesses shall not exclude the proof by experts, or by a comparison of the

New Jersey,¹ New York²

writing as established in the Civil Code.³

The provisions of this code modify the former. It must be strictly followed, and, therefore, evidence that the party admitted his signature is inadmissible. *Plicque et al. v. Labranche et al.*, 9 La. 559.

It is sufficient if the witness testifies that he *believes*, though he does not *know*, the signature to be genuine. *Bradford et al. v. Cooper*, Admr., 1 La. Ann. 325.

A admitted his signature as acceptor of a bill, but denied his endorsement. A comparison of the two signatures was made by sworn experts, and *held* sufficient to prove genuineness in *Whitney v. Bunnell*, 8 La. Ann. 429.

The weight of the testimony introduced under the code is for the court on trial without a jury. *Fox v. McDonough*, 18 La. Ann. 419.

In criminal cases it has been decided that on the trial of an indictment for forgery, papers not otherwise in the case are not admissible to prove the handwriting of the accused by comparison. *Slate v. Fritz*, 23 La. Ann. 55. But on the trial of an indictment for bigamy, proof that certain letters were written by the defendant was made by comparison in *State v. Barrow*, 31 La. Ann. 691.

1. *New Jersey Law.*—The New Jersey statute of 1865 is as follows: "In all cases where the genuineness of any signature or writing is in dispute, comparison of the disputed signature or writing with any writing proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses, and such writings and the testimony of witnesses respecting the same may be submitted to the court or jury as evidence of the genuineness or otherwise of the signature or writing in dispute; provided, nevertheless, that where the handwriting of any person is sought to be disproved by comparison with other writings made by him, not admissible in evidence in the cause for any other purpose, such writings, before they can be compared with the signature or writing in dispute, must, if sought to be used before the court or jury by the party in whose handwriting they are, be proved to have been written before any dispute arose as to the genuineness of the signature or writing in controversy." *Rev. Stats.* 1877, p.

381, § 19. See *Yeomans v. Petty*, 40 N. J. Eq. 495.

2. In New York the question has been finally decided by a statute. Prior to the adoption of the statute numerous cases had arisen and the following principles had been established.

Expert testimony as to handwriting is inadmissible generally. *Titford v. Knott*, 2 Johns. Cas. 211; *Wilson v. Kirkland*, 5 Hill 182; *Merchant's Will*, 1 Tucker, 152; *Frank v. Chem. Nat. Bank*, 37 N. Y. Sup. Ct. (5 J. & S.) 26.

It was at first denied that the disputed paper could be compared by the jury with other admittedly genuine papers already in evidence in the case. *Titford v. Knott*, 2 Johns. Cas. 211; *Jackson v. Phillips*, 9 Cowen 94. But the later decisions clearly established the right of the jury to make such comparison. *Ellis v. The People*, 21 How. Pr. 356; *Pontius v. The People*, 82 N. Y. 339, affirming s. c. 21 Hun 328. And it was also thoroughly established that such comparison could be made by experts. *Rogers Admr. v. Shaler*, Anth. N. P. 149; *Dubois v. Baker*, 30 N. Y. 355; affirming s. c., 40 Barb. 556; *Goodyear v. Vosburgh*, 63 Barb. 154; *Pontius v. The People*, 82 N. Y. 339; affirming s. c., 21 Hun 328. And in case of a reference by the referee himself. *Hunt v. Lawless*, 7 Abb. N. C. 113. But a witness not an expert was *held* incompetent to make such a comparison in *Ellis v. The People*, 21 How. Pr. 356. And since the defendant's denial would be the best evidence, it was *held* that without such prior testimony a witness was incompetent to testify whether the writing was or was not genuine. *Cheritree v. Roggen*, 67 Barb. (N. Y.) 124; (see cases to the contrary, note *supra*).

But papers not otherwise evidence in the case may not be introduced for the sole purpose of making a comparison between them and the disputed paper. Neither the jury nor experts can make such a comparison. *Haskins v. Stuyvesant*, Anth. N. P. 133; *Hoyt, Admr. v. Stuart*, Exr. 3 Bosw. 447; *Merchant's Will*, 1 Tuck. 152; *Morey v. Safe Deposit Company of New York*, 34 N. Y. Sup. Ct. (2 J. & S.) 154; *Glover v. The Mayor*, 7 Hun 232; *Van Wyck v. McIntosh*, 14 N. Y. 439. Even though the papers so offered were admittedly genuine. *Randolph v. Loughlin*, 48 N. Y. 456; *Gilbert v. Simpson*, 6 Daly

and Wisconsin;¹ and in trial of criminal cases only in Pennsylvania² and Texas.³

(f) *Law in Alabama, Arkansas, Colorado, Delaware, Illinois, Kentucky, Maryland, Montana, Nebraska, New Mexico, Tennessee and United States Courts.*—In Alabama, Arkansas, Colorado, Delaware, Illinois, Kentucky, Maryland, Montana, Nebraska, New Mexico and Tennessee, any papers, properly in evidence in the case,⁴ may be compared by the jury, though irrelevant papers are

29; *Hynes v. McDermott*, 9 Daly 4; affirmed in s. c., 82 N. Y. 42; s. c., 37 Am. Rep. 538. But questions to a witness tending to prove that the note in suit was in the handwriting of the defendant who denies his signature thereto are admissible, even though it lead to a comparison by the jury of the signature and the body of the note. *Haughey, Admx. v. Wright et al.*, 12 Hun 179. And writing made by the party himself while on the stand may be put in evidence as a standard of comparison. *Bronner v. Loomis*, 14 Hun 341: But it is too late to object in the appellate court that papers put in evidence in the case, and used as standards of comparison, were irrelevant to the case, and only in evidence for that purpose. *Miles v. Loomis et al.*, 75 N. Y. 288.

In indictment for forgery comparison was admitted so far as to state if a hand was or was not simulated. *The People v. Hewit*, 2 Park. C. C. (N. Y.) 20; *contra*, *People v. Spooner*, 1 Denio 343.

The act of February 28, 1880, in New York, reads as follows: "Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." Laws 1880, ch. 36. The proof of genuineness is addressed to the court and error cannot be alleged in respect thereto. And if the standard is offered and the party whose signature it is alleged to be is present and does not demand proof of its genuineness, there is no error in admitting it without such proof. *Hall v. Van Vrankin*, 64 How. Pr. 407; s. c., 28 Hun 403.

The act only provides for the admission of papers proved to be signed by the person whose signature is denied. Therefore the act does not

authorize admission of writings, though duly proved, made by the person alleged to have forged the disputed paper. *Peck v. Callaghan*, 95 N. Y. 73.

Under the act, the expert may give his reasons for this opinion. *Winnie v. Tousley*, 36 Hun 190.

But the witness must be proved to be an expert, as only experts are allowed to testify. *McKay v. Lasher*, 42 Hun 270.

1. *Wisconsin Law.*—By the act of March 29, 1881, it is provided in Wisconsin that "Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." Laws of Wisconsin, 1881, p. 270.

Prior to the adoption of this statute, it had been decided in Wisconsin that irrelevant papers were inadmissible for the purposes of comparison, though both the jury and experts could compare the disputed paper with other papers already in the case. *Hazleton, Admr. v. Union Bank of Columbus*, 32 Wis. 34; *State v. Miller*, 47 Wis. 530. And that experts could compare the disputed paper with papers signed by the party and made part of the record of a former trial of a case, and treated by both parties as in evidence on the trial in question. *Smith v. Elmer*, 47 Wis. 479.

2. See *supra*, 7. COMPARISON OF HANDWRITING (g).

3. See *supra*, 7. COMPARISON OF HANDWRITING (d).

4. Prior to 1880, this was the law in New York and it was decided there that where a paper had been offered in evidence without objection and received in evidence, it cannot be objected in the appellate court that the paper was inadmissible for any other

inadmissible for the sole purpose of comparison.¹ This is the rule in the United States Supreme Court; but the decisions in the other United States courts are not uniform.² It is not clearly

purpose than comparison. It was queried whether the objection could then be taken, even if the party admitted that the paper was only put in evidence for the purpose of making the comparison. *Miles v. Loomis et al.*, 75 N. Y. 288.

1. In some of the earlier of the cases hereinafter cited there were intimations to the effect that this comparison could only be made when there was other evidence in the case, but this distinction has been abandoned, and now, in the States named, any papers properly in evidence in the case for other purposes, or a part of the record, the genuineness of the writing thereof not being disputed, may be compared by the jury with the disputed writing; but no papers, otherwise irrelevant to the case, may be introduced in evidence for the sole purpose of comparison, even though their genuineness be admitted or duly proved. *Little v. Beazley*, 2 Ala. 703; the *State v. Givens*, 5 Ala. 747; *Crist v. State*, 21 Ala. 137; *Bishop v. State*, 30 Ala. 34; *Kirksey v. Kirksey*, 41 Ala. 626; *Bestor v. Roberts*, 58 Ala. 331; *Moon's Admr. v. Crowder*, 72 Ala. 79; *Snider v. Burks*, (Ala.) 4 S. W. Rep. 225; *Miller v. Jones*, 32 Ark. 337; *Wilber et al. v. Eicholtz*, 5 Colo. 240; *McCafferty v. Heritage*, 5 Houst. (Del.) 220; *Jumperty v. People*, 21 Ill. 375; *Brobston v. Cahill*, 64 Ill. 356; *Snow v. Wiggan*, 19 Bradw. (Ill.) 542; *Woodard v. Spiller*, 1 Dana (Ky.) 180; s. c., 25 Am. Dec. 139; *McAllister v. McAllister*, 7 B. Mon. (Ky.) 269; *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257, 267; *Armstrong v. Thurston*, 11 Md. 148; *Williams v. Drexel*, 14 Md. 566; *Niller v. Johnson*, 27 Md. 6; *Davis v. Fredericks*, 3 Mon. 262; *Staab et al. v. Jaramillo*, (N. Mex.) 1 Pac. Rep. 170, 171; *First National Bank of Omaha v. Lierman*, 5 Neb. 247; *Clark v. Rhodes*, Admr. 2 Helsk. (Tenn.) 206; *Wright v. Hessey*, 3 Baxt. (Tenn.) 42. It has, however, been decided that if the parties consent, signatures admittedly genuine may be given the jury for comparison with the disputed paper. *Kannon v. Galloway*, 2 Baxt. (Tenn.) 230.

2. In the courts of the United States there has been some disagreement upon

the admissibility of evidence by comparison of hands.

Supreme Court.—In the Supreme Court of the United States in 1832, the testimony of witnesses unacquainted with the party's handwriting, but testifying from comparison alone, was held to be inadmissible except to prove ancient writings. *Strother v. Lucas*, 6 Peters (U. S.) 763. But in a comparatively recent case it was decided that if a paper admitted to be in party's handwriting is in evidence for some other purpose in the cause, the jury may compare it with the disputed paper. *Moore v. U. S.*, 91 U. S. 270.

Circuit and District Courts.—The decisions in these courts are not uniform.

In the First Circuit, the jury were allowed to make a comparison with papers proved to be genuine, and offered in evidence only for that purpose. *Smith v. Fenner*, 1 Gall. (U. S.) 170 (1812).

In the Second Circuit, comparison both by jury and experts has been held admissible, and with any paper duly proved as a basis of comparison. *U. S. v. Chamberlain*, 12 Blatchf. (C. C.) 390 (1874).

But in a later case this was denied, and it was held that comparison by jury of writings lawfully in evidence for some other purpose is alone admissible. *U. S. v. Jones*, 10 Fed. Rep. 469 (1882).

In the Third Circuit, experts cannot prove handwriting by comparison either in civil or criminal cases. *Muriati v. Luciani*, 1 Bald. 49; *Martin v. Taylor*, 1 Wash. (C. C.) 1, 3; *U. S. v. Craig*, 4 *Id.* 729. But the jury may make comparisons with papers in evidence in the case for other purposes. *Turner v. Hand*, 3 Wall. Jr., (U. S.) 88, 115.

In the Fourth Circuit, the rule laid down in *Moore v. U. S.*, 91 U. S. 270, *supra*, was adopted in *U. S. v. McMillan*, 29 Fed. Rep. 247.

In the Eighth Circuit, comparison both by jury and by experts is admissible. *U. S. v. Molloy*, 31 Fed. Rep. 19; *U. S. v. Pendergast*, 32 Fed. Rep. 198.

Court of Claims.—This court made a comparison of a disputed paper with the original petition in the case veri-

determined whether in these jurisdictions experts may or may not testify.¹

(g) *Law in Pennsylvania, South Carolina and Rhode Island.*—In Pennsylvania²

fied by claimant and admittedly signed by him in *Medway v. U. S.*, 6 Ct. of Cl. 421; *Blewett v. U. S.*, 10 Ct. of Cl. 235; and their right so to do was sustained by the supreme court in *Moore v. U. S.*, 91 U. S. 270.

District of Columbia—Supreme Court.—In an equity case, expert testimony was admitted to prove that a signature was not genuine. The court decided it was genuine, and said as to the expert testimony: "Of all kinds of evidence admitted in a court, this is the most unsatisfactory. It is so weak and deceptible as scarcely to deserve a place in our system of jurisprudence." *Cowan v. Beall*, 1 MacArthur 270.

District of Columbia—Circuit Court.—Handwriting was proved by comparison of the disputed signature with the signature of the same party to a bail bond filed in the case. *Dunlop v. Silver*, 1 Cr. (C. C.) 27. Comparison of handwriting was allowed to prove publication of a libel in *Brooke v. Peyton*, 1 Cr. (C. C.) 96. But comparison of the disputed signature with a power of attorney filed in the case was not allowed where the genuineness of the power of attorney was not proved. *Shannon v. Fox*, 1 Cr. (C. C.) 133. Nor with a receipt under similar circumstances in *Macubbin v. Lovell*, 1 Cr. (C. C.) 184. And comparison by experts has been expressly rejected in *Turner v. Foxall*, 2 Cr. (C. C.) 324; *Elliot v. Hayman*, 2 *Id.* 678; *U. S. v. Prout*, 4 *Id.* 301. For comparison with the disputed paper, *Kannon v. Galloway*, 2 Baxt. (Tenn.) 230.

1. It has been expressly decided in several of these States that expert testimony is wholly inadmissible, even when the expert testifies from a comparison of the disputed paper with other papers already in the case. *Kernin v. Hill*, 37 Ill. 209; *Snyder v. McKeever*, 10 Bradw. (Ill.) 188; *Glitchell v. Ryan*, 24 App. (Ill.) 372; *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257, 264; *Daniel v. Toney*, 2 Metc. (Ky.) 523; *Fee v. Taylor*, 83 Ky. 259; (the case of *Northern Bank v. Buford*, 1 Duv. (Ky.), is to the contrary, but it is clearly overruled;) *Smith v. Walton*, 8 Gill (Md.) 77, 85; *Tome v. Parkersburg Branch R. R. Co.*, 39 Md. 37; *Herrick*

et al. v. Swomley, 56 Md. 439, 460; *Davis v. Fredericks*, 3 Mon. (Ky.) 262.

It has, however, been intimated that expert testimony in such cases is admissible in *Moon's Admr. v. Crowder*, 72 Ala. 79; *Wilber et al. v. Eicholtz*, 5 Colo. 240, and *First National Bank of Omaha v. Lierman*, 5 Neb. 247. See, also, *U. S. v. Chamberlain*, 12 Blatchf. (U. S.) 390; *U. S. v. Molloy*, 31 Fed. Rep. 19; *U. S. v. Pendergast*, 32 Fed. Rep. 198; *Cowan v. Beall*, 1 MacArthur. (D. C.) 270.

2. **Pennsylvania Law.**—In an early case, in an action for libel, a comparison of types, devices, etc., of two newspapers, one of which was proved clearly, and the other imperfectly, was held to have been properly made by the jury to determine whether both were printed by the same person, on the same principle that evidence from comparison of handwriting, supported by other circumstances, is admissible. *McCorkle v. Binns*, 5 Binn (Pa.) 340. And a long line of cases in that State has established the principle that in all cases where there is evidence to support the disputed fact as to whether the handwriting in question is or is not genuine, the party may introduce other papers, and admit or prove their genuineness, for the sole purpose of a comparison by the jury; but such comparison is inadmissible as proof independent of such prior evidence. *Farmers' Bank of Lancaster v. Whitehill*, 10 S. & R. 110; *Callan v. Gaylord*, 3 Watts 321; *Guffey v. Deeds*, 29 Pa. St. 378; *Haycock et al., Admrs. v. Greup*, 57 Pa. St. 438; *Burkholder's Exr. v. Plank*, 69 Pa. St. 225; *Udderzook v. Com.*, 76 Pa. St. 340; *Ballentine v. White*, 77 Pa. St. 20; *Aumick v. Mitchell*, 82 Pa. St. 211; *Berryhill v. Kirchner*, 96 Pa. St. 489.

To authorize the admission of the writing offered as a test or standard, nothing short of evidence by a person who saw the party write the paper, or of an admission by such party of its being genuine or evidence of equal certainty, is sufficient. *Baker v. Haines*, 6 Whart. (Pa.) 284; *Depue v. Place*, 7 Pa. St. 428; *Cohen v. Teller*, 93 Pa. St. 123.

A comparison between the disputed and genuine writing cannot be made by witnesses unacquainted with the party's

and South Carolina,¹ in all cases where there is conflicting direct evidence, then only the jury may make a comparison with any papers duly proved, and expert testimony is also admissible to a limited extent. While, in Rhode Island, it would appear that no comparison whatever is admissible.²

8. Expert.—(a) *Who is an Expert.*—There is no rule of law fixing the precise amount of experience or degree of skill necessary to constitute an expert. The witness need not be engaged in any particular business, or claim to be a professional expert. He

writing. *O'Connor v. Layton*, 2 Am. L. Reg. (Pa.) 120; *Lodge v. Phipper*, 11 S. & R. 333; *Bank of Pennsylvania v. Jacobs*, 1 P. & W. 161, 180; *Power v. Frick*, 2 Grant's Cas. (Pa.) 306; *Philadelphia & West Chester R. R. Co. v. Hickman*, 28 Pa. St. 318; *Clayton v. Siebert*, 3 Brews. 176.

It would seem, however, that experts can testify in Pennsylvania as to their opinion whether a signature was feigned and imitated or natural and genuine. *Travis v. Brown*, 43 Pa. St. 9, 18; *Burkholder's Exrs. v. Plank*, 69 Pa. St. 225, 229. Also, whether an instrument was written by the same hand, with the same pen and ink and at the same time. *Fulton v. Hood*, 34 Pa. St. 365. And as to alterations and erasure. *Ballentine v. White*, 77 Pa. St. 20, 22. The dictum in *Guffey v. Deeds*, 29 Pa. St. 378, that "The parties are entitled to call experts, examined and approved as such by the court, and get them to aid the jury in the comparison, by giving their opinion as witnesses," is not supported by the preceding or subsequent cases.

A witness, however, who is acquainted with the party's handwriting may refresh his memory before testifying by referring to the sources of his information. *Bank of Pennsylvania v. Jacobs*, 1 P. & W. (Pa.) 161, 179; *McNair v. Com.*, 26 Pa. St. 388.

By the act of March 31, 1860, § 55 (P. L. 284), in Pennsylvania it is provided that "Upon the trial of any indictment for making or passing, and uttering any false, forged or counterfeited coin, or bank note, the court may receive in evidence, to establish either the genuineness or falsity of such coin or note, the oaths or affirmations of witnesses who may, by experience and habit, have become expert in judging of the genuineness or otherwise of such coin or paper, and such testimony may be submitted to the jury, without first requiring proof of the handwriting or

the other tests of genuineness, as the case may be, which have been heretofore required by law."

1. South Carolina Law.—In South Carolina, when there is conflicting evidence as to the genuineness of a signature, signatures admitted or duly proved may be sent to the jury to compare with the disputed signature as confirmatory evidence. *Robertson & Co. v. Miller*, 1 McMull (S. Car.) 120; *Boman's Admr. v. Plunkett*, 2 McCord (S. Car.) 518. But such comparison is not admissible as independent proof. *Richardson v. Johnson*, 3 Brev. (S. Car.) 51.

And in such case of conflicting evidence, it has been held that experts could make comparison between the disputed writing and other writings admitted to be genuine and already in the case. *Bennett v. Mathews*, 5 S. Car. 478; *Graham v. Nesmith*, 24 S. Car. 285. And the experts need not be professional experts. The intelligence, skill and experience of the witness goes to the weight of his testimony, not to his competency. *Benedict, Hall & Co. v. Flanigan*, 18 S. Car. 506.

Whether the direct evidence is or is not so conflicting and doubtful as to justify the admission of comparison of handwritings is a question for the trial judge, and his ruling will not be disturbed unless error is very patent. *Benedict, Hall & Co. v. Flanigan*, 18 S. Car. 506; *Graham v. Nesmith*, 24 S. Car. 285, 296.

2. Rhode Island Law.—A witness will not be allowed to prove genuineness of a signature from a comparison of handwriting, but must testify from a knowledge previously acquired, either by having seen the person whose signature is questioned, write, or by familiarity with and examination of writings admitted to be his, so as to be able to speak from the correspondence of the signature with an exemplar existing in the mind. *Kinney v. Flynn*, 2 R. I. 319.

must, however, claim to have experience.¹ With that limitation, attorneys at law, bank officers, book-keepers, business men, conveyancers, county officials, photographers, treasurer and clerk of railroad and writing teachers have all been *held* competent to testify as expert.² And *it seems* that experience with handwriting gener-

1. **Who are Experts.**—In Bouvier's Law Dictionary (15th ed.), page 633, experts are defined to be "Persons selected by the court or parties in a cause, on account of their knowledge or skill, to examine, estimate and ascertain things and make a report of their opinions. Witnesses who are admitted to testify from a peculiar knowledge of some art or science, a knowledge of which is requisite or of value in settling the point at issue."

"There is no rule of law fixing the precise amount of experience or degree of skill necessary to constitute an expert. All that is open to inquiry and proof at the trial. The judge must in the first instance pass upon the admissibility of the witness; and then, if admitted, the jury judge of the weight and credit to be given to the testimony." Wells, J., in *Com. v. Williams*, 105 Mass. 62.

"The greatest number of those who give you an opinion upon the signature, think it that of the defendant, but counsel claim that the superior skill and opportunity of the witnesses for the defendant entitle them to the most weight; and, particularly that the experience acquired by the cashier of the bank enables him to judge, with the greatest certainty, of handwriting. It is true, that the experience and practice in judging of writing as well as experience and practice in anything else, will enable a witness more readily to form an opinion upon the subject of his experience, but the knowledge is not confined to particular stations; any person may acquire it." *Murphy v. Hagerman*, Wright (Ohio) 293, 297.

"They are not the less experts because they did not profess to know the precise meaning of the word expert, or because they had not been in situations where their duty required them to distinguish between genuine and counterfeit handwriting. When handwriting is a subject of controversy in judicial proceedings, witnesses, who, by study, occupation and habit have been skillful in marking and distinguishing the characteristics of handwriting, are allowed to compare that in question with other writings, which are admitted

or fully proved to have come from the party, and to give opinions formed from such comparisons." *Tenney, J., in Sweetser v. Lowell*, 33 Me., 446, 450. See *Hyde v. Woolfolk*, 1 Iowa 159.

"A witness was offered to prove that Gould's note was not written with the same ink with the note in suit. He was shown to have been a writing-master and book-keeper of considerable experience, but was rejected because it had not been shown he was an expert in regard to color. We think any experience in using pen and ink would qualify a person of ordinary capacity to form an admissible opinion, concerning such identity, although it might be of very small weight under doubtful circumstances. It stands upon the same footing with other inquiries concerning handwriting." *Campbell, J., in Vinton v. Peck*, 14 Mich. 287, 296.

"The rule is that mere opportunity afforded for observation will not constitute one an expert, or render his mere opinion admissible as evidence; he must have been educated in the business about which he testifies; or it must be shown that he has acquired actual skill and scientific knowledge upon the subject." *Per curiam, Goldstein v. Black*, 50 Cal. 462, 465. See, also, *Page v. Homans*, 14 Me. 478.

See an article on Expert Testimony, Scientific Testimony in the examination of written documents, illustrated by the Whittaker Case, etc. 21 Am. Law Reg. 425, 489.

2. **Who are Experts.**—The following have been *held* competent to testify as experts, they having professed some skill or experience with handwriting.

See, also, EXPERT AND OPINION EVIDENCE.

Attorneys at Law.—*Hyde v. Woolfolk et al.*, 1 Iowa 159; *Eisfield & Co. v. Dill et al.*, 71 Iowa 442; *State v. Phair*, 48 Vt. 366. *Contra*, where the attorney showed no special experience and did not claim to be able to give an opinion upon which any great reliance could be placed. *Ellingwood v. Bragg*, 52 N. H. 488.

Bank Officers—Cashiers.—*Lyon v. Lymon*, 9 Conn. 55; *Stone v. Hubbard*, 7 Cush. (Mass.) 597; *Dubois v. Baker*,

ally or specially will enable the witness to testify especially or generally thereto.¹

(b) *Proof that Witness is an Expert.*—The witness must claim to have had experience, and experience will not necessarily be presumed.² Any evidence bearing on his competency is admissible, and the question of his competency is for the trial judge, and his decision will not be reviewed in error, and the competency

30 N. Y. 355; affirming s. c., 40 Barb. 556; *Walker v. State*, 14 Tex. App. 609, 616; *Kennedy v. Upshaw*, 66 Tex. 442, 446. Tellers.—*Speiden v. State*, 3 Tex. App. 156. Officer whose business it was to examine papers with a view of detecting alterations and erasures and ascertaining spurious from genuine. *Pate v. People*, 8 Ill. (3 Gill.) 644. But the testimony of a bank cashier is not entitled to any more credit than that of another person of equal skill. *Murphy v. Hagerman*, Wright (Ohio) 293.

Book-keeper.—*Vinton v. Peck*, 14 Mich. 287; *State v. Ward*, 39 Vt. 225; *Kennedy v. Upshaw et al.*, 6 Tex. 442, 446.

Business Men—with large correspondence. *Hyde v. Woolfolk*, 1 Iowa 159; *Ort v. Fowler*, 31 Kan. 478; *Kennedy v. Upshaw*, 66 Tex. 442, 446.

Conveyancers.—*Vinton v. Peck*, 14 Mich. 287.

County Officials.—County Auditor—*Eisfield & Co. v. Dill et al.*, 71 Iowa 442. County Clerk, Clerk of Courts—*Winch v. Norman*, 65 Iowa 186; *Kennedy v. Upshaw et al.*, 66 Tex. 442, 446; *State v. Phair*, 48 Vt. 366. County Treasurer—*Ort v. Fowler*, 31 Kan. 478. Justice of the Peace, Tax Assessor—*Kennedy v. Upshaw et al.*, 66 Tex. 442, 446.

Photographer.—Accustomed to examine handwritings with a view to detect forgeries. *Marcy v. Barnes*, 16 Gray (Mass.) 161. See *Bacon v. Williams et al.*, 13 Gray (Mass.) 525.

Treasurer and Clerk of Railroad.—Accustomed to examine signatures to transfers of stock and bank notes. *Wither v. Rowe*, 45 Me. 571.

Writing Teacher.—*Eisfield & Co. v. Dill et al.*, 71 Iowa 442; *Bacon v. Williams*, 13 Gray (Mass.) 525; *Moody v. Rowell*, 17 Pick. (Mass.) 490; s. c., 28 Am. Dec. 317; *Vinton v. Peck*, 14 Mich. 287.

1. It has been held that a witness competent to testify as to the genuineness of a writing, is not competent to

testify as to the age of the writing unless experienced also in that respect. *Clark v. Bruce Exrs.*, 12 Hun (N. Y.) 271. Such a question was held not to be a question for expert testimony in *Cheney v. Dunlap*, 20 Neb. 265; but a contrary conclusion was reached, and persons familiar with writings who thought they could give an opinion as to age were allowed to testify in *Eisfield v. Dill*, 71 Iowa 442.

Experience in the comparison of promissory notes for the purpose of determining the genuineness of the signature, renders one competent to say whether two letters are in the same handwriting. *Com. v. Williams*, 105 Mass. 62.

2. *Proof that Witness is an Expert.*—Generally speaking the witness must claim to be an expert or at least show that he had had means of gaining experience. He need not claim to be a professional expert, but he must claim to have had experience and feel competent to express an opinion. *Goldstein v. Black*, 50 Cal. 462; *Mixer v. Bennett*, 70 Iowa 329; *State v. Tompkins*, 71 Mo. 613; *State v. Owen*, 73 Mo. 440; *Ellingwood v. Bragg*, 52 N. H. 488. The rule is the same under the *New York* and *Texas* codes. *McKay v. Lasher*, 42 Hun (N. Y.) 270; *Heacock v. State*, 13 Tex. App. 97. But he need not claim that he could not be mistaken in his opinion. *Walker v. State*, 14 Tex. App. 609, 616. And in an early case in Iowa (1855) where witness testified to some knowledge and experience of handwriting, but denied that he claimed any extra skill over business men, but he thought he was as good a judge as business men generally. *Hyde v. Woolfolk et al.*, 1 Iowa 159.

It has been held, that the mere fact that witness has a position as county treasurer or clerk of court from which he might gain experience is insufficient unless the witness further says that he has had the experience. *Winch v. Norman*, 65 Iowa 186; *Ort v. Fowler*, 31 Kan. 478.

of the witness is not affected by his credibility.¹

(c) *To what Expert may Testify.*—An expert may testify as to the characteristics of the handwriting in question;² as to whether the writing is natural or feigned, was or was not written at same time, with same pen and ink, and by same person, and as to alterations or erasures therein;³ as to the age of the writing and

1. *Proof of Experience.*—The witness may be asked any question designed to show his business ability, knowledge and skill. *Roe v. Roe*, 40 N. Y. Sup. Ct. (8 J. & S.) 1.

But his credibility does not affect his competency as an expert. It can therefore only be inquired into after his testimony as an expert has been given. *Smyth v. Caswell*, 67 Tex. 567.

The question whether the witness has proved that he is an expert is for the court. *Forgey v. First National Bank of Cambridge*, 66 Ind. 123; *State v. Ward*, 39 Vt. 225. And the decision of the trial judge upon this question is conclusive unless he refers all the evidence thereon to the appellate court for their decision. *President, etc. of the Quinsigamond Bank v. Hobbs*, 11 Gray (Mass.) 250; *Bacon v. Williams*, 13 Gray 525; *Ellingwood v. Bragg*, 52 N. H. 488; *Wright v. Williams' Est.*, 47 Vt. 222.

2. *Testimony of Expert—Characteristics of Writing.*—An expert may testify as to the characteristics of the writing in question. *U. S. v. Chamberlain*, 12 Blatchf. (U. S.) 390. Thus an expert was allowed to testify that the writing was more crowded and the words more cramped and confined than the maker's usual writing, indicating that the note was written after the signature. *Dubois v. Baker*, 30 N. Y. 355, affirming s. c., 40 Barb. 556. To the contrary, however, is *Jewett v. Draper*, 6 Allen (Mass.) 434. As to a difference in the slant of the letters, *Goodyear v. Vosburgh*, 63 Barb. (N. Y.) 154; as to the condition and appearance of the words, and letters and characters, *Roe v. Roe*, 40 N. Y. Supr. Ct. 1; as to peculiar formation of one or more letters and lightness and freedom of handwriting, *Taylor v. Crowninshield, et al.*, 5 N. Y. Leg. Obs. 209, 223; as to comparative size and length of signatures, whether written on or above or below the line, and differences in certain letters, *Riordan v. Guggerty*, (Iowa) 39 N. W. Rep. 107 (1888). The intimation to the contrary in *Morey v. Safe Deposit Co.*, of N. Y., 34 N. Y. Supr. Ct. 154, is clearly overruled.

3. *Expert Testimony—Natural or Feigned Writings—Alterations.*—The decisions are uniform even in those jurisdictions where comparison by experts is not generally allowed, that experts may testify as to whether the handwriting submitted to them is in a free, natural and genuine hand, or a stiff, artificial and imitated hand; also as to whether the paper was or was not written at the same time, by the same hand and with the same pen and ink; and as to whether there were or were not alterations and erasures in the writing. Whether the writing is free and natural or artificial and imitated. *Cox v. Dill*, 85 Ind. 334; *Wither v. Rowe*, 45 Me. 571; *Moody v. Rowell*, 17 Pick. (Mass.) 490; s. c., 28 Am. Dec. 317; *People v. Hewitt*, 2 Park. C. C. (N. Y.) 20; *Goodyear v. Vosburgh*, 63 Barb. (N. Y.) 154; *Sudlow v. Warshing*, 108 N. Y. 520, distinguishing *Kowing v. Manly*, 49 N. Y. 192. The early criminal case of *People v. Spooner*, 1 Denio (N. Y.) 343, an indictment for forgery, is to the contrary effect, but it would seem to be impliedly overruled by the later cases.

In *Pennsylvania* it would seem that such testimony is admissible under *Travis v. Brown*, 43 Pa. St. 9, 18; *Burkholder's Exr. v. Plank*, 69 Pa. St. 225, 229, impliedly overruling *Bank of Pennsylvania v. Haldeman*, 1 P. & W. (Pa.) 161, 180.

Thus an expert was allowed to give his opinion that a mark could not have been that of a very aged man, but was simulated. *Lansing v. Russell*, 3 Barb. Ch. (N. Y.) 325, and the fact that two signatures attributed to the same hand are found to be *fac similes*, and on being superposed against the light match each other in every detail, is evidence of intentional simulation. *Hunt v. Lawless*, 7 Abb. N. C. (N. Y.) 113. Whether a paper was or was not written at the same time by the same hand, and same pen and ink. *Cooper v. Bocket et al.*, 4 Moore P. C. 419. *Farmers' & Mechanics' Bank v. Young*, 36 Iowa 44; *President, etc. of the Quinsigamond Bank v. Hobbs*, 11 Gray (Mass.) 250; *Jewett v. Draper*, 6 Allen

obscurities therein;¹ the result of his examination of the writing under a magnifying glass;² and, perhaps, to prove the standard of comparison.³ He may always give the reasons for his opinion,⁴ but he must confine his testimony to his opinion based on the handwriting itself, and not as affected by the facts of the case.⁵

(Mass.) 434; *Vinton v. Peck*, 14 Mich. 287; *Sheldon v. Warner*, 45 Mich. 638; *Ellingwood v. Bragg*, 52 N. H. 488; *Dubois v. Baker*, 30 N. Y. 355, affirming s. c., 40 Barb. (N. Y.) 556; *Goodyear v. Vosburgh*, 63 Barb. (N. Y.) 154; *Clark v. Bruce, Exr.*, 12 Hun (N. Y.) 271; *Fulton v. Hood*, 34 Pa. St. 365; *Reese v. Reese*, 90 Pa. St. 89.

In one case an expert was permitted to state his opinion whether certain words on a paper shown him were written before or after the paper was folded. *Bacon v. Williams et al.*, 13 Gray (Mass.) 525 (1859). While the same year (1859) it was decided in New York that the opinion of an expert on such a matter was inadmissible. *Sackett v. Spencer*, 29 Barb. (N. Y.) 180.

An expert may testify that some of the writing was not made by a pen, but cannot be asked whether it was made by a certain instrument naming it. *Com. v. Webster*, 5 Cush. (Mass.) 295. As to alterations and erasures. *Regina v. Williams*, 8 C. & P. 434 (34 E. C. L.); *Kruse v. Chester*, 66 Cal. 353; *Pate v. People*, 3 Gill (8 Ill.) 644; *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257, 264; *Moye v. Herndon*, 30 Miss. 110; *Edelin v. Sanders*, 8 Md. 118; *Vinton v. Peck*, 14 Mich. 287; *Ballentine v. White*, 77 Pa. St. 20, 22, and *Dubois v. Baker*, 30 N. Y. 355, affirming s. c., 40 Barb. 556, though to the contrary is *Jewett v. Draper*, 6 Allen (Mass.) 434.

1. Age of Writing.—An expert was allowed to give an opinion as to the age of a writing in *Eisfield v. Dill*, 71 Iowa 442. But such a question was held not to be a question for expert testimony in *Cheney v. Dunlap*, 20 Neb. 265, and in *Sackett v. Spencer*, 29 Barb. (N. Y.) 180, while in *Clark v. Bruce, Exr.*, 12 Hun (N. Y.) 271, it was apparently admitted that the question was one for an expert, but it was decided that the expert had to have experience not only with handwriting generally, but with the age of writing particularly. When the date written in a paper is obscure, the testimony of experts is admissible to prove the real date. *Stone v. Hubbard*, 7 Cush. (Mass.) 595. Also to decipher an instrument when the writing is obscure, either originally or

when it has become so by age. *Gobley v. Beechy*, 3 Sim. 24; s. c., *Wigram v. Wills* (2nd Am. ed.) 287; *Norman v. Morrell*, 4 Ves. 769; *Masters v. Masters*, 1 P. Wms. 421, 425; *Sheldon v. Benham*, 4 Hill (N. Y.) 129. In an early case in England (1835) a question arising from the obscurity of handwriting was decided by the court who refused to allow the question to go to the jury. *Remon et al. v. Hayward*, 2 A. & E. 666 (29 E. C. L.). But such questions were always held to be for the jury in the United States. *Jackson v. Ransom*, 18 Johns. (N. Y.) 107; *Armstrong v. Burrows*, 6 Watts (Pa.) 266.

2. The expert may give the result of his examination of the writing with a magnifying glass. *Walker v. State*, 14 Tex. App. 609, 618. And the jury may also examine the paper with a microscope. *Hatch v. State*, 6 Tex. App. 384; *Kannon v. Galloway*, 2 Bart. (Tenn.) 230, and such an examination was made by the supreme court in *Day v. Cole*, (Mich.) 8 Western Rep. 161. See An Article On Microscopic Experts in Writing, in 3 New Jersey Law Journal 198.

3. When the standard of comparison is proved by testimony other than experts, the admissibility of expert testimony as to whether the standard is or is not forged is in the discretion of the court, and the admission of such testimony was held no ground of reversal in *Costello v. Crowell*, 133 Mass. 352 (1882). But the admission of such proof was held to be error in *Winch v. Norman*, 65 Iowa 186.

4. An expert may always give the reasons for his opinion. *U. S. v. Chamberlain*, 12 Blatchf. (U. S.) 390; *Farmers' & Mechanics' Bank v. Young*, 36 Iowa 44; *Com. v. Webster*, 5 Cush. (Mass.) 295, 301; *Keith v. Lothrop*, 10 Cush. (Mass.) 453; *Demerritt v. Randall*, 116 Mass. 331; *Winnie v. Tounesley*, 36 Hun (N. Y.) 190; *Koons v. State*, 36 Ohio St. 195.

5. Expert Testimony Inadmissible.—An expert must confine his testimony to his opinion, he cannot state his inferences deduced from the facts. *Kruse v. Chester*, 66 Cal. 353; see *Taylor v. Crowninshield*, 5 N. Y.

He must also give his testimony himself.¹

(d) *Testing Accuracy of Expert*.—It seems that an expert may be tested with other papers in the case, but not with irrelevant papers, and the whole of the test paper must be shown him.²

9. *Standard of Comparison*.—(a) *Production of Original Letter Press Copies — Photographic Copies*.—The standard used by the expert must be produced in court.³ Letter press copies of the standard will not suffice,⁴ but photographic copies are admissible when accompanied by the originals.⁵

Leg. Obs. 223. He may not testify as to whether a man unable to write could have made a copy of a signature. *Thayer v. Chesley*, 55 Me. 393. Nor testify as to a party's inability to write a perfect hand. *Boyle v. Colman*, 13 Barb. (N. Y.) 42; *Burrow's Case*, 27 Gratt. 934. Nor as to a party's ability to improve his handwriting. *McKeone v. Barnes*, 108 Mass. 344. Nor as to the ease with which a party's signature may be forged. *Thomas v. State*, 18 Tex. App. 213.

1. The expert must testify himself. A witness cannot state what an expert had said. *Smyth v. Caswell*, 67 Tex. 567.

2. *Testing Expert*.—The expert may be asked whether the disputed paper is in the same handwriting as one admittedly genuine. *Revett v. Braham*, 4 Term Rep. 497. And in one case whether the disputed paper and one not admitted to be genuine are in the same handwriting. *Thomas v. State*, 103 Ind. 419.

There are several decisions to the effect that the expert cannot be tested with papers not relevant to the case. *U. S. v. Chamberlain*, 12 Blatchf. (U. S.) 390; *Howard v. Patrick*, 43 Mich. 121; *Rose v. First National Bank of Springfield*, 91 Mo. 399. But an expert cannot be shown part of the test paper, he is entitled to see all of it. *West v. State*, 22 N. J. L. 212, 240.

3. An expert cannot give an opinion as to the genuineness of a signature based upon a comparison thereof with signatures not before the court. *Tyler v. Todd*, 36 Conn. 218; *Woodman v. Dana*, 52 Md. 9; *Morey v. Safe Deposit Co. of N. Y.*, 34 N. Y. Sup. Ct. 154.

4. *Letter Press Copies* and duplicates made by writing machines are not originals and therefore cannot be used as a standard of comparison. *Com. v. Eastman*, 1 Cush. (Mass.) 189, 217; *Com. Jeffries*, 89 Mass. (7 Allen) 562; *Cohen v. Teller*, 93 Pa. St. 123.

And though the handwriting of a letter press copy of a letter may be proved by direct testimony, *Clark v. Finn*, 12 Mo. App. 582, 583, yet an expert cannot testify as to the genuineness of a disputed writing upon a comparison of a genuine writing produced with a press copy of the writing whose genuineness is disputed. *Spottiswood v. Weir*, 66 Cal. 525.

5. *Photographic Copies* are admissible in evidence when they are proved to be exact reproductions of the original. *Re Stephens*, 8 Eng. Rep., Moak notes 481; *Leathers v. Salvor W. and T. Co.*, 2 Woods (U. S.) 680; *Eborn v. Zimpelman*, 47 Tex. 503; s. c., 26 Am. Rep. 315. But not when the originals can be had. *Maclean v. Scripps*, 52 Mich. 214. Or when not proved to be an exact reproduction. *Houston v. Blythe*, 60 Tex. 506. When the original writing is in evidence and its genuineness is disputed, magnified photographic copies of the writing and of admittedly genuine writings are admissible in evidence for comparison by jury or experts when accompanied by competent preliminary proof that the copies are accurate in all respects except as to size and coloring. *Marcy v. Barnes*, 16 Gray (Mass.) 161; *Frank et al. v. Chemical National Bank*, 37 N. Y. Sup. Ct. 26; *Rowell v. Fuller's Est.*, 59 Vt. 688. To the contrary effect is *Tome v. Parkersburg Branch R. R. Co.*, 39 Md. 36.

But such comparison cannot be made when the originals of the photographic copies are not produced. *Hynes et al. v. McDermott et al.*, 82 N. Y. 41; s. c., 22 Alb. L. Jour. 367; 37 Am. Rep. 538; affirming s. c., 9 Daly 4; *Eborn v. Zimpelman*, 47 Tex. 503; s. c., 26 Am. Rep. 315; *Houston v. Blythe*, 60 Tex. 506.

And it has been decided that while it might not be error to permit photographic copies of a will which was in controversy to be given to a jury, with such precautions as to secure their identity and correctness, yet their use

(b) *Generally*.—All writings acknowledged or duly proved to be genuine are proper standards of comparison.¹ So are all undisputed papers forming part of the record of the case,² and the signatures of public officers.³ On trials for forgery, papers written by accused and by the party whose name is alleged to have been forged, seem to be admissible.⁴ Objections to the standard must be taken in trial court.⁵

can never be compulsory and their rejection cannot be urged as error. *Foster's Will*, 34 Mich. 21. See an article on *Examination of Handwriting*, in 16 *Chicago Legal News*, 71.

1. **Standard of Comparison**.—All writings acknowledged or duly proved to be genuine are proper standards of comparison. *Thomas v. State*, 59 Ga. 784; *State v. Calkins*, (Iowa) 34 N. W. 777 (case of name written in hotel register); *Richardson v. Newcomb*, 21 Pick. (Mass.) 315; *Com. v. Williams*, 105 Mass. 62.

But a mortgage, though duly acknowledged, is not a standard, unless the signature be proved. *Hyde v. Woolfolk*, 1 Iowa 159. Nor is the writing in a diary, which the party admits is his diary, unless the writing be proved. *Van Sickle v. People*, 29 Mich. 61. Nor an answer to a letter. *McKeone v. Barnes*, 108 Mass. 344. And it has been *held* that the fact that the writing offered as a standard was written after the commencement of the action will not render it incompetent, but may be considered by the jury as affecting its weight. *Singer Manufacturing Co. v. McFarland et al.*, 53 Iowa 540.

A convict cannot admit his writing so as to make a person who has seen the writing admitted competent to testify. *Long v. State*, 10 Tex. App. 186.

A party, denying his handwriting, may be asked on cross-examination if his signature to another document used in the case for comparison is genuine. *Neal v. Neal*, 58 Cal. 287.

2. **Papers in the Case**.—All writings made by the party which are part of the record of the case he is estopped from denying, and, therefore, they are a proper standard of comparison. Thus the signature of a party to the following papers have been *held* competent standards. Affidavit of defence, *McCafferty v. Heritage*, 5 Houst. (Del.) 220; Affidavit to petition, *Medway v. U. S.*, 6 Ct. of Cl. 421; *Blewett v. U. S.*, 10 Ct. of Cl. 235; *Moore v. U. S.*, 91 U. S. 270; affidavit to plea, *Wilber*

v. Eichholtz, 5 Col. 240; affidavit for a change of venue, *Thomas v. State*, 103 Ind. 419, 439; appeal bond, *Vinton v. Peck*, 14 Mich. 287.

When papers signed by defendant had been made part of the record of a former trial of an action, and were treated by both parties as in evidence on the second trial, it seems that they are a proper standard. *Smith v. Ehnert*, 47 Wis. 479.

See cases cited under 7. (f), p. 288.

3. **Signatures purporting to be those of the party whose handwriting is in question in the archives of a public office are admissible as standards**. *Rogers v. State*, 11 Tex. App. 608. See *De-pue v. Place*, 7 Pa. St. 428. See, also, cases cited under 4. (h) **PROOF OF GENUINENESS—WHEN WRITER HOLDS AN OFFICIAL POSITION**.

4. **Forgery Cases**.—In an indictment for forgery it has been *held* that papers admittedly written by the defendant may be compared with the alleged forgery. *Koons v. State*, 36 Ohio St. 195. The contrary was *held* in *State v. Fritz*, 23 La. Ann. 55. Also papers written by the party whose signature was alleged to have been forged. *State v. Hopkins*, 50 Vt. 316; but other papers alleged to have been forged by the defendant are not admissible. *Wright v. Williams' Est.*, 47 Vt. 222.

In a civil action, under the New York code, it has been *held* that papers admittedly proved to have been written by the party alleged to have forged the disputed paper are inadmissible for comparison. *Peck v. Callaghan*, 95 N. Y. 73.

5. When a paper is offered in evidence and received without objection, in a State where comparison can only be made with the papers in the case, it cannot be objected in the appellate court that the paper was inadmissible for any other purpose than comparison. *Miles v. Loomis*, 75 N. Y. 288. Nor can it be objected in the appellate court that the genuineness of the standard was not proved. *Hall v. VanVrankin*, 64 How. Pr. (N. Y.) 407; s. c., 28 Hun 403.

(c) *Writing by Witness on Stand.*—In England, by statute, any person present in court whose writing is in question, may be directed by the court to write any words or figures for the purpose of comparison.¹ In the *United States* a witness may be asked so to write on cross-examination, but not in direct examination.²

(d) *Proof of Genuineness—Proof is for the Court.*—Before a paper can be accepted as a standard of comparison, it must be proved to be genuine to the satisfaction of the trial judge. His decision is final if supported by any proper evidence. The appel-

1. By the Individual Evidence Act of 1872, in Great Britain, it is provided that "the court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person." Taylor on Evidence (8th ed.), § 1871. This was only incorporating into a statute the previous decisions in Williams' Case, 1 Lewin. C. C. 137; Osbourne v. Hosier, 6 Mod. 167; Cobbett v. Kilminster, 4 F. & F. 490; Devine v. Wilson, 10 Moore P. C. 502, and Regina v. Taylor, 6 Cox Cr. C. 58.

2. In the United States it has been held that a party who denies that what purports to be his signature was made by him, may, on cross-examination, be asked to write his name and other words for comparison by the jury. Chandler v. Le Barron, 45 Me. 534; Hayes v. Adams, 2 N. Y. S. C. (T. & C.) 593, 595; Bronner v. Loomis, 14 Hun (N. Y.) 341; Roe v. Roe, 40 N. Y. Sup. Ct. (8 J. & S.) 1; Sanderson v. Osgood, 52 Vt. 309. To the contrary, however, are First National Bank of Houghton v. Robert, 41 Mich. 709, and Gilbert v. Simpson, 6 Daly (N. Y.) 341. The decisions have been uniform to the effect that a party whose writing is in question cannot in direct examination be requested so to write, as that would be manufacturing testimony for himself. U. S. v. Jones, 10 Fed. Rep. 469; Williams v. State, 61 Ala. 33; King v. Donahue, 110 Mass. 155; Com. v. Allen, 128 Mass. 46. See, also, Keith v. Lothrop, 10 Cush. (Mass.) 453; Van Wyck v. McIntosh, 14 N. Y. 439; State v. Koontz, (W. Va.) 5 S. E. Rep. 328. When, however, a party does so write at the request of his counsel, a witness who has only a knowledge derived from such writing is not competent to testify as to the genuineness of the

writing in question. Reese v. Reese, 90 Pa. St. 89.

When a defendant, who has denied that a note sued on is genuine, called his son as a witness, who testified in chief that certain words in the note which his father actually gave were written by himself, he may, on cross-examination, be required to write the same words in the presence of the jury for their comparison. Huff v. Ninis, 11 Neb. 363. The contrary was held in an early case (1819) on the trial of an indictment for forgery. Hutchins' Case, 4 City Hall Rec. (N. Y.) 119. And in another case where witnesses, on the trial of an indictment for forgery, testified as to the handwriting of one Leonard, they were allowed to write the letter "L" as they thought Leonard wrote it for the jury's comparison, and that though technical comparison of hands is not allowed in West Virginia. State v. Henderson, 29 W. Va. 147, 158.

A party denying his handwriting may be asked in cross-examination if his signature to another document used in the case for comparison is genuine. Neal v. Neal, 58 Cal. 287.

"This is a test which may often be successfully applied. At the Greenwich county court, a plaintiff, on one occasion, denied most positively that a receipt produced was in his handwriting. It was thus worded: 'Received the Hole of the above.' On being asked to write a sentence in which the word 'whole' was introduced, he took evident pains to disguise his handwriting, but he adopted the above *phonetic* style of spelling, and also persisted in using the capital H. On being subsequently threatened with an indictment for perjury he absconded." Taylor on Evidence (8th ed.), § 1871, note 2.

"The practice of thus testing a party is vindicated by one of the most sagacious of German jurists, Mitter-

late court will only review the decision if all the evidence is before them.¹ The question of genuineness is for the jury, however, in *New Hampshire*.² While, in *Ohio* and *Pennsylvania*, only papers proved by direct evidence are admissible as a standard.³

10. Comparison of Handwriting Allowed to Prove Ancient Writings.—Comparison of handwriting, either by jury or witnesses, is uniformly allowed to prove writings which are not old enough to prove themselves, but are too old to admit of direct proof of their genuineness.⁴

maier, on grounds not only of expediency, but of authority. See Nov. 73, Cap. 1." Wharton on Evidence (3rd ed.), § 706.

1. Proof of Genuineness of Standard.—Before a paper can be used as a standard of comparison, it must be admittedly genuine, or be so proved to the satisfaction of the trial judge, and so far as his decision is of a question of fact it is final, if there is any proper evidence to support it. Exceptions to his decision will not be sustained unless it clearly appears that there was some erroneous application of the principles of law to the facts of the case, or that the evidence was admitted without proper proof of the qualifications requisite for its competency. *Tyler v. Todd*, 36 Conn. 218; *Hyde v. Woolfolk*, 1 Iowa 159; *Winch v. Norman*, 65 Iowa 186; *Wilson v. Irish*, 62 Iowa 260; *State v. Thompson*, (Me.) 13 At. Rep. 892; *Com. v. Eastman*, 1 Cush. (Mass.) 217; *Martin v. Maguire*, 7 Gray (Mass.) 177; *Com. v. Coe*, 115 Mass. 481; *Costello v. Crowell*, 139 Mass. 588; *People v. Cline*, 44 Mich. 290; *Crisman v. Schoonover*, Penn. (N. J.) 396; *Depue v. Place*, 7 Pa. St. 428; *State v. Horn*, 43 Vt. 20; *Rowell v. Fuller's Est.*, 59 Vt. 688; *Hanriott et al. v. Sherwood et al.*, 82 Va. 1. So under *Louisiana* and *New York* codes. *Conrad v. Louisiana Bank*, 10 Martin (La.) 700; *Hall v. Van Vrankin*, 64 How. Pr. (N. Y.) 407; s. c., 28 Hun 403.

And the appellate court will only review the decision admitting an expert when all the evidence is before them. *Pavey v. Pavey*, 30 Ohio St. 600.

2. In *New Hampshire* the jury must first consider if the standard is proved to be genuine. If they think it is, they then consider the expert testimony based on it, and, if they wish, make their own comparison. If they think it is not, they reject the standard and the testimony based thereon. *State v.*

Hastings, 53 N. H. 452; *Carter v. Jackson*, 58 N. H. 156.

In *Vermont* a similar proceeding was at first adopted. *State v. Ward*, 39 Vt. 225; but it is no longer the practice. *State v. Horn*, 43 Vt. 20; *Rowell v. Fuller's Est.*, 59 Vt. 688.

3. In *Ohio* and *Pennsylvania* the standard, when not a paper already in the case or admittedly genuine, must be clearly proved by persons who testify directly to its having been written by the party. *Calkins v. State*, 14 Ohio St. 222; *Bragg v. Colwell*, 19 Ohio St. 407; *Pavey v. Pavey*, 30 Ohio St. 600; *Baker v. Haines*, 6 Whart. (Pa.) 284. But this does not apply in case of ancient writings, but any uncertainty as to the genuineness of the standard in such case goes to the weight of the evidence, not to the competency of the standard. *Bell v. Brewster*, 44 Ohio St. 690; *Sweigart v. Richards*, 8 Barr (Pa.) 436.

4. Ancient Writings.—In all cases where writings are so ancient as to make direct proof of their genuineness impossible, if the writings are not old enough to prove themselves, their genuineness may be proved even in those States where comparison is ordinarily not allowed, by a comparison between the paper in question and other writings, the genuineness of which is duly proved. And this comparison may be made by the jury and by experts. *Morewood v. Wood*, 14 East 327, note a.; *Brune v. Rawlings*, 7 East. 279, 282; *Tilman v. Tarver*, *Moody & Ryan* 141; *Fitzwalter Peerage Case*, 10 Cl. & Fin. 193; *Crawford and Lindsay Peerage Case*, 2 H. of L. Cas. 534, 557; *Strothers v. Lucas*, 6 Peters (U. S.) 763; *State v. Givens*, 5 Ala. 747; *Kirksey v. Kirksey*, 41 Ala. 626; *McAllister v. McAllister*, 7 B. Mon. (Ky.) 269; *West v. State*, 2 Zab. (22 N. J. L.) 212; *Jackson v. Brooks*, 8 Wend. (N. Y.) 426; affirmed in *Jackson v. Brooks*, 15 Wend. (N. Y.)

11. **Value and Weight of Expert Testimony by Comparison.**—The value of expert testimony is but slight.¹ Its weight is for the jury or court in equity case or trial without a jury.² The finding of the jury will be reversed if against the weight of the evidence.³

12. **Comparison of Handwriting—When Made by Appellate Court.**—A court of appeals will, on the hearing of a case *de novo*, and even, according to a late decision, on simple writ of error, make a comparison between the disputed paper and the papers in the record,

111; *Wilson v. Betts*, 4 Denio (N. Y.) 201; *Jackson v. Murray*, Anth. N. P. (N. Y.) 143; *Sweigart v. Richards*, 8 Pa. St. 436; *Cantry v. Platt*, 2 McCord (S. Car.) 260; *Hauley v. Gandy*, 28 Tex. 211; *Hazleton Admr. v. Union Bank of Columbus*, 32 Wis. 34.

See, also, the cases cited under 4. (h) **PROOF OF GENUINENESS, WHEN THE WRITER HOLDS AN OFFICIAL POSITION.**

1. **Weight of Testimony.**—The value of expert testimony as to handwriting is but slight. It is not of a very high order. *Cowan v. Beall*, 1 MacArthur (D. C.) 270; *Borland v. Wolrath*, 33 Iowa 130; *Whitaker v. Parker*, 42 Iowa 585; *Moye v. Herndon*, 30 Miss. 110; *Mutual Benefit Life Ins. Co. v. Brown et al.*, 30 N. J. Eq. 193; *Mutual Benefit Life Ins. Co. v. Brown et al.*, 32 N. J. Eq. 809. Even in the ecclesiastical courts it is held to be "very inconclusive." *Robson v. Roche*, 20 Addams 53, 79. So under *Texas* criminal code. *Jones v. State*, 7 Tex. App. 475; *Heacock v. State*, 13 Tex. App. 97.

2. The weight of the testimony is for the jury. *U. S. v. Molloy*, 32 Fed. Rep. 19; *U. S. v. Pendergast*, 32 Fed. Rep. 198; *Forgey v. First National Bank of Cambridge City*, 66 Ind. 123; *Kennedy v. Upshaw*, 66 Tex. 442. And the jury may also make the comparison themselves. *Joseph v. First National Bank*, 17 Kan. 256. Even with a microscope. *Hatch v. State*, 6 Tex. App. 384; *Kannon v. Galloway*, 2 Baxt. (Tenn.) 230.

In a case in equity, or in a trial without a jury, the weight of the testimony is for the court. *Lay v. Wissman*, 36 Iowa 305; *Fox v. McDonough*, 18 La. Ann. 419; *Wilson v. Beauchamp*, 50 Miss. 24; *Servis v. Nelson*, 14 N. J. Eq. 94. Who will also make its own comparison. *Moody v. Rowell*, 17 Pick. (Mass.) 490; *Cowan v. Beall*, 1 MacArthur (D. C.) 270; *Yeomans v. Petty*, 40 N. J. Eq. 495; *Doe dem. Henderson*

v. Roe, 16 Ga. 521; *Redford v. Peggy*, 6 Rand. (Va.) 316; and in case of a reference for the referee, *Hunt v. Lawless*, 7 Abb. N. C. (N. Y.) 113.

It was therefore held not error for the trial judge to instruct the jury that "experts were not infallible; generally their opinions were reliable, but they were sometimes wrong. Their opinion is not conclusive." *Pratt v. Rawson*, 40 Vt. 183.

8. Where ten witnesses were equally competent and credible and one testified handwriting was genuine and nine testified it was not, a verdict sustaining the genuineness of the writing will be set aside as against the weight of the testimony. *Bell v. Shields*, 4 Harr. (19 N. J. L.) 93. So where one witness acquainted with party's writing testified it was genuine and there was no other evidence and jury found the writing a forgery, the verdict was set aside as contrary to the evidence. *Cook v. Smith*, 30 (N. J. L.) 387; see *Olmssted v. Stewart*, 13 Johns. (N. Y.) 238.

The testimony of one witness that he actually saw a party sign his name will not be invalidated by testimony of two witnesses acquainted with party's signature to the contrary. *Bell v. Norwood*, 7 La. 95. But such testimony is not necessarily sufficient to overcome all evidence to the contrary. *Sarvent v. Hesdra*, 5 Redf. (N. Y.) 47.

See also an article on "Expert testimony, Scientific testimony in the examination of written documents, illustrated by the Whittaker Case," 21 Am. Law Reg. 425, 489. And "the handwriting of Junius professionally investigated by Mr. Charles Chabot, Esquire," by Twistleton and Chabot, quarto, published by Murray in 1871, said by Mr. Taylor in his work on Evidence (8th ed.), § 1871, note 3, to be "the most instructive and scientific essay that has ever been published in English respecting the best methods to be adopted in comparing handwritings."

admitted or proved to be genuine.¹

13. Proof of Handwriting—Value as Proof of Identity.—Upon the question of identity, comparison of handwritings is admissible as proof, but the value of such evidence has scarcely been determined as yet.² (See IDENTITY.)

HAPPEN.—See note 3.

1. It has been decided the appellate court will not make a comparison between the paper in suit whose genuineness is denied and other papers admitted or proved to be genuine. They will accept the decision or verdict in the lower court as decisive. *Burdick v. Hunt*, 43 Ind. 381.

That will be done, however, by the appellate court in the trial of a chancery case there *de novo*. *Morris v. Sargent*, 18 Iowa 90. See *Servis v. Nelson*, 14 N. J. Eq. 94; *Yeomans v. Petty*, 40 N. J. Eq. 495. And in a recent case (1887), in Michigan, the appellate examined the signature with a magnifying glass, deciding themselves upon the correctness of the testimony, and made a comparison as well. *Day v. Cole*, (Mich.) 8 Western Rep. 161.

2. In the famous Tichborne trial, handwriting was admitted as strong evidence bearing on the question of identity. See *The Tichborne Trial* (London Ed.) pp. 762-783.

Where the identity of a person is in issue, it is competent to introduce letters or receipts, claimed to be in his handwriting, for the purpose of comparison by jury, court and experts with other writings admitted or clearly proved to be genuine. *Bell v. Brewster*, 44 Ohio St. 690.

See Lawson on "Expert and Opinion Evidence," pp. 277-279, and an article on "Handwriting as Evidence of Identity" in 32 Central Law Journal, 316; 19 Irish Law Times, 488.

But neither a letter, nor the envelope containing it, nor an inclosure therein is admissible in evidence to prove that on the day of its date the writer was at the place from which it was written and mailed. *Jackson v. Emmens*, 21 Weekly Notes (Pa.) 199.

3. Sec. 2 of Art. 1 of the constitution of the United States provides that "when vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies." P was, by the general assembly of Rhode Island, in accordance with a statute of that State, declared to have been elected

on November 4, 1884, a representative in the 49th congress. The House of Representatives on January 25, 1887, adopted a resolution declaring that the said P was not elected, and that the seat was vacant, the reason being that neither he nor any other person received a majority of the legal votes cast at the said election of November 4, 1884. It was *held* that there was a vacancy under the section of the constitution above quoted. Said the court: "There can be no doubt that a vacancy exists; the only question is whether a vacancy which exists by reason of a failure to elect is, within the meaning of the provision above quoted, a vacancy which has *happened* in the representation, since the word *happen* may be thought to import a vacancy occurring in the course of the representation after it has been filled. We think it is, even under such a construction, for we suppose we may assume that P received a certificate of election, and that on the faith of it he was admitted to a seat in congress, which he continued to occupy, as representative *de facto*, until the seat was declared vacant by the resolution aforesaid." *In res* the Rep. Vacancy, 15 R. I. 621.

The constitution of Wisconsin provides that "where a vacancy shall happen in the office of judge of the supreme or circuit court, such vacancy shall be filled by an appointment by the governor, which shall continue until a successor is elected and qualified. It was *held* that this provision did not apply to a case where a vacancy existed in the office of circuit judge by reason of the creation of a new circuit by the legislature. Said the court: "The use of the word 'happen' in this connection, is very significant, and evidently has reference to some casualty not provided for by law, which could not be remedied by the usual means of an election. The principle established by the constitution is, that judges shall be elected, and the power of temporary appointment seems only to have been conferred from necessity, to cure certain defects which are inseparable from

HARBOR.—A place where ships may ride with safety; any navigable water protected by the surrounding country; a haven.¹ In the law of torts, to receive clandestinely or without lawful authority a person for the purpose of so concealing him that an-

the system adopted. In the creation of a new circuit no such necessity exists. The business of our courts is never such that the public would suffer inconvenience by delay of an election in such a case. It is not a casualty in any sense of the word, but the deliberate act of a legislative body, which may well and conveniently be provided for by the usual method prescribed by the constitution." *State v. Messmore*, 14 Wis. 178.

By the constitution of Pennsylvania it is provided that the governor "may fill any vacancy that may happen . . . in any judicial or in any other elective office, which he is or may be authorized to fill, . . . but in any such case of vacancy in an elective office a person shall be chosen to said office at the next general election, unless the vacancy shall happen within three calendar months immediately preceding such election, in which case the election for said office shall be held at the second succeeding general election." It was held that where a new county was erected under the provisions of a general act of the legislature, a vacancy in the county offices happened within the meaning of the constitution. The court apparently considered "happen" as equivalent to "occur." *Walsh v. Com.*, 89 Pa. St. 419.

Sec. 2, Art. 2, of the constitution of the United States provides that "the president shall have power to fill up all vacancies that may happen during the recess of the senate by granting commissions which shall expire at the end of their next session." The phrase "vacancies that may happen" used in this section, has been construed to mean vacancies that may exist, including those that may have occurred before as well as those that may have occurred during the recess. The court quoted the opinion of Mr. William Wirt, attorney general of the United States under President Monroe, as follows: "In reason it seems to me perfectly immaterial when the vacancy first arose, for, whether it arose during the session of the senate or during their recess, it equally requires to be filled. The constitution does not look to the moment of the origin of the vacancy, but to the

state of things at the point of time at which the president is called on to act. . . . This seems to me the only construction of the constitution which is compatible with its spirit, reason and purpose, while at the same time it offers no violence to its language, and these are, I think, the governing points to which all sound construction looks." *In re Farron*, 3 Fed. Rep. (U. S. C. C.) 112.

In Case of Anything Happening to me, used in an instrument in the form of a letter that was held to be a valid will, was construed to indicate that the instrument was intended to take effect only in the event of the testatrix's death. *Cowley v. Knapp*, 42 N. J. 297.

1. Bouv. Law Dict.

"Harbour and Port are very commonly used as synonymous terms. A distinction is, however, sometimes made between them. Strictly *harbour* seems to denote a place for the accommodation of *vessels*; *port*, a place for the reception and delivery of cargoes." *Burrill's Law Dict.*

The Grand river, Michigan, at a point three miles up stream from the mouth, is not a harbor in the sense in which that word is used in the statute of Michigan, making it unlawful to catch fish in a certain way, except in certain places, *inter alia*, the harbors connected with Lake Michigan. Said the court: "A harbor, in its usual and ordinary sense, means an indentation in the coast of a lake, sea, or ocean, extending into the country in such manner as to form an inlet or bay, and sufficiently narrow between the headlands as to afford protection to vessels against the wind and storm upon the waters. It was in this sense that the legislature used the word harbor in the statutes applicable to this case, and this construction of the statute substantially decides the question raised. The stipulation shows that it is not the custom of vessels from the lake to go further up the river than three quarters of a mile from its mouth, unless in exceptional cases, and then they are towed up; that it is three miles from the mouth of the river to the point where the defendant's nets were set when he was complained of in this case; and

other, having a right to the lawful custody of such person, shall be deprived of the same; for example, the harboring of a wife or an apprentice in order to deprive the husband or the master of them; or, in a less technical sense, it is the reception of persons improperly.¹

that it is not customary for boats from the lake to go up the river more than three quarters of a mile to tie up or lay up." *People v. Kirsch*, 35 N. W. Rep. (Mich.) 157; s. c., 12 West. Rep. 62.

In *Nicholas v. Lewis*, 15 Conn. 137, it was held that "harbor" as used in a will referred to the land about a bay rather than to the bay itself; and the court said that this was not an uncommon meaning.

1. Bouv. Law Dict.

Harboring Slaves.—By the 4th section of the act of Congress, passed Feb. 12, 1793, providing for the capture of fugitives from labor that had gotten beyond the jurisdiction of the place of their bondage, it was enacted as follows: "Any person who . . . shall harbour or conceal such person [a fugitive from labor], after notice that he or she was a fugitive from labor as aforesaid, shall . . . forfeit and pay the sum of five hundred dollars, which penalty may be recovered by and for the benefit of such claimant . . . saving, moreover, to the person claiming such labor or service, his right of action for, or on account of, the said injury." In *Van Metre v. Mitchell*, 2 Wall. Jr., (U. S. C. C.) 311, Grier, J., in his charge to the jury, defined harbor as used in this act as follows: "The word 'harbour' is defined by Dr. Johnson and other lexicographers, 'to entertain,' 'to permit to reside,' 'to shelter,' 'to secure,' and Dr. Webster adds, 'to secrete.' It has various shades of meaning not exactly defined by any synonyme. Mr. Bouvier's definition, cited and relied on at bar, is quoted in the opinion of the Supreme Court already referred to [*Jones v. VanZandt*, 5 How. (U. S.) 215], but without the intention of affirming either the authority of Mr. Bouvier's Law Dictionary, or the correctness of the definition. For although the word may be used in the complete meaning there given to it, it does not follow that all these conditions are necessary elements in its definition, 'Receiving and entertaining a person clandestinely, and for the purpose of concealment,' may well be called 'harbouring,' as the word is sometimes used. Yet one may harbour without conceal-

ing. He may afford entertainment, lodging and shelter to vagabonds, gamblers and thieves, without a purpose or attempt at concealment, and it may be correctly affirmed of him that he 'harbours' them. The act of Congress, by using the terms 'harbour' or 'conceal,' assumed, I think, that the terms are not synonymous, and that there might be a harbouring without concealment. . . . But neither in legal use, nor in common parlance, is the word 'harbour' precisely defined by the words entertain or shelter, given by Dr. Johnson as two of its meanings. It implies impropriety in the conduct of the person giving the entertainment or shelter in consequence of some imputations on the character of the person who receives it. An innkeeper is said to *entertain* travellers and strangers, not to *harbour* them, but may be accused of *harbouring* vagabonds, deserters, fugitives or thieves, person whom he ought not to entertain. The act of Congress does not intend to make common charity a crime, or treat that man as guilty of an offence against his neighbour who merely furnishes food, lodging or raiment to the hungry, weary or naked wanderer, though he be an apprentice or a slave. . . . The harbouring made criminal by this act . . . requires some other ingredient besides a mere kindness or charity rendered to the fugitive. The intention or purpose which accompanies the act must be to encourage the fugitive in his desertion of his master, to further his escape and impede and frustrate his reclamation. 'The act must evince an intention to elude the vigilance of the master, and be calculated to obtain the object. [2 McLean 608.] I can imagine a harbouring of slaves, without any affectation of concealment, which might be as injurious to the master, and as effectual in promoting the escape of the slave and frustrating the vigilance of the master." See, also, *Driskell v. Parish*, 3 McLean (U. S. C. C.) 631; *Driskell v. Parish*, 5 McLean (U. S. C. C.) 64. In *McElhaney v. State*, 24 Ala. 71, and *Eells v. People*, 5 Ill. 498, the word "harbor" in State statutes upon the same subject was similarly construed.

In an action brought under the act of

HARMONY—HARVEST—HAUL—HAVE.

HARMONY.—See note 1.

HARVEST.—See note 2.

HAUL.—See note 3.

HAVE.—See note 4.

Congress above quoted, it appeared that several slaves owned by the plaintiff in Kentucky, escaped from him and fled to Ohio, adjoining, and, aided by some person not named, and when about twelve miles distant from their master's residence, were taken into a covered wagon by the defendant in the night, and driven with speed twelve miles, so that one was never retaken, though fresh suit was made for him. It was *held* that the defendant was guilty of harboring or concealing within the act. *Jones v. Van Zandt*, 5 How. (U. S.) 215.

Several fugitive slaves that had escaped from Kentucky into Indiana were secreted in a fodder-house for the purpose of being safely returned to their master. Late one night the fugitives were removed from the fodder-house, and assisted to escape. In an action brought by the master for the value of the slaves, under the act of Congress of 1793, against D and H, on the ground that it was they who effected the removal, the court charged the jury as follows: "If the defendants removed the fugitives from the fodder-house, and by that means they were enabled to escape, so that their services have been lost to their master, the defendants are liable in this form of action. That the defendants knew they were fugitives from labor is shown by the confessions of D, and by the circumstances of the case. . . . Liability attaches from 'harboring or concealing' the fugitives." *Ray v. Donnell*, 4 McLean (U. S.) 504.

1. The charter of the city of St. Louis was formed by a board of freeholders, under a constitutional requirement that it should be "in harmony with and subject to the constitution and laws of Missouri." "By the word 'harmony,' in this connection, is not to be understood an exact coincidence in all possible points of comparison. Its meaning is, clearly, that no regulation established by the charter, nor any made by its authority, shall do violence to the declared laws, or to the policy or manifest governmental purposes of the State, as shown in her constitution and statutory enactments." *In re Dunn*, 9 Mo. App. 259.

2. A sold a reaping and mowing machine to B, and warranted it to do good work of a certain character. But in

the contract of warranty it was provided as follows: "Keeping the machine during harvest, whether kept in use or not, without giving notice as above, shall be deemed conclusive evidence that the machine fills the warranty." In an action by the purchaser against the vendor, based on this warranty, the court charged the jury as follows: "The word 'harvest,' as used in the warranty in this case, means the usual time of harvesting small grain and grass, and should not be construed as including the cutting of a second crop of grass in the fall of the year, after the usual time for cutting small grain and grass." On appeal this portion of the charge was *held* to have been correct. *Wendall v. Osborne*, 63 Iowa 99.

3. A statute of *Indiana* provides, "whoever shall feloniously steal, take and carry, lead or drive away the personal goods of another," shall be guilty of larceny. An indictment in a prosecution under the act charged that the defendant "did feloniously steal, take and haul away fifty pounds of tobacco," etc. It was *held* that the use of the word "haul" instead of "carry" did not render the indictment bad. Said the court: "One sense in which the word 'haul' is properly used, is to 'carry or convey in a cart or other vehicle.'" *Spittorff v. State*, 108 Ind. 171.

4. **Having and Holding Lands.**—The English land tax act of 38 G. 3, ch. 5, which directed that a certain sum should be raised from a tax upon all manors, lands, and annuities, yearly profits, and other real property, provided that all persons "having and holding" the same should be charged, in respect thereof, with as much equality and indifference as possible by a pound rate. In a case under the act, *Bayley, J.*, in construing the words "having and holding," said: "It was contended for the defendant [a lessee of lands], that the charge was on the landlord, but that is not the language of the legislature; the tax is imposed on the lands, and the persons having and holding such lands. . . . The words [having and holding] apply to persons receiving the rents and profits; and where a party receives the whole of the profits,

he is to be charged with the whole. But where one person receives the profits to a limited extent only, and another receives the residue, the words having and holding embrace both." *Ward v. Const.*, 10 Barn. & Cress. 635.

Have and Keep.—Where several packages of gunpowder were sent by different persons to a warehouse, in London, belonging to a carrier and licensed carman, as a temporary halting place in their transit, until they should afterwards be forwarded by country carriers to their several destinations, it was *held* that this was not "having or keeping" of gunpowder within 12 G. 3, ch. 61, § 11, which made it unlawful for any person "to have or keep" gunpowder, except under certain conditions. "Have," as used in the act, was construed as synonymous with "keep." *Briggs v. Mitchell*, 2 B. & S. 523.

A policy of insurance on a flouring mill and distillery contained the following conditions: "If the assured shall keep or have, in any place on the insured premises where this policy may apply, petroleum, naphtha, benzine," etc.; "or keep, have or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy, then, and in every such case, this policy shall be void." With proper precautions the assured took and used benzine on the premises insured for the purpose of cleaning machinery. It was *held* that the policy was not forfeited under the provisions of the conditions. Said the court: "It will be observed that in the first portion of this condition the provision is that the assured shall not 'keep or have' any of the enumerated articles upon the insured premises, while, in the latter portion, the 'use' of certain other articles is prohibited in addition to the restriction contained in the first. The words 'keep or have,' as applied to the articles first enumerated, evidently were intended to prevent a storage of the prohibited articles upon the premises, either permanently or habitually. While the words are used in the disjunctive, they are evidently synonymous, and signify to retain in possession. It would be straining a point to say that bringing a prohibited article upon the premises upon a single occasion, and for the purpose of cleaning machinery, was keeping or having it there within the meaning of the policy." *Mears v. Humboldt Insurance Co.*, 92 Pa. St. 15.

A Court Having a Seal.—A statute of California authorized the clerk of a "court having a seal" to take acknowledgments. An acknowledgment was taken by a clerk of a court required by statute to have a seal, but for which no official seal had as yet been provided. It was *held* that the acknowledgment was valid. Said the court: "This general phrase, 'having a seal,' was only intended to denote a court of record, which is defined to be a court having a seal. The power of the clerk was never intended to be made to depend upon the fact of his having procured this article, or the care with which he preserved it." *Ingoldsby v. Juan*, 12 Cal. 564.

Die Without Having Children.—A testator bequeathed personal property to A, but provided that, if A should die "without having child or children," the said property should go to B. A had a child that died in her lifetime. It was contended that the word "having," in the phrase above quoted, ought to be construed as synonymous with "leaving," and that, therefore, upon the death of A, the bequest over to B took effect. But it was *held* by the court, in order to carry out what appeared from the evidence to have been the testator's intention, that the absolute interest vested in A upon the birth of her child. Lord Kenyon, Ch. J., declared this to be "also the fair grammatical construction, for the meaning of the word 'leaving' is essentially different from that of 'having.'" *Weakley v. Rugg*, 7 Term 322.

Die Without Having Issue.—A testator devised real estate to A, without any words of limitation; but there was a devise over in the event of A "dying without having any lawful issue." It was *held* that the devise over would take effect only on an indefinite failure of A's issue; and that, therefore, A took an estate tail. "Having," in the phrase quoted, was construed as equivalent to the word "leaving." *Cole v. Goble*, 13 C. B. 445.

Having as a Sign of the Perfect Tense.—The words "Your having indorsed" in the following letter, "Messrs. A, B & Co.—Gentlemen: In consideration of your having indorsed the under-mentioned notes, drawn by D T in your favor, we hereby hold ourselves accountable to you for them in the same manner as though the said notes were drawn by us," signed, "S, T & Co.," were *held*, by a divided court, to import

HAVEN.—(See PORT.) A place of a large receipt and safe riding of ships, so situate and secured by the land circumjacent, that the vessels thereby ride and anchor safely, and are protected by the adjacent land from dangerous and violent winds.¹

a past consideration. *Bulkley v. Landon*, 2 Conn. 404 (1818).

A declaration in *assumpsit* stated that T had commenced an action against M for 165 l.; and that in consideration of T's "agreeing to stay the said action," the defendant promised to pay T the 165 l. within six months next after the decease of A. The promise, as proved, was to pay as above in consideration of T's "having agreed" to stay the action. It was *held* that there was no variance, and that a valid consideration was proved. Said Denman, C. J.: "Here the declaration speaks of the consideration as the plaintiff *agreeing to stay*, etc. Now that word necessarily implies a continuing agreement till the action is stayed; and the words of the instrument, 'having agreed,' necessarily imply the same, for it would be absurd to suppose that the defendant bound himself to pay the money in consideration of the plaintiff merely having, at a past time, agreed to stay the proceedings, unless that agreement was continuing at the time of the signing of the instrument and until the action was actually stayed." The real meaning of both expressions is in truth the same. *Tanner v. Moore*, 9 Q. B. 1 (1846).

In an action on the following guarantee, addressed to the plaintiffs and signed by the defendants, "In consideration of your having this day advanced to our client, U D, £750," "we hereby jointly and severally undertake to pay the same on default," it was *held* that the words, "your having this day advanced," were sufficiently ambiguous to render evidence admissible to show that the advance was not a past one, but was made simultaneously with the execution of the guarantee. Said Alderson, B.: "The words, 'your having this day advanced,' no advance having been made, show that they do not refer to a past event. If the words had been 'having advanced yesterday,' the evidence would not have been admissible, as it would have been a contradiction." *Goldshede v. Swan*, 1 Eng. Ch. 153 (1847); see, also, *King v. Cole*, 2 Eng. Ch. 628 (1848).

The defendant sent to the plaintiff the following letter: "In consideration

of your having resigned the office of deacon and your connection with the Baptist church and congregation at C., I hereby agree to hold myself responsible to you for the payment of the sum of 150 l. due to the Rev. J. E. by the Baptist church at C. . . for which you and M, deacons of the said church, became responsible to the Rev. J. E. by an instrument bearing date," etc. It was *held*, on argument of a special case, in an action on this promise, that the letter showed a valid consideration. Said the court: "We think that the words [having resigned], in their ordinary acceptation, are capable of expressing either a past or a concurrent consideration; and, as upon one construction the instrument is void, the other is to be adopted which makes it valid. The expression, that a promise is founded upon a consideration, conveys the notion that the consideration precedes the promise in the mind of the party making the promise; he promises because the consideration exists; and this form of expression is shown by the authorities to have been frequently used when the consideration and the promise are concurrent. Each side of a contract is consideration or promise according to the party speaking of it; and, if each party were to put into writing his own promise, each side of the contract would in him appear to have preceded the other, though both formed one agreement; the plaintiff might write 'you having guaranteed, I resign;' and the defendant, 'you having resigned, I guarantee.'" *Steele v. Hoe*, 14 Q. B. 431 (1849). See, also, *Payne v. Willson*, 7 Barn. & Cress. 423; *Butcher v. Stewart*, 11 M. & W. 857 (1843).

1. Hale, *De Fure Maris*, quoted in *U. S. v. Morel*, 13 Am. Jur. 279; s. c., 1 Brunner Col. Cas. 373, where a haven was *held* not to be included in the term "high seas" in an act defining the criminal jurisdiction of the United States Courts. "The admiralty has never held that the waters of havens, where the tide ebbs and flows, are properly the high seas, unless those waters are without low water mark." *U. S. v. Hamilton*, 1 Mas. (C. C.) 152.

"Sir Francis Moore, who drew up the Statutes of Charitable Uses of 43

HAWKERS AND PEDDLERS.—See COMMERCIAL TRAVELLERS, vol. III, p. 315.

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I. Who are.—A person who practices carrying merchandise about from place to place for sale, as opposed to one who sells at an established shop, is a hawker. It is equivalent to peddler which is more used at the present day,¹ and a peddler is a person who travels about the country with merchandise for the purpose of selling it.²

A person is a hawker and peddler where he transfers the merchandise from place to place by means of public conveyance or otherwise, as well as where he himself carries it;³ and one who goes from house to house soliciting orders for the purchase of goods to be delivered in the future is likewise a hawker and peddler,⁴ as well as one who goes about the country bartering

Eliz, c. 4, says in his reading thereon that 'common ponds or watering places are within the equity of' the words 'ports and havens' in that statute." *Paine v. Woods*, 108 Mass. 169.

1. Abb. L. Dict. (Hawkers.)

Bouvier in his law dictionary defines hawkers to be persons going from place to place with goods and merchandise for sale.

It is, perhaps, not essential to the idea, but is generally understood from the word, that a hawker is one who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them, as goods for sale, by an actual exhibition or exposure of them by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish. *Com. v. Ober*, 12 Cush. (Mass.) 493.

2. Bouv. L. Dict. (Peddlers.)

Persons, except those peddling newspapers, bibles or religious tracts, who sell or offer to sell, at retail, goods, wares or other commodities, traveling from place to place in the streets, or through different parts of the country, are peddlers. Act. of Congr. July 1, 1862.

3. A person traveling from town to town, and having packages of books sent after him by public conveyance,

and taking rooms at each town, and there selling such books by retail or by auction, is a trading person within the meaning of the statute. *Dean v. King*, 4 B. & A. 517.

A licensed auctioneer, conveying goods by public stage or wagon from place to place, and selling the same on commission, by retail or auction, at different towns, is a peddler, or trading person, within 50 Geo. 3, ch. 41, § 6; *Rex v. Turner*, 4 B. & A. 510.

Where a person who goes from the town in which he resides and takes a room at another town, and there sells goods which are brought direct from the town of his residence, he is liable to a penalty under 50 Geo. 3, ch. 41, § 17, as a trading person, going from town to town trading without a hawker's license. *Manson v. Hope*, 2 B. & S. (Eng.) 498; 31 L. J., M. C. 191; *Jur. U. S.* 971; 6 L. T. 326; 10 W. R. 664.

4. *Graffy v. Rushville*, 107 Ind. 502; s. c., 57 Am. Rep. 128.

Sale of Corn by Sample.—A person not being a licensed hawker, was committed and fined under the Markets and Fairs Clauses Act, 1847, (10 & 11 Vict. ch. 14), § 13, for having sold corn by sample in a place other than his own dwelling-place or shop, within the municipal boundary of the city of London-berry, the bulk of the corn being at the time of sale within the municipal boundary. *Held*, that the conviction was

merchandise for such articles as he can get in exchange;¹ but a manufacturer selling the goods of his own manufacture is not usually a hawker and peddler;² nor is the servant or agent of such manufacturer,³ nor usually a producer of any kind selling the products of his industry unless they are produced for that express purpose,⁴ neither is a solicitor or agent of a mercantile establishment soliciting orders for goods kept for sale by it, even though he usually carries samples;⁵ and, of course, one selling marketable articles from his own private shop or premises is not a hawker and peddler.⁶

II. Restrictions on.—Hawkers and peddlers are obliged, under the laws of perhaps all the States, to take out licenses and conform to the regulations which these laws establish.⁷ These regulations, being merely statutory, differ in different States, but are

right. *Londonberry (Mayor) v. McElhinney*, 9 Ir. R., C. L. 71.

1. A person who goes about the country and barter needles, threads and tapes, for bones, rags and other similar articles, is a hawker and peddler, and requires a license, under 50 Geo. 3, ch. 41, § 6; *Dune v. Gabb*, 6 W. R. (Eng.) 497.

2. See *R. v. Farady*, 1 B. & Ad. (Eng.) 275; *R. v. Mainwaring*, 5 M. & R. (Eng.) 57; 10 B. & C. 56.

Under the Pennsylvania act of 1830, regulating peddlers, any one who has tinware manufactured in the State, may peddle it under certain restrictions. *Wolf v. Clark*, 2 Watts (Pa.) 298.

But under the act of 1846, a person engaged in the sale of goods of his own manufacture, and who sells articles of domestic manufacture to an amount less than \$1,000 per annum, not manufactured by him, or at his shop, is liable to the license duty. *Osborn v. Holmes*, 9 Pa. St. 333.

What is a Manufacturer.—Admixture by boiling together certain drugs to form a nostrum is not a process of manufacture within Acts N. C., 1887, ch. 135, § 23, exempting from the peddler's tax any persons selling goods of their own manufacture. *State v. Morrell*, (N. Car.) 6 S. E. Rep. 418.

3. The servant of a firm of manufacturers, not residing with them, traveled with goods of the manufactory to a town, where he sold, in a public room, having advertised the goods as those of his employers, to be disposed of by him according to their instruction; one of the proprietors was present and noted the purchases and received the money, but nobody was informed who he was. *Held*, that the

seller, though not licensed, was exempt from penalty, the sale being substantially a sale by the master. *R. v. Farady*, 1 B. & Ad. (Eng.) 275.

The 50 Geo. 3, ch. 41, § 23, does not extend to an agent or a servant residing in a separate dwelling-house, though solely employed by such worker or maker. *R. v. Mainwaring*, 5 M. & R. (Eng.) 57; 10 B. & C. 66.

4. A city ordinance prohibiting the sale of mutton on the city streets by a farmer exercising "the business of farming for the purpose of producing or preparing mutton for sale or market." *Held*, not to apply to a farmer selling mutton produced on his farm, unless he was at the time exercising the business of farming for that purpose. *Home-wood v. Wilmington*, 5 Del. 123.

5. *Davenport v. Rice*, (Iowa) 39 N. W. Rep. 191.

A drummer who sells his principal's goods by sample, merely taking orders for them, does not require a license such as must be taken out by "hawkers, peddlers and merchants." Nor does the fact that the drummer makes a single sale make any difference. *Kansas v. Collins*, 34 Kan. 434.

A servant of a licensed tea dealer was sent by his master round the neighborhood to ask for orders for tea, and was subsequently sent by his master to deliver small parcels of tea in pursuance of those orders. *Held*, that this was not a carrying to sell within the meaning of the 50 Geo. 3, ch. 41, so as to subject the servant to a penalty for trading as a hawker without a license. *Rex v. McKnight*, 10 B. & C. (Eng.) 734.

6. *Pope v. Whalley*, 6 B. & S. 303; 34 L. J., (N. S.) M. C. 76.

7. *Bouv. L. Dict. (Peddlers)*.

usually somewhat alike in their general features. Hawking and peddling is usually prohibited under penalty of a fine, forfeiture of the stock of goods or other punishment, except where license has been duly granted; such licenses are granted by a designated officer or board upon written application showing the manner in which the applicant intends to travel and trade, upon payment of a specified fee, the restriction being limited to the hawking and peddling of goods of foreign manufacture in some States;¹ such a license is a special personal privilege, the tax thereby imposed being a tax on the calling and not on the goods, and is, therefore,

1. The New York statutes, as to the application and license, are as follows:

"§ 1. No person shall be authorized to travel from place to place within this State for the purpose of carrying to sell, or exposing for sale, any goods, wares or merchandise of the growth, produce or manufacture of any foreign country, other than family groceries and provisions, unless he shall have obtained a license as a hawker and peddler in the manner hereinafter directed.

"§ 2. Every person desirous to obtain a license as a hawker or peddler shall apply to the secretary of this State, and shall deliver to him a note in writing, signed by such applicant, or his authorized agent, and stating in what manner the applicant intends to travel and trade, whether on foot, or with one or more horses, or other beasts of burden, or with any sort of carriage or boat.

"§ 3. Every applicant for a license as a hawker or peddler, before he shall be entitled to a license, shall pay into the treasury the following duties: If he intend to travel on foot, the sum of twenty dollars for one year's license; if he intend to travel and carry his goods with a single horse or other beast, carrying or drawing a burden, or with a boat or boats, the sum of thirty dollars for one year's license; and, if he intend to travel with any vehicle or carriage drawn by more than one horse or other animal, the sum of fifty dollars for a year's license, which several sums shall be reduced proportionally for any shorter term not less than six months." 2 N. Y. R. S. (7th ed.), 1292.

In Ohio it has been enacted that "county auditors in the several counties in this State shall grant license to peddlers as hereinafter provided.

"Any person shall have a license to peddle in this State who files with the auditor of any county, under oath,

which may be administered by the auditor, a statement or list of his stock in trade, in conformity with the law with respect to statements made by merchants, and pays to the treasurer of such county the proportionate amount of taxes on such stock in trade in conformity with such law, together with twelve dollars, if the applicant intends to travel on foot, twenty dollars, if on horseback, or in a one-horse wagon or other vehicle, and sixty dollars if in a boat or other water-craft, or in railroad cars, which sums, except taxes, shall be credited to the common school fund, and files with the auditor separate receipts of the treasurer thereof, and also pays to the auditor fifty cents for granting the license; but any merchant in this State who, by himself or agent, desires such license, shall not be required to make the statement herein required if the subject-matter thereof has been otherwise listed for taxation.

"A license granted in conformity with the preceding section shall authorize the person in whose name the same is granted to vend and sell goods, wares, and merchandise for one year from the date of the receipt of the treasurer, as a peddler or traveling merchant; but any such person may take out a license to peddle for the term of three or six months, and pay the same proportionately, in accordance with the provisions of the peddling section." 1 Ohio R. S. (1880) §§ 4397, 4398, 4399.

And in Missouri the law is that, "whoever shall deal in the selling of patent or other medicines, goods, wares, and merchandise, except books, maps, charts and stationery, which are not the growth, produce or manufacture of this State, by going from place to place to sell the same, is declared to be a peddler.

"No person shall deal as a peddler without a license; and no two or more persons shall deal under the same

not transferable,¹ and can be acted upon only within the territorial limits of the jurisdiction of the licensing power,² and only such articles can be sold as are enumerated in the license and the statutes authorizing it.³

The amount of the license fee is usually fixed by the statute,⁴ and if the amount is fixed for a year, and no provision made for a shorter time, the full year's fee must be paid, even though the

license, either as partners, agents or otherwise; and no peddler shall sell wines or spirituous liquors.

"Every license shall state the manner in which the dealings are to be carried on, whether on foot, or with one or more beasts of burden, or of the kind of cart or boat or vessel to be employed." 2 Wag. Stat. Mo. (1870) 979. See, also, the statutes of the other States.

1. Under Miss. Code, 1871, § 1735, *et seq.*, imposing a license tax on hawkers and peddlers of goods, it is the occupation that is taxed and not the goods; and it is incumbent upon him who engages in the business, whether he is agent or owner, to take out a license. *Temple v. Sumner*, 51 Miss. 13.

A peddler who employs a servant to drive his wagon and sell his goods does not render himself liable to the penalty of the Pennsylvania act of 1799 (3 Smith 360), which forbids the transfer of a peddler's license, but the servant renders himself liable to the penalty of the act of 1840, which forbids peddling without a license, as the license is a special personal privilege. *Gibson v. Kauffield*, 63 Pa. St. 168.

Use by Servant.—A licensed hawker, who gave his license to be used by his servant employed to sell goods on his account, was not liable on 29 Geo. 3, ch. 26, as for letting to hire or lending the license. *Hodgson v. Flower*, 2 Camp. 288.

2. **Hawking in Different Places.**—The manufacturer of goods cannot, without obtaining a hawker's license, vend them in any other places than those enumerated in 50 Geo. 3, ch. 41, 223; and a manufacturer who hawks his goods in a different place, without a license so to do, can be convicted in a penalty of 10*l* only, under section 17, although section 20 impose a penalty of 40*l* for an offence apparently of the same description. *R. v. Websdell*, 3 D. & R. 360; 2 B. & C. 136.

A hawker's license does not give the privilege of selling goods in a

borough where, by a by-law made pursuant to a charter and ancient custom, strangers are not permitted to trade. *Simson v. Moss*, 2 B. & Ad. 543.

3. See *Com. v. Stephens*, 14 Pick. (Mass.) 370, where it was held upon an indictment under a statute against peddling certain enumerated articles, that plain gold rings and ear-knobs were comprehended in the signification of the term "jewelry."

Candy made in another State is not "foreign" goods within the meaning of the Pennsylvania act of April 16, 1840, which prohibits the hawking and peddling of foreign goods without license. *Hart v. Willetts*, 62 Pa. St. 15.

Produce.—A license law provided that "every person whose business is to buy and sell produce, fish, meats, and fruits from wagons and carts, shall be regarded as a produce dealer," and that "no additional license shall be required from produce dealers for selling meat." Held, that butter and eggs are "produce" within the statute, but one who sells meats alone is not a produce dealer. *District of Columbia v. Oyster*, 4 Mackey (D. C.) 285; s. c., 54 Am. Rep. 275.

Victuals.—Barm or yeast is victuals within the exempting clause of 50 Geo. 3, ch. 41, § 23, and therefore a person purchasing that article of brewers, and selling the same, is not liable to the penalty imposed by that statute upon hawkers trading without a license. *Rex v. Hodgkinson*, 10 B. & C. (Eng.) 73; 5 M. & R. 162.

4. See *Hart v. Beauregard*, 22 La. Ann. 238; *Mayes v. Erwin*, 8 Humph. (Tenn.) 290, and the statutes of the different States.

Disposition of License Moneys.—The amounts payable for licenses by hucksters in Cumberland, Bedford, Franklin, Fulton, and New York counties, under the Pennsylvania act of 1866, are for the use of the respective counties, and not for the use of the commonwealth. *Zeigler v. Com.*, 59 Pa. St. 92.

applicant wishes to sell only for the shorter period.¹ In Tennessee it is *held* that he must pay in proportion to the amount of goods he has for sale.²

III. Constitutionality and Effect.—Laws restraining hawkers and peddlers from the practice of their calling without a license are generally *held* to be constitutional both with reference to the state and national constitutions.³ They must, however, be uniform, and not discriminate in favor of one class and against another.⁴

The restriction against hawking and peddling without a license is no interference with the rights given by the United States statutes to vend a patented article,⁵ and applies to peddlers of patent medicines,⁶ and a license under such laws is no excuse for the violation of a city ordinance or a rule of law.⁷

1. Where the statute fixes the fee for a license at a certain sum for the year—as, by saying “there shall be levied and collected an annual amount as a license,” and no provision is made for a *pro rata* license, no authority is given to the tax collector to demand or recover less than the amount fixed by law. One taking a license towards the end of a year, must pay the full fee; nor is this a violation of the principle of uniformity established by the constitution. The amount required of every one in the same occupation is the same per annum; the time during which the business is conducted is a matter entirely with the person taking out the license. The State prescribes that a certain sum per annum shall be paid by each, who thereby secures the right for the calendar year. Whether he closes before the end of the year or does not begin business until the year has advanced rests with him. *Hart v. Beauregard*, 22 La. Ann. 238.

2. Under Tenn. Stat., 1835, ch. 13, requiring the payment of a tax for a license to sell goods, a party must pay in proportion to the whole stock of goods which he has for sale, notwithstanding he has purchased a part of them from a firm in which he was a partner, and a tax has already been paid upon them by the firm. *Mayes v. Erwin*, 8 Humph. (Tenn.) 290.

And see *Rex v. McGill*, 2 B. & C. (Eng.) 142; 3 D. & R. 377, where it was *held* that a person exposing for sale and selling tea as a hawker, without a license is liable to the penalty imposed by 50 Geo. 3, ch. 41, § 17, upon hawkers trading without a license, although, even with a license, he would be liable to a penalty for selling tea in an unentered place.

Construction of Statutes.—Alabama

act of 1837, §§ 1, 2, relative to the licensing of peddlers, and the penalty of peddling without a license, being inconsistent with are repealed by act of 1848. *Hirschfelder v. State*, 18 Ala. 112.

A peddler having a license, in Pennsylvania, under act of March 4, 1824, is liable, under an earlier act, to a penalty of \$50 for selling anything, however small, from house to house. *Com. v. Willis*, 14 Serg. & R. (Pa.) 398.

The penalties prescribed by Alabama act of 1848 are not repealed by subsequent act of Feb. 9, 1850. *Sterne v. State*, 20 Ala. 43.

3. *Warren v. Geer*, 117 Pa. St. 207; *Taunton v. Taylor*, 116 Mass. 254; *Seymour v. State*, 51 Ala. 52; *Huntington v. Cheesbro*, 57 Ind. 74; *Com. v. Ober*, 12 Cush. (Mass.) 493.

4. See *Bouv. L. Dict.* 15th ed. (Peddlers).

A city ordinance which, while requiring the same license tax from the owners of meat shops in the old as in the new city limits, permits the one class to sell from shops and wagons and the other class to sell from shops only, discriminates, and therefore is unconstitutional. *St. Louis v. Spiegel*, 90 Mo. 587.

The Pennsylvania act of June 10, 1881, prohibiting peddlers without a license, and ordinance of the city of Pittsburgh approved December 4, 1886, are not in conflict with Const. Pa. art. 9, § 1, which provides that all taxes shall be uniform upon the same class of subjects. *Kneeland v. Pittsburgh*, (Pa.) 11 Atl. Rep. 657.

5. *Coldwater v. Russell*, 49 Mich. 617; s. c., 43 Am. Rep. 478.

6. *Laffer's Appeal*, 13 Phila. (Pa.) 499.

7. A municipal regulation prohibiting the stoppage of teams on streets for

IV. What Constitutes Hawking and Peddling.—A single act of selling does not constitute hawking and peddling;¹ the act consists rather in the going about, and proof of the mere travelling, accompanied with an offer to sell, is *prima facie* enough to establish it,² and this in whatever way the goods may have been carried or transferred.³

Selling goods by sample is not peddling;⁴ and in England it

more than twenty minutes, is a valid police regulation, and one violating it cannot justify under a hawker's and peddler's license from the commonwealth. *Com. v. Fenton*, 139 Mass. 195.

1. *Rex v. Little*, 1 Burr. (Eng.) 609; 2 Ld. Ken. 317.

Taking orders for goods to be manufactured, and making one sale of a few articles. *Held*, not to justify a charge of peddling without a license. *Spencer v. Whiting*, 68 Iowa 678.

A single shipment of goods regularly consigned by A to B & Co., merchants and auctioneers, and sold by himself and them at auction and at private sale, for the use and benefit of A, is not hawking and peddling within the meaning of S. C. act of 1835. *State v. Belcher*, 1 McMul. (S. Car.) 40.

2. (1842) Opinions of Attys. Gen. (N. Y.) 111.

The carrying of goods about and offering them for sale are, by the Connecticut statute for the suppression of peddlers, etc. (tit. 74, 354), considered as trading, dealing and trafficking with them. *Merriam v. Langdon*, 10 Conn. 461.

A cabinet-maker, residing at Leicester, and having a shop there, selling goods to Ashby-de-la-Zouch in a cart, which he accompanied on foot part of the way, and then going to Ashby-de-la-Zouch by the mail, where he employed an auctioneer and sold the goods by auction, is a person travelling from town to town within 50 Geo. 3, ch. 41, § 7, and it is not necessary in an information for penalties under said act to state that the defendant sold by auction, by opening a room or a shop, and exposing to sale his goods by retail. *Att. Gen. v. Woolhouse*, 1 T. & J. (Eng.) 463; 12 Price 65.

A person who, having rented a vacant lot, and erected a large tent, with stands and benches, gives free exhibitions of sleight of hand, and lectures, and extols the merits of the goods, and sells medicines from stock in said tent, or by his agents, but neither makes nor solicits any sales, whatever, outside of

said tent, is not liable to the license tax imposed by the revenue law (Sess. Acts Ala. 1886-87, p. 37, § 5, subd. 18), upon "peddlers of medicines or other articles of like character." *Randolph v. Yellowstone Kit*, (Ala.) 3 S. Rep. 706.

Evidence Of.—On the trial of an indictment for carrying on, without a license, the business of a transient or itinerant dealer of goods, evidence of sales made in other counties than that named in the indictment is admissible for the purpose of showing the itinerant nature of the business. *Shiff v. State*, (Ala.) 4 S. Rep. 419.

An information charging the defendant under 50 Geo. 3, ch. 41, as a trading person, going from town to town, etc., with selling at S (by sale at auction) goods, etc., is supported by evidence that he lived at B, and was a trader there,—that he went to S and took up a temporary abode at an inn there, at S to sell for him there goods from B (part of which was proved to be of his own manufacture), who sold them by the defendant's order, and under his directions and authority, the defendant remaining in S during the sale, against the objection that the evidence did not establish a going from town to town, so as to bring the defendant within the statute. *Att. Gen. v. Tongue*, 12 Price (Eng.) 51.

3. The fact that the peddler carries his parcels on his person is no defence to a complaint under Mass. Gen. Stat., ch. 50, § 24, requiring the conspicuous posting of his name, residence, and number of license on his parcels or vehicle. His neglect renders him liable to the penalty imposed by section 27. *Com. v. Cusick*, 120 Mass. 183.

The selling of groceries from a canal boat is within Pennsylvania act of 1840, April 16, punishing any unlicensed person "who shall be found hawking, peddling, or traveling from place to place to sell or expose for sale," etc. *Fisher v. Patterson*, 13 Pa. St. 335.

4. *Com. v. Jones*, 7 Bush (Ky.) 502; But see, *Burbank v. McDuffee*, 63 Me.

would seem that hawking and peddling is confined to transactions carried on for profit, it having *held* that such going about and selling for a philanthropic and religious purpose did not come within the statute.¹

V. Delegation of the Power. — The legislature of a State may delegate its power to tax employments as well as property, and to grant licenses to carry on certain employments to municipal corporations;² and this, even though the constitution expressly confers the power upon the legislature without giving any direct and express authority to delegate the same;³ but the municipal corporation cannot impose a tax on, or grant a license to carry on any occupation, unless directly authorized to do so by its charter or the laws of the State;⁴ and, as a general rule, where this power is conferred upon a municipal corporation, it cannot again delegate it to any person or body, but must itself exercise it.⁵

135; where it was *held* that under Maine Rev. Stat. 1871, ch. 44, § 1, which provides that no person, without first obtaining a license "shall travel from town to town, or place to place in any town, carrying for sale, or offering for sale, any goods, wares, or merchandise, whole or by sample, under a penalty of not less than \$200, and the forfeiture of all property thus unlawfully carried, etc.," does not apply to goods forwarded from without the State, upon the order of a purchaser, though such order was procured through an agent of the seller's, who was unlawfully traveling and offering goods against the prohibition of the statute.

1. Selling from Missionary Basket. — Twelve ladies having purchased materials and made them up into articles of wearing apparel, each in turn for one month carried these articles about in a basket called a "missionary basket," from house to house for sale. The ladies did not find the money to purchase the materials, but the money derived from the sales was applied towards the purchase, and the profits of the sales were devoted to a village school and religious purposes. *Held*, that none of these ladies came within the definition of a peddler in the Peddler's act, 1871 (34 & 35 Vict. ch. 96), § 3, and was not liable under § 4 to a penalty for acting as a peddler without a certificate. *Gregg v. Smith*, 8 L. R. Q. B. 302; 42 L. J., M. C. 121.

2. Osborne v. Mobile, 44 Ala. 493; *Fretwell v. Troy*, 18 Kan. 271; *Kniper v. Louisville*, 7 Bush (Ky.) 599.

The provisions of 1 Ind. Rev. Stat. 1876, 267, § 53, specif. § 3, authorize

cities to adopt an ordinance restraining any person from peddling within her limits without having a license so to do, and prescribe a punishment for its violation. *Held*, that such ordinance violates no provision of either the state or federal constitution. *Huntington v. Cheesbro*, 57 Ind. 74.

The maxim, *salus populi suprema lex*, applied in sustaining as constitutional, Mass. Gen. Stat. ch. 26, §§ 52-60, empowering the board of health to prohibit the exercise of a hurtful trade within a city, and restraining the same during the pendency of an appeal to the jury. *Taunton v. Taylor*, 116 Mass. 254.

3. The Ill. Const. Art. 9, § 1, authorizing the general assembly to tax peddlers, auctioneers, etc. *Held*, not to prevent the legislature from authorizing municipal corporations to tax such persons. *Wiggins v. Chicago*, 68 Ill. 372.

4. Mayor, etc., of Plaquenine *v. Roth*, 29 La. Ann. 261.

A city, if duly authorized by the legislature, may pass ordinance to restrain peddling within the city limits, and punishing a violation; such laws or ordinances are not infringements of either the federal or the Indiana constitutions. *Huntington v. Cheesbro*, 57 Ind. 74.

5. As a general rule, where power is conferred upon a municipal corporation to regulate any calling or business, they are powerless to delegate their discretionary authority to others, or to an individual. Such bodies are created to aid the government in the preservation of good order, and to protect more effectually persons in the particular

1. *Extent of the Delegated Power.*—The character and extent of the power thus delegated to municipal corporations depends upon the wording and construction of the charters and laws conferring it upon them.¹ It being the calling and not the property which is taxed, such taxes may be imposed whether the person be a resident within the limits of the corporation or not, and whether he pay other taxes upon the property used or not.² Authority to regulate and license a business or trade confers no power to impose a tax upon it³ either for the purpose of raising revenue or

community from injuries and annoyances that cannot be readily guarded against by the general laws of the State. Their powers are conferred with the intention that they shall be exercised by the body created, and in the mode prescribed, and any departure from such authority or any attempt by the body to transfer their powers to others is unwarranted. *East St. Louis v. Wehrung*, 50 Ill. 28.

1. The provisions of the general borough act of April 3, 1851, § 3, (P. L. 320), vests in boroughs power to make all needful regulations respecting markets and market-days, the hawking and peddling of market produce and other articles in the borough, etc. *Held*, that the court could not say, on demurrer to a declaration, that such provisions were not broad enough to authorize the passage of an ordinance requiring book canvassers to take out a license, and where an act of assembly incorporating a borough gives to the council of such borough express authority to enact such by-laws and make such rules, regulations, and ordinances as shall be determined by a majority to be necessary to promote the peace, good order, benefit, and advantage of such borough, particularly providing for the regulation of the markets, streets, alleys, highways, etc., therein, said council has power to pass an ordinance requiring book canvassers to take out such license and imposing a penalty for failure to do so. *Borough of Warren v. Geer*, 114 Pa. St. 207.

An authority conferred on a city to collect taxes on "auctioneers, transient dealers, and peddlers," will justify it in imposing a tax either upon the amount of the sales of such persons, or in the form of a license to the auctioneers. *Carroll v. Mayor, etc., of Tuscaloosa*, 12 Ala. 173.

The Ordinance of the City of Los Angeles, requiring peddlers of vegetables to pay license, is not in conflict

with Cal. Code, § 3384, and is not affected by the new constitution. *Ex parte Ah Toy*, 57 Cal. 92.

The City of Syracuse, under its charter, may prohibit by ordinance the peddling or delivery of milk from vehicles in the streets by unlicensed persons, and may declare the violation of such ordinance a misdemeanor, and such an ordinance is not in conflict with the privileges of the Onondaga Milk Association, as conferred by its charter. (N. Y. Laws 1872, ch. 102.) *People v. Mulholland*, 82 N. Y. 324; s. c., 37 Am. Rep. 568.

The City of Chicago has power under § 62, subd. 41, of its charter, to compel one who peddles milk from door to door to take out a license. Such a dealer is a "peddler," although he has regular customers. [Mulkey, Dickey and Scholfield, J. J., dissenting.] *Chicago v. Barte*, 100 Ill. 57.

2. *Comrs. of Edenton v. Capeheart*, 71 N. C. 156.

A city authorized to tax all persons exercising within its bounds any profession, trade, or calling, may impose a license tax upon persons selling butchers' meat therein, "whether from stalls, or shops, or by peddling," and upon their wagons used in that business, although "agricultural products" thus sold are exempt, and although such persons reside and have their slaughter-houses and sale-shops out of the city, and come into the city simply to deliver to customers, and, although farmers selling their own products are exempt, and although such wagons are otherwise taxed as property. *Davis v. Macon*, 64 Ga. 128; s. c., 37 Am. Rep. 60. *Compare Burr v. Atlanta*, 64 Ga. 225.

3. *Muhlenbruck v. Long Branch Comrs.*, 42 N. J. L. 364; s. c., 36 Am. Rep. 518.

The provision of code, § 456, that "cities shall have power to establish and regulate markets, does not em-

otherwise,¹ and power to enact such ordinances as shall be deemed expedient for the good government of the city does not give the right to require a license from peddlers.² But a prohibition against the exercise of a hurtful trade should be liberally construed.³

2. *Validity of Acts under it.*—Ordinances are merely the laws of a municipal corporation, and are not exempt from the operation of the general principle that a by-law to be good must be reasonable.⁴ Thus, an ordinance requiring the payment by hawkers and peddlers of an unreasonable fee, is void,⁵ and to be valid an ordinance must not discriminate against the products or residents of one State or locality in favor of those of another.⁶

power a city council to make an ordinance forbidding the peddling of meats. *City of Burlington v. Dankwardt*, (Iowa) 34 N. W. Rep. 801.

1. The Brooklyn charter (N. Y. Laws 1880, ch. 564), authorizing the common council to "regulate and license vehicles used in carrying on any business, except physicians, for a certain fee, does not authorize an ordinance of scope to raise a revenue by taxation. An ordinance allowing the mayor to license such persons as he may deem proper, to carry on the business of coachman, etc., "and all other vehicles used upon the public streets in the conduct of any business, except that of physicians, provided the licenses shall be granted to no person other than citizens of the United States. *Held*, void; it being such attempt to tax, it also not sufficiently excluding vehicles used for pleasure, and it also authorizing the mayor to exercise a power belonging only to the common council. *Brooklyn v. Nodine*, 26 Hun (N. Y.) 512.

2. *St Paul v. Stoltz*, 33 Minn. 233.

3. *Taunton v. Taylor*, 116 Mass. 254. Such prohibition is a quasi-judicial act, and can be revised only in the manner provided in the statute. The defendant in the suit for an injunction cannot prove that the trade is not a nuisance. *Taunton v. Taylor*, 116 Mass. 254.

4. *State v. Mayor, etc.*, 37 N. J. L. 348.

5. A city ordinance requiring peddlers to pay a license "not less than one nor more than twenty-five dollars, for a fixed time, in the discretion of the mayor," is void for unreasonableness. *State Center v. Barenstein*, 66 Iowa 249.

A borough ordinance requiring persons canvassing from house to house

for the purpose of selling or soliciting orders for books, to take out a license for that purpose, and to pay certain fees therefor, thus putting such person on the same footing as others holding mercantile licenses within the borough, is not unreasonable or opposed to common right, and is not in conflict with the constitution of the United States or of Pennsylvania. *Borough of Warren v. Geer*, 117 Pa. St. 207.

An ordinance providing that "the owners of meat shops who have paid their license may be permitted to deliver meat in a wagon or otherwise without taking out an additional license therefor, and in the new limits, such owners may send out their wagons in such new limits." *Held*, not to limit the sale of meat from wagons in the new limits to those whose meat shops are within the new limits. *St. Louis v. Spiegel*, 16 Mo. App. 210.

Under a city charter giving power, not to tax, but to license peddlers, a license fee of \$15 per year is not objectionable. *Coldwater v. Russell*, 49 Mich. 617.

A city ordinance requiring hawkers and peddlers to pay a license fee of \$2.50 per day is neither class legislation, an unjust discrimination, partial and oppressive, or inconsistent with public policy. *Cherokee v. Fox*, 34 Kan. 16.

The Remedy.—An applicant for hawkers' and peddlers' license, who is refused unless he will pay an excessive and illegal fee imposed by ordinance, is entitled to a *certiorari* to review it. *State v. City of Orange*, (N. J.) 13 A. 240.

6. See *Comrs. of Edenton v. Capeheart*, 71 N. Car. 156.

A city order requiring all peddlers and drummers to pay a license tax is not void, as discriminating against the products of other States, although as a

The question whether or not an ordinance is reasonable is one for the court.¹ Ordinarily, the only rules and regulations which a corporation may make in respect to business or trade under its police powers, are such as have relation to public health, morals and order.²

VI. Effect of Failure to Procure a License.—While a violation of the laws requiring hawkers and peddlers to procure a license will subject the offender to the fine or other penalty prescribed by that law, it has no effect upon the validity of the contract of sale made by him, and he is equally entitled to recover the purchase price of the goods whether sold with or without a license.³

VII. Prosecution for Violation of License Law.—The violation of the laws requiring hawkers and peddlers to obtain a license before engaging in their calling may be prosecuted in some States by indictment,⁴ and it is the general rule that such indictment must set forth the particular act or acts which constitute the offence relied upon.⁵ But in Alabama it is *held* unnecessary to allege the

matter of fact, few of the residents of the city or State care to sell under it, so that in practice most of the revenue under it is derived from outsiders. *Ex parte Hanson*, (Oreg.) 28 Fed. Rep. 127.

And see *Nightingale's Case*, 11 Pick. (Mass.) 168; s. c., *Buffalo v. Webster*, 10 Wend. (N. Y.) 100, holding that a by-law prohibiting inhabitants of the city, or of any town in the vicinity, who offer for sale the produce of their own farms, etc., from occupying any stand for the purpose of vending etc., in certain streets, which are, by the by-law, a part of the market, is valid.

1. *State v. Mayor, etc.*, 37 N. J. L. 348.

2. *Muhlenbruck v. Long Branch Comrs.*, 42 N. J. L. 364; s. c., 36 Am. Rep. 518.

3. The statute of New Hampshire, which subjects to a penalty "every peddler or other person going from place to place, carrying to sell or exposing for sale, any goods without license," does not render illegal a sale made by such peddler or other persons without license; and the price of goods thus sold may be recovered by suit. *Jones v. Berry*, 33 N. H. 209.

Where the plaintiffs in New York forwarded goods to the defendant in Maine on his order procured by their unlicensed traveling agent. *Held*, in a suit for the price of the goods, that the fact that the agent, in procuring the order, was acting in violation of the statute because not licensed, was no defense; and that, for goods thus forwarded

upon the order of the purchaser, the sellers were entitled to recover. *Burbank v. McDuffee*, 65 Me. 135. See, also, *Benj. on Sales* (1888 ed.) 501.

4. See *May v. State*, 9 Ala. 167; *Com. v. Bruckheimer*, 14 Gray (Mass.) 29; *Page v. State*, 6 Mo. 205; *State v. Powell*, 10 Rich. (S. Car.) L. 373; *State v. Aikin*, 7 Yerg. (Tenn.) 268.

5. *Com. v. Dudley*, 3 Metc. (Ky.) 221.

Sale as a Hawker and Peddler.—An indictment on Mass. Stat. 1846, ch. 244, § 2, which alleges that the defendant at a certain time and place, was a hawker, peddler and petty chapman, and did then and there go from place to place exposing goods for sale, and did then and there sell certain goods, is insufficient, for want of an allegation that he sold the goods as a hawker, peddler or petty chapman, or while going about as such. *Com. v. Bruckheimer*, 14 Gray (Mass.) 29.

In a *qui-tam* action for selling goods without a license, the declaration must aver that the defendant was such peddler, etc., as is required to have license, and that he did sell. *Prigmore v. Thompson, Minor* (Ala.) 420. See, also, *Greer v. Bumpass*, Mart. & Y. (Tenn.) 94; *State v. Aikin*, 7 Yerg. (Tenn.) 268.

No License.—An indictment against a peddler, which does not allege that the person charged with peddling has not first obtained a license therefor, is bad, and a judgment founded on such an indictment will be reversed. *May v. State*, 9 Ala. 167.

HAWKERS AND PEDDLERS—HAZARDOUS—HE-HIS.

facts which constitute hawking and peddling; being engaged in the business being the gist of the offence.¹

The burden of proof rests with the prosecution.² It is no defense that the accused applied to the proper officer for a license and tendered the fee;³ and proof of an order of the board directing a license to issue is not enough; a license may be authorized and yet not taken out.⁴

A warrant issued for the seizure of the property which is being peddled must be directed to and issued against the person actually engaged in the hawking and peddling, whether he be the owner or merely an agent.⁵

HAZARDOUS.—See INSURANCE. ⁶

HE-HIS.—See note 7.

Must Allege Sale.—Under Missouri act of 1835, an indictment against a person for peddling clocks without a license must allege a sale, though it is not necessary to allege to whom the sale was made. Page v. State, 6 Mo. 205.

But in South Carolina an indictment for peddling, not setting forth to whom the peddler sold, is defective. State v. Powell, 10 Rich. (S. Car.) L. 373.

1. Sterne v. State, 20 Ala. 43.

2. State v. Hirsch, 45 Mo. 429. See, also, State v. Richeson, 45 Mo. 575.

3. State v. Myers, 63 Mo. 324.

4. Schlicht v. State, 31 Ind. 246.

5. **How Enforced.**—A warrant directing a seizure of property of two persons as partners for peddling "by their agent" certain sewing machines, "without having obtained a license," etc., held, to be upon its face illegal and void. The Ga. Code, § 1634, requiring the license to describe "the person of the peddler," imports that the process must issue against the actual peddler. Howard v. Reid, 51 Ga. 328.

6. "The terms 'hazardous,' 'extra hazardous,' 'specially hazardous,' and 'not hazardous' are well understood technical terms in the business of insurance, having a distinct separate meaning. Although what goods are included in each designation may not be so known as to dispense with actual proof, the terms themselves are distinct and known to be so; so that an insurance upon goods 'hazardous' does not include goods 'extra hazardous' or 'specially hazardous'; and an insurance upon goods 'extra hazardous' does not include goods 'specially hazardous'. 'Extra hazardous' and 'specially hazardous' are not subdivisions or classifications of goods under the more general term 'hazardous'; but distinct classes

of goods." And where express definitions of these terms form a part of the policy, further inquiry is precluded. A policy covering goods hazardous and not hazardous, does not cover goods extra or specially hazardous. Pindar v. Continental Ins. Co., 38 N. Y. 364; s. c., 97 Am. Dec. 795; Reynolds v. Commerce F. Ins. Co. of N. Y., 47 N. Y. 597.

A description of certain goods as hazardous is tantamount to an exclusion of all others as not hazardous, in the absence of a special classification of the latter term. N. Y. Equitable Ins. Co. v. Langdon, 6 Wend. (N. Y.) 623.

7. The use of "he" and "his" in a sheriff's deed in referring to the grantee, whose Christian name is designated therein by a mere initial, is not conclusive that the person referred to is a male, and parol evidence is admissible to show that a female was intended. Berniand v. Beecher, 71 Cal. 38. And the word "his" includes a woman in the phrase "take into his possession" in an embezzlement act. Rex v. Smith, R. & R. 267.

Under an act making it unlawful for any person to sell spirituous liquors to be used in or about his house, without being duly licensed, a hired bar-tender may be indicted. "The act of selling and the control and possession of the article sold at the place of sale, indicate an actual possession or claim of possession, on the part of the seller, and the terms 'his house or other buildings' indicate the extent in which he has or claims to have possession for any purpose connected with the use of spirituous liquors." Com. v. Hadley, 11 Met. (Mass.) 66. The same construction was put upon an act making it a

HEAD.—See note 1.

HEALTH.—See ABATEMENT, ADULTERATION, BOARDS OF HEALTH, CEMETERIES, DRAINS AND SEWERS, DRUGGISTS, HOSPITALS, INJUNCTION, MUNICIPAL CORPORATIONS, NUISANCE, PHYSICIANS AND SURGEONS, QUARANTINE, WATERS AND WATER-COURSES.

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misdeemeanor for any person to keep open *his* shop on the Lord's day, under which, an employe who had the management of the business and could and did decide when the shop should be opened and when closed, was *held* indictable. "If a man has the government and management of a shop and its business, it may properly be described as his shop." Com. v. Dale, 144 Mass. 363; s. c., 4 N. Eng. Rep. 200; 19 Chic. Leg. News 314.

A discharge of an insolvent from "all debts founded on any contract made by him," decreed under insolvency proceedings instituted by him in his individual capacity, and also as a member of a firm, releases him from liability for the debts of the firm. Lathrop v. Tilden, 8 Cush. (Mass.) 375.

In Insurance Policies.—"The words 'his' or 'their' used in a policy, as descriptive of the property of the assured, do not render the policy void, if the insured has an insurable interest, although the interest may be a qualified or defeasible, or even an equitable interest." Fowle v. Springfield Ins. Co., 122 Mass. 194. But where the policy contained a condition that "If the interest in the property to be insured be a leasehold interest or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, otherwise the insurance shall be void," and there was no written application, nor statement in the policy of the interest, which was a leasehold, but the property was described as "his," it was *held*, that if the insured truly represented his interest to the company, its failure to incorporate it did not avoid the policy, but if he made no representation, his acceptance of the policy amounted to a declaration that his interest was absolute, and avoided the policy. Mers v. Franklin Ins. Co., 68 Mo. 127.

A policy, with this same condition, was

not avoided by a description of the property as "his" where the interest of the assured was an equitable one under an agreement to purchase and part payment of the purchase money. "An individual may properly regard property as 'his,' and so denominate it, when he has a right to it, and the power by law to enforce and protect that right. . . . Indeed both in common parlance and in legal acceptance, property is *his*, who in case of its destruction, must sustain the loss of it." Hough v. City F. Ins. Co., 29 Conn. 10.

His Commercial Paper.—An accommodation indorser of negotiable paper, whose indorsement is in no way connected with his business, and who failed to pay the same, could not be forced into bankruptcy "for suspending and failing to resume payment of his commercial paper." *In re Clemens*, 2 Dill. (C. C.) 533.

His Crop.—See CROP.

His Natural Life.—Where A demises to B for the term of his natural life, the demise is *prima facie* for the life of B. But where A demised to B, his executors and administrators, for the term of his natural life, and the lease contained a covenant for quiet enjoyment by B, his executors, etc., during the natural life of A, the demise was for the life of A. Pritchard v. Dodd, 5 B. & Ad. 689.

1. **Head of Bureau.**—See PEOPLE v. Board of Fire Comrs. of N. Y., 86 N. Y. 149.

Head of Corporation.—Under an act requiring service on the head of a corporation, service on the president is proper. Sacramento v. Fowle, 21 Wall. (U. S.) 119.

Head of a Creek.—This is the source of the longest branch. Davis v. Bryant, 2 Bibb (Ky.) 110.

Head of Department.—See DEPARTMENT.

Head of Family.—See FAMILY.

1. Definition.—Bodily health is the state of being free from physical pain or disease.

2. Private Rights as to Health.—Whatever degree of health a person's constitution and habits may admit of, the primary right of personal security includes his legal right to preserve his health uninjured by any acts or practices on the part of others.¹

3. How Infringed and Protected.—The legal right to health is infringed whenever, by any acts or practices of another, a man sustains, or is likely to sustain, any apparent damage in his vigor or constitution.² Apart from the right to abate a nuisance affecting

1. 1 Bl. Com. 129. It is one of those rights to which every man is entitled by reason and natural justice, since, without it, he cannot have the perfect enjoyment of any other advantage or right.

1 Bl. Com. 134.

2. 3 Bl. Com. 122.

Instances.—The giving or selling *unwholesome articles of food or drink* to a man, he being in ignorance of their character. See ADULTERATION.

Polluting the Water in his well, or in the stream from which he takes his drinking water. If a person has substances injurious to health on his own land, he may or may not be allowed to keep them there, but he must certainly keep them off his neighbor's land. No plea of necessity can be heard to contravene this rule, for, as was said in the case of a leaking privy-well, "the proposition that one man should under any circumstances be permitted to deposit any part of his health-destroying filth in or upon his neighbor's premises is simply absurd." Haugh's App., 102 Pa. St. 42.

Nor can the fact that the injury results from the carrying on of a manufacture authorized by statute affect the matter. Pottstown Gas Co. v. Murphy, 39 Pa. St. 257. Nor that the noxious matter was carried to the plaintiff's well by the ordinary operation of natural laws. Brown v. Ilius, 27 Conn. 84.

The extreme case of Penna. Coal Co. v. Sanderson, 113 Pa. St. 126, is not inconsistent with the above, for no question of health was involved. The court, though deciding against the plaintiff, says expressly, p. 149, "We do not say that a case may not arise in which a stream, from such pollution, may become a nuisance, and that the public interests, as involved in the general health and well-being of the community, may not require the abatement of that nuisance. This is not such a case; it is shown that the community in and around the city of Scranton, including

the complainant, is supplied with abundant pure water from other sources. There is no complaint as to any injurious effects from this water to the general health. . . . The plaintiff's grievance is for a mere personal inconvenience."

Depositing Noxious Matter on another's land, whether by flow of water or otherwise. Beckley v. Skroh, 19 Mo. App. 75; Perrine v. Taylor, 43 N. J. Eq. 128; Chapman v. Rochester, (N. Y.) 18 N. E. Rep. 88; Evans v. W. & W. R. Co., 96 N. Car. 45.

Letting Water Accumulate and stagnate near any man's premises. Hamilton v. Columbus, 52 Ga. 435.

The commission of *any other nuisance* injurious to health. See NUISANCE.

Communicating to a man *any contagious disease*, or exposing him to the risk of contagion. *E. g.*, the receiving persons suffering from contagious diseases into a hospital, situate in the residence part of a town, is an offence against the health of the persons living near by. Gifford v. Babies' Hosp., 1 N. Y. Supp. 448.

Even the local health authorities may be proceeded against for keeping a pest-house too near a man's dwelling. Haag v. Vanderburgh Co. Comrs., 60 Ind. 511. See HOSPITALS.

Unskillful Treatment on the part of a physician or surgeon.—Without considering the finer points of the law of malpractice or of negligence, which can best be studied under those heads, it is sufficient for the purposes of the present article to state that if one who undertakes to act as a physician injures the health or bodily soundness of his patient by improper treatment, will be liable. Landon v. Humphrey, 9 Conn. 209; Atley v. Burns, 70 Ill. 162; Kelsey v. Hay, 84 Ind. 189; Smothers v. Hanks, 34 Iowa 286; Branner v. Stormont, 9 Kan. 57; Patten v. Wiggin, 51 Me. 594; Hitchcock v. Burgett, 38 Mich. 501;

health,¹ a personal action lies if the injury can be compensated for in damages;² but if it consist in the consequences of a continuing act, and cannot be so compensated for, an injunction is

Craig v. Chambers, 17 Ohio St. 253; *Heath v. Gllson*, 3 Or. 64; *Brooke v. Clarke*, 57 Tex. 105; *Hathorn v. Richmond*, 48 Vt. 557.

To expose himself to such a liability, the defendant must have assumed to act as a regular practitioner. To hold otherwise would be to charge responsibility in damages upon all who made mistakes in the performance of kindly offices for the sick. *Haucke v. Hooper*, 7 C. & P. 81; *Lamphier v. Phipos*, 8 C. & P. 475; *Simonds v. Henry*, 39 Me. 155; *Gill v. Middleton*, 105 Mass. 477; *Higgins v. McCabe*, 126 Mass. 13.

A physician or surgeon must exercise the ordinary care and skill shown by men of his profession, in his specialty, if he be a specialist, or according to his particular school, if he profess to belong to such. *Bowman v. Woods*, 1 Greene (Iowa) 441; *Corsi v. Mardzek*, 4 Sm. (N. Y.) 1; *Carpenter v. Blake*, 75 N. Y. 12; *Musser v. Chase*, 29 Ohio St. 577; *Quinn v. Higgins*, 63 Wis. 664.

The highest skill is not required of him. *Holtzman v. Hoy*, 19 Ill. App. 459; *Smothers v. Hanks*, 34 Ia. 286; nor even skill proportionate to the seriousness of the case; *Atley v. Burns*, 70 Ill. 162; neither is he to be judged by the general standard of the profession, without regard to locality, for it is clear that a city physician has greater opportunities for gaining knowledge and experience than one in the country. In *Gramm v. Boener*, 56 Ind. 497, it was said that the criterion must be the standard of professional excellence in such localities as that in which the physician practiced, rather than in the particular locality. "There might be but few practicing in the given locality, all of whom might be quacks, . . . and it would not do to say that because one possessed and exercised as much skill as the others, he could not be chargeable with the want of reasonable skill."

A different rule seems to have been adopted in *Gates v. Fleischer*, 67 Wis. 504, where a charge that the defendant "was bound to bring to [the plaintiff's] aid and relief such skill as is ordinarily possessed and used by physicians and surgeons in the vicinity or locality in which he resides, having regard to the advanced state of the profession at the time of the treatment," was approved.

A physician must, however, employ the best skill of which he is capable. *Fisher v. Nicolls*, 2 Ill. App. 484; *Carpenter v. Blake*, 17 N. Y. Sup. Ct. 358. And proof of gross culpability is not necessary to sustain an action against him. *Carpenter v. Blake*, 17 N. Y. Sup. Ct. 358.

If he be incompetent, or believes himself to be so, he should call in another physician. If he be in doubt as to his competency, he must exercise his best judgment. *Mallen v. Boynton*, 132 Mass. 443.

His reputation is immaterial, and evidence thereof cannot be introduced. *Holtzman v. Hoy*, 19 Ill. App. 459.

A physician's reasonable instructions must be obeyed by the patient, and failure to obey may be set up as contributory negligence in defense to an action for malpractice. *Lower v. Franks*, (Ind.) 14 N. E. Rep. 885; s. c., 17 N. E. Rep. 630; *Geiselman v. Scott*, 25 Ohio 86; *McCandless v. McWha*, 22 Pa. St. 261.

1. See ABATEMENT; NUISANCE.

2. **Right of Action**—A man can have an action for the injury done to the health of his family as well as to his own. *Jarvis v. St. L. I. M. & S. R. Co.*, 26 Mo. App. 253.

And it constitutes a cause of action by a hotel keeper that the health of his guests is affected. *O. & R. Co. v. Simon*, 40 Ind. 278.

A plaintiff's exceptional susceptibility to injurious effects will not entitle him to relief where the practice complained of would not affect the health of the average man. *Ruff v. Phillips*, 50 Ga. 130; *Price v. Grantz*, 118 Pa. St. 402. See, also, *Westcott v. Middleton*, 43 N. J. Eq. 478.

It is enough that the plaintiff suffers special damage, though others may suffer also. *Corley v. Lancaster*, 81 Ky. 171.

The fact that a house is let to a tenant does not affect the landlord's liability for a cesspool so located and constructed that its lawful use by a tenant works an injury to the health of his neighbors. And in such a case the tenant is also liable. *Fow v. Roberts*, 108 Pa. St. 489.

Evidence.—In an action for damages for raising a dam, and accumulating

the proper remedy.¹ No length of time can legalize the continuance of a practice destructive to the health of those dwelling near.²

4. Rights and Powers of the Community.—The protection of the health of every thickly-settled community calls for the action of the public authorities in many particulars, both in the way of regulating the acts of private citizens, and in the construction and maintenance of public works.³ Where prompt action is needed,

stagnant water, evidence showing the comparative healthfulness of the plaintiff's premises before and after the change is alone material. *Watson v. VanMeter*, 43 Iowa 76.

1. *Wright v. Moore*, 38 Ala. 593; *Wahle v. Reinbach*, 76 Ill. 322; *Minke v. Hopeman*, 87 Ill. 450; *Rand v. Wilber*, 19 Ill. App. 395.

2. *Wright v. Moore*, 38 Ala. 593.

3. "While the power of any particular branch of the body politic so to act in any special case or class of cases is usually regulated by statute, the power itself, abstractly considered, is one of those "police powers" which are a feature of civilized government everywhere.

"The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives or health . . . of the citizens. Unwholesome trades, slaughter houses, .

. . . The burial of the dead, may all be indicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community." 2 Kent's Com. (13th ed.) 340. See, also, Cooley's Const. Lims, ch. 16. See MUNICIPAL CORPORATIONS.

The power to regulate all matters affecting health being most essential to the well-being of the community, the legislature cannot, by any contract, divest itself of the right to exercise it. Hence, where a company was chartered with the exclusive right to have all stock landed at their stock landing-place and slaughtered at their slaughter-house, the articles of a subsequent constitution of the State, vesting in the local authorities the right to regulate slaughtering, and forbidding any monopoly of the business, and certain ordinances of New Orleans, made in pursuance of the constitution, were

held valid, because the contract whose obligation they impaired was one which the legislature had no power to make. *Butcher's Union, etc., Co. v. Crescent City, etc., Co.*, 111 U. S. 746.

No charter can confer an irrevocable right to continue a practice injurious to the public health. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659.

Statutes Regulating Health.—The most complete statute with regard to health is the English Public Health Act of 1875, 38 & 39 Vict. ch. 55. In America the statutes of the various States deal with the matter more or less thoroughly.

The community takes action, for the preservation of health, chiefly in regard to the following matters:

Drains and Sewers.—The construction and proper maintenance of *drains* and *sewers*, and the regulation of all matters of both surface and house drainage, including the disposal of sewage and refuse by natural or artificial means. On this point the English act is very complete. As to house drainage, the Pennsylvania act of June 30, 1885, P. L. 250, and the rules made in pursuance thereof (*Brightly's Phila. Dig.* 103, note) furnish an illustration.

Every local authority must use its sewers in accordance with the act authorizing them, if such there be. *Met. Bd. of Wks v. Eaton*, 48 J. P. 611.

A municipality must see where its sewage goes to, and that it is not so carried off as to create a nuisance elsewhere. *Att. Gen. v. Kingston*, 24 L. J. Ch. 481; s. c., 12 L. T. N. S. 665; *Att. Gen. v. Leeds*, L. S. 5 Ch. App. 583. *Gould v. Rochester*, 105 N. Y. 46.

The fact that an ordinance, still unrepealed, permits drainage into a stream is immaterial, if it be in fact injurious to the public health. *State v. Hutchinson*, 39 N. J. Eq. 218, 569.

See, in general **DRAINS AND SEWERS.**

Scavenging and Street Cleaning.—See, *Ex parte Casinello*, 62 Cal.

538; *St. Paul v. Byrnes*, (Minn.) 36 N. W. Rep. 449; *Gregory v. Taylor*, 40 N. Y. 273.

A municipality may, to control the removal of dirt and offensive matter, prohibit this from being done except by parties licensed or employed by it. Such an ordinance is not in restraint of trade. *Boehm v. Baltimore*, 61 Md. 259; *In re Vandine*, 6 Pick. (Mass.) 187; *Com. v. Stodder*, 2 Cush. (Mass.) 562, 575.

Where a city has established, for the preservation of the public health, a place for the deposit and burial of dead animals, garbage, etc., and has passed ordinances for its proper use with penalties for violation, it is not liable to an adjoining property owner for injury to his health by reason of violation of the ordinances, without proof of negligence in enforcing them. *Worth v. Crawford*, 64 Tex. 202.

Providing Pure Water.—Providing a supply of pure water for the inhabitants, and protecting the same from pollution. Thus, a power to pass ordinances for the preservation of health and the public welfare includes the power to contract for the construction of water-works, the corporation being the judge of the best mode of accomplishing the purpose of the general power. *Livingston v. Pippin*, 31 Ala. 542; *Rome v. Cabot*, 28 Ga. 50; *Wells v. Atlanta*, 43 Ga. 67.

And a city may bind itself by the grant of a right to lay water pipes under the surface of the streets. *Quincy v. Bull*, 106 Ill. 337.

It may take land by eminent domain for the construction of water-works. *Burden v. Stein*, 27 Ala. 104; s. c., 28 Ala. 455; *Reddall v. Bryan*, 14 Md. 444; *Ham v. Salem*, 10 Mass. 350; *Waylan v. Comrs.*, 4 Gray (Mass.) 500; *Gardner v. Newburg*, 2 John. Ch. (N. Y.) 162; *In re Roch. Water Comrs.*, 66 N. Y. 413.

But a power to purchase a site for water-works is not included in a power to contract for a supply of water and for machinery and pipes. *Peop. v. McClintock*, 45 Cal. 11.

Water being a public necessity, a city cannot arbitrarily refuse to supply it; e. g., to the owner of a rented house, merely because the tenant is in default for water consumed in another house. *Dayton v. Quigley*, 29 N. J. Eq. 77.

A power "to secure the general health" authorizes the filling up of impure wells in the streets, at the public

expense, but without compensation to persons who have constructed them under a license. *Ferrenbach v. Turner*, 86 Mo. 416.

See **NUISANCE; WATERS AND WATER-COURSES.**

Prevention of the Manufacture or Sale of Unwholesome Articles of Food and Drink. See **ADULTERATION.**

In this connection, the right to forbid the feeding of cows on still slopes may be noticed. *Johnson v. Simonton*, 43 Cal. 224.

Regulation of the Manufacture and Sale of Drugs and Poisons. See **DRUG-GISTS.**

Opium Smoking.—The prevention and suppression of *unhealthy practices, e. g.,* opium smoking. See *In re Lee Tong*, 9 Saw. (U. S.) 333. But such a power, though given by charter, is strictly construed. *Ex parte Ah Lit*, 26 Fed. Rep. 512.

Dwelling and Lodging Houses.—The inspection and sanitary regulation of *dwelling and lodging houses*. Thus a municipality may be authorized to abate unhealthy dwellings as a nuisance. This is a valid exercise of the police power, and therefore not in conflict with a constitutional prohibition against applying private property to public use without the owner's consent, or compensation to him. *Theilan v. Porter*, 14 Lea (Tenn.) 622.

But a house cannot ordinarily be closed, and its inmates removed except in time of pestilence. *Eddy v. Bd. of Health*, 10 Phila. (Pa.) 94.

The use of cellars as dwellings may be restricted, as by 38 & 39 Vict. ch. 55, §§ 75, 71.

And the manufacture of cigars or tobacco in tenement houses forbidden, as is done in New York. Laws of 188, p. 79; Laws of 1884, p. 335.

Overcrowding may be treated as a nuisance, as by 38 & 39 Vict. ch. 55, § 91.

Factories, Workshops and Mines.—The regulation of *factories, workshops and mines*, both as to their sanitary condition, and the employment of children therein. See 39 & 40 Vict. ch. 75, § 6; 46 & 47 Vict. ch. 53, § 18.

So shopkeepers may be compelled to furnish seats for their female employees, and to allow their use of them. 2 Rev. Stats. N. Y. p. 1089.

Nuisances and Offensive Trades.—The prevention and abatement of *nuisances and offensive trades*. As, however, it is well settled that it is not essential to a nuisance that it be injurious to health

(*Rex v. White*, 1 Burr. 333; *Walker v. Seefe*, 4 Eng. L. & E. 15; *Catlin v. Valentine*, 9 Paige (N. Y.) 576; *Brady v. Weeks*, 5 Barb. S. C. (N. Y.) 157), the legal character and mode of dealing with a nuisance of this sort do not differ from those of any other kind of nuisance. For the purposes of the present article a few illustrations will suffice:—

Penning back the water of a stream, so as to make it stagnant, and prejudicial to the health of the neighborhood, will not be allowed. *State v. Close*, 35 Iowa 570; *Munson v. People*, 5 Park. Cr. (N. Y.) 16; *Com. v. Webb*, 6 Rand. (Va.) 726.

A very common exercise of the police power to preserve health is the prohibition of slaughter-houses within certain districts. This is warranted by a general power to regulate their erection, use, and continuance. *Ex parte Shrader*, 33 Cal. 279; *Ex parte Heilbrow*, 65 Cal. 609; *Watertown v. Mayor*, 109 Mass. 315; *Sawyer v. St. Bd. of Health*, 125 Mass. 183; *Cronin v. People*, 82 N. Y. 318.

But such prohibition is not warranted by a power to compel slaughter-houses to be cleansed, and abated when necessary for the health of the inhabitants. *Wreford v. People* 14 Mich. 41.

The keeping of swine may also be prohibited within certain limits. *Com. v. Hatch*, 97 Mass. 221.

So of the business of rendering dead animals, the convenience of the public being no defense. *Secord v. People*, 121 Ill. 623.

Nor even a license from the local board of health. *Garrett v. State*, 49 N. J. 94; *Affirming Id.* 693.

Nor can the care taken to minimize the effect be a defense where the business is really injurious to health. *Moses v. State*, 58 Ind. 185.

The carrying on of a lawful business, not necessarily injurious to health, in such a manner as not to be a nuisance, cannot, of course, be prevented. *Weil v. Ricord*, 24 N. J. Eq. 169.

Thus the power "to pass and enforce all ordinances deemed necessary or proper to prevent the introduction of infectious or contagious diseases, and preserve the health of the inhabitants" does not authorize an ordinance making it unlawful "to import, sell, or otherwise deal in second-hand or cast-off garments, blankets, bedding, or bed-clothes," even with a proviso allowing

the sale of such articles when not imported, or when they had not been used by persons having infectious diseases. *Greensboro v. Ehrenreich*, 80 Ala. 579.

An ordinance forbidding the burning of oyster shells and stone lime within the city of Baltimore was *held* void, as the lime kilns so employed were not necessarily nuisances, and whether any particular one was a nuisance or not was a mixed question of law and fact, to be determined by process of law. *State v. Mott*, 61 Md. 297; s. c., 4 Am. & Eng. Corp. Cas. 334.

An ordinance granting an exclusive right to remove all carcasses of animals not slain for food is void except as to such carcasses as are nuisances. *River Rend. Co. v. Behr*, 77 Mo. 91; s. c., Am. & Eng. Corp. Cas. See in general NUISANCES.

Practice of Medicine.—The regulation of the practice of medicine. See PHYSICIANS and SURGEONS.

Hospitals.—As also of all hospitals and institutions for the care of children, the insane, etc. See HOSPITALS.

Contagious and Infectious Diseases.—And all matters relating to contagious and infectious diseases. See BOARD OF HEALTH; QUARANTINE.

Cemeteries.—And cemeteries, both as to interments and disinterments. *Graves v. Bloomington*, 17 Ill. App. 476; *Bogert v. Indianapolis*, 13 Ind. 134; *Austin v. Murray*, 16 Pick. (Mass.) 121; *Com. v. Goodrich*, 13 All. (Mass.) 546; *Com. v. Fahey*, 5 Cush. (Mass.) 408; *Pres. Ch. v. Mayor*, 5 Cow. (N. Y.) 528; *Coates v. Mayor*, 7 Cow. (N. Y.) 582; *Kincaid's App.*, 66 Pa. 411. See CEMETERIES.

Public Parks.—The maintenance of public parks and squares. These being essential to the health, as well as the comfort of the inhabitants of cities and towns, ground may be taken for these purposes under eminent domain. *Park Comrs. v. Williams*, 51 Ill. 57; *State v. Hennepin Co.*, 33 Minn. 235; s. c., 7 Am. & Eng. Corp. Cas. 206; *Owners, etc., v. Albany*, 15 Wend. (N. Y.) 374; *In re Cent. Pk. Extension*, 16 Abb. Pr. (N. Y.) 58. See EMINENT DOMAIN.

Public Baths.—Public baths are also necessary to health. The power to establish and maintain them includes the power to designate and procure proper places for their location, and the owner of a pier where a bath is placed is entitled to compensation. *Pollrow v. Brooklyn*, 101 N. Y. 132.

HEALTH—HEALTHY—HEAR—HEARING.

public nuisances may be abated,¹ and they, as well as other acts and practices calculated to injure public health, are also the subject of indictment.² The local health authorities are the proper parties to take action in such matters in behalf of the public.³

HEALTHY.—"Free from disease or bodily ailment, or a state of the system peculiarly susceptible or liable to disease or bodily ailment."⁴

HEAR.—See note 5.

HEARING.—The stage of proceeding in a cause in equity which corresponds to the trial of a cause at law; the hearing of the arguments of counsel for the parties upon the pleadings, or pleadings and proofs.⁵ The preliminary examination of a prisoner charged with a crime, and of witnesses for the prosecution and defense.⁷ For the wide and general meaning of the term see note 8.

1. See **ABATEMENT**; **NUISANCE**.

2. E. g., the intentional selling of unwholesome or adulterated articles of food and drink, or drugs and medicines, or adulterating the same for the purpose of sale, selling poisons without a label, or except on a proper application. See **ADULTERATION**; **DRUGGISTS**.

3. See **BOARDS OF HEALTH**.

English authority: Glen's Law of Public Health (10th ed. 1888).

4. *Bell v. Jeffreys*, 13 Ired. (N. C.) 356. In this case a warranty that a slave was healthy and sound was held to be broken by the slave's nearsightedness.

Under a statute giving a settlement to every healthy and able-bodied person in the town in which he first resided for a year, the test of health and ability of body is not ability to labor and support oneself and family. A person who received an injury resulting in permanent disability, but who was not incapacitated for labor during the year, was not healthy and able-bodied. *Town of Marlborough v. Sisson*, 26 Conn. 57. One is healthy and able-bodied if he is "in the ordinary health which is enjoyed by others in health and is possessed of the physical ability which men of sound bodies ordinarily possess." His status is not altered by "a casual and temporary illness or bodily unsoundness, which produces an occasional and temporary effect upon his capacity to gain a livelihood by his bodily exertions." The standard is "the ordinary health of those who regard themselves and are regarded by others as healthy and robust persons possessing their physical

powers unimpaired. *Starksboro v. Hinesburgh*, 15 Vt. 200.

5. The constitutional right of a prisoner to be heard by himself or counsel, so far as hearing in person is concerned, applies to trial only and not to an appeal. *Tooke v. State*, (Tex.) 24 Rep. 24. A reasonable limit of the time of argument is not an infringement of the right. *State v. Hoyt*, 47 Conn. 518; *State v. Page*, 21 Mo. 257.

"Hear and determine the matter of appeal" in a statutory provision relating to costs, means to decide it upon its merits. A discharge for want of proper notice is not a hearing and determination. *In re Madden*, 31 U. C. Q. B. 333.

Hear From.—See **FROM**.

6. *Burr. Law Dict.*, 2 Danl. Ch. Prac. 1176.

7. *Bouv. Law Dict. CRIMINAL PROCEDURE*, vol. iv., p. 730.

8. Under a statute authorizing the court to order costs upon a hearing of a cause, the attendance of a defendant in bastardy process, in default of the appearance of the prosecutors, is a hearing. *Queen v. Stamper*, 1 Q. B. 119. A cause dismissed for want of proper parties has had a hearing. "As soon as the case came on to be heard there was a 'hearing' for the purposes of this clause." *Reg. v. Recorder of Exeter*, 5 Q. B. 342.

A *nisi prius* trial is a "hearing." *Wilson v. Hood*, 3 H. & C. 148.

A statute gave justices jurisdiction of assault, and power, upon hearing, to discharge, in which case the plaintiff was precluded from other remedies. A plaintiff appeared before the justices, and after plea, declined to proceed, stat-

HEARSAY EVIDENCE AND ADMISSIONS.

HEARSAY EVIDENCE AND ADMISSIONS.—(See also **CONFESSIONS, DECLARATIONS, DYING DECLARATIONS, EVIDENCE, RES GESTAE.**)

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I. DEFINITION.—Hearsay is that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also in part on the veracity and competency of some other person.¹

II. EVIDENCE NOT HEARSAY.—1. *Where the Fact that the Declaration was made is in Issue.*—(See **DECLARATIONS**, vol. 5, p. 361.)

2. *Expressions of Bodily Feeling.*—(See **DECLARATIONS.**)

3. *Res Gestae.*—(See **RES GESTAE.**)

ing that he meant to bring an action, whereupon the justices discharged the defendant. *Held*, that there had been a hearing. *Tunnicliffe v. Tedd*, 5 C. B. 553.

The "hearing of a motion" includes an application for a rule *nisi*. *Morgan v. Alexander*, L. R. 9 C. P. 184.

A rule requiring notice of demand for jury trial three days before the "day of hearing," means day appointed for hearing and not day of actual hearing. *Fletcher v. Baker*, L. R. 9 Q. B. 370.

1. *Bouv. Law Dict.*; 1 *Phil. Ev.* 185; *Shaw v. People*, 5 N. Y. Sup. Ct. 444.

Hearsay evidence is the statement which the witness professes to have heard given by a third person as to some particular transaction or thing; literally what the witness says he heard another person say. *Stockton v. Williams*, 1 *Doug. (Mich.)* 570.

"The term *hearsay* is used with reference to that which is written as well as to that which is spoken; and in its legal sense, it denotes that kind of evi-

dence which does not derive its value solely, from the credit to be given to the witness himself, but rests also in part on the veracity and competency of some other person." 1 *Greenl. Ev.* (14th ed.), § 99; *People v. Cox*, 21 *Hun. (N. Y.)* 47; *Arhcraft v. De Armond*, 44 *Iowa* 229; *Schooler v. State*, 57 *Ind.* 127; *Hunter v. Randall*, 69 *Me.* 183; *Fillee v. Angell*, 102 *Mass.* 67; *State v. Haynes*, 71 *N. Car.* 79; *Campbell v. State*, 8 *Tex. App.* 84; *Sussex Peerage Case*, 11 *Cl. & Fin.* 85, 113; *Staplyton v. Clough*, 22 *Eng. L. & Eq.* 276; 2 *El. & Bl.* 933.

Knowledge acquired by an administrator in the course of his duty as such, that a certain demand belonged to or was set up by the estate is not hearsay. *Stewart v. Chadwick*, 8 *Iowa* 463.

A witness's statement of remarks made by himself to the defendant is not hearsay. *Charles v. State*, 49 *Ala.* 332.

Testimony of a witness that he saw "a man they said was J. M.," is not hearsay. *Willis v. Quimby*, 31 *N. H.* 485.

III. HEARSAY EVIDENCE GENERALLY INADMISSIBLE.—As a general rule, hearsay evidence is inadmissible to establish any fact which is capable of being proved by witnesses who speak from their own knowledge.¹ But where, from the nature of the case, no better evidence of a fact can be presumed to exist, hearsay is sometimes

1. *Pearson v. Darrington*, 32 Ala. 227; *The Governor v. Campbell*, 17 Ala. 566; *Scales v. Desha*, 16 Ala. 308; *McNeill v. Arnold*, 22 Ark. 477; *Buckley v. Cunningham*, 34 Ala. 69; *Smith v. Flagg*, 46 Ala. 624; *David v. David*, 66 Ala. 139; *Carpenter v. First Nat'l Bank of Joliet*, 119 Ill. 352; *Chicago & A. Rd. v. Johnson*, 116 Ill. 206; *Capen v. DeSteiger Glass Co.*, 105 Ill. 185; *Morse v. Thorsell*, 78 Ill. 600; *Kent v. Mason*, 179 Ill. 540; *Hyde v. Howes*, 2 Ill. App. 140; *Dencer v. Parsons*, 8 Ill. App. 625; *Melody v. People*, 8 Ill. App. 485; *Lawrence v. Fulton*, 19 Cal. 683; *Bornheimer v. Baldwin*, 42 Cal. 27; *Parker v. State*, 8 Blackf. (Ind.) 292; *Schooler v. State*, 57 Ind. 127; *Mershorn v. State*, 51 Ind. 14; *Reynolds v. Copeland*, 71 Ind. 422; *Meyer v. Bell*, 65 Ind. 83; *State v. Henke*, 58 Iowa 457; *Simpson v. Smith*, 27 Kan. 565; *Tarbox v. Sughrue*, 36 Kan. 225; *Lynch v. Postlethwaite*, 7 Mart. (La.) 69; s. c., 12 Am. Dec. 495; *Stockwell v. Blamey*, 129 Mass. 312; *Com. v. Ricker*, 131 Mass. 581; *Filley v. Angell*, 102 Mass. 67; *Chapin v. Taft*, 18 Pick. (Mass.) 379; *Smith v. Tarbox*, 70 Me. 127; *King v. Frost*, 28 Minn. 417; *Brown v. Metropolitan Lf. Ins. Co.*, 32 N. W. Rep. (Mich.) 610; *McCormick Harvesting Machine Co. v. Cochran*, 31 N. W. Rep. (Mich.) 561; *People v. Mead*, 50 Mich. 228; *Atwood v. Cornwall*, 28 Mich. 336; *Williamson v. Dillon*, 1 Har. & G. (Md.) 444; *Melins v. Houston*, 41 Miss. 59; *Wells v. Shipp*, 1 Miss. (Walk.) 353; *Fougue v. Burgess*, 71 Mo. 389; *People v. Beach*, 87 N. Y. 508; *People v. Cox*, 21 Hun. (N. Y.) 47; *Holcombe v. Munson*, 103 N. Y. 682; *Stickney v. Billings*, 30 Hun. (N. Y.) 304; *Wiggins v. People*, 4 Hun. (N. Y.) 540; *Salmon v. Orser*, 5 Duer (N. Y.) 511; *Milbank v. Dennistown*, 10 Bosw. (N. Y.) 382; *Page v. Parker*, 40 N. H. 47; *Davis v. Sanders*, 11 N. H. 259; *Demonney v. Walker*, 1 N. J. L. (Coxe) 33; *Robeson v. Schuylkill, etc., Co.*, 3 Grant's Cas. (Pa.) 186; *Bridger v. Asheville, etc., R. Co.*, 27 S. Car. 456; *Everingham v. Mesroon*, 2 Brev. (S. Car.) 461; *Campbell v. State*, 8 Tex. App. 84; *Penniman v. Patchin*, 6 Vt.

325; *Mima Queen v. Hepburn*, 7 Cranch (U. S.) 290.

"That this species of testimony [hearsay] supposes something better which might be adduced in the particular case is not the sole ground of its exclusion. Its extrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible." 1 Greenl. Ev. (14th ed.), § 99; *Mima Queen v. Hepburn*, 7 Cranch, (U. S.) 290; *Davis v. Wood*, 1 Wheat. (U. S.) 6; *Rex v. Eriswell*, 3 T. R. 707.

Where a child is too young to testify, a statement made by it to others is not admissible in evidence. *Smith v. State*, 41 Tex. 352.

A statement is not the less hearsay that the declarant is dead. *Hammel v. State*, 14 Tex. App. 326.

Illustrations—Hearsay Inadmissible.—Declarations made by a party in his own favor in the absence of the other party, and not as a witness, are generally hearsay and not admissible. *Treadway v. Treadway*, 5 Ill. App. 478; *Ward v. Ward*, 37 Mich. 253; *Whitney v. Houghton*, 125 Mass. 451; *Nourse v. Nourse*, 116 Mass. 101; *Woodward v. Leavitt*, 107 Mass. 453; *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256.

A voluntary affidavit ranks in equal grade with hearsay testimony in the scale of evidence, and in no case is received where, from the nature of the case, better testimony can be had. *Patterson v. Maryland Ins. Co.*, 3 H. & J. (Md.) 71; s. c., 5 Am. Dec. 419.

Ex parte affidavits by other plaintiffs in other actions are not competent to establish either indebtedness or fraud on the part of a defendant. *Bookman v. Stegman*, 105 N. Y. 621.¹

On the trial of an indictment for an attempt to procure the miscarriage of a woman, whereby she died, evidence, that the deceased said before the alleged offence that she was pregnant by a person other than the defendant, and that if he did not perform an operation to procure a miscarriage or get some one to do so, she would do it herself, is

heresay and inadmissible. *Com. v. Felch*, 132 Mass. 22.

On a trial for murder, a witness can not testify that he was told by another person, who has been subpoenaed as a witness, but is not present, that the deceased made threats against the defendant which were communicated to the latter by the witness. *Atkins v. State*, 69 Ga. 595.

Evidence of statements of a person who has been robbed, made to a third party, as to the descriptions of the parties committing the crime is hearsay and not admissible on the part of the defendant to show that he was not the person thus described. *People v. McCrea*, 32 Cal. 98.

The declarations of a person, not a party to the suit, as to his motive in committing an act, not made at the time of its commission are hearsay. *North Stonington v. Stonington*, 31 Conn. 412.

It has been held on a trial for the theft of a pair of boots, that an altercation between the clerk of the store from which they were taken and the accused at the time they were taken, could not be proved by witnesses who were present and heard the altercation. *Davis v. State*, 37 Tex. 277.

In a criminal action for trespass, evidence of statements made to the prosecutor by the defendant's brother a few days before the alleged trespass, not shown to have been made in the defendant's presence or by his authority, is hearsay. *Owens v. State*, 74 Ala. 401.

On the separate trial of one of two persons jointly indicted for murder, where there is no evidence of conspiracy, testimony of threats, made by the other persons months before the homicide, is not admissible. *State v. Weaver*, 57 Iowa 730.

Though a witness prove the admission of a debt by the defendant, he can not testify to information received from other persons which induced him to call on the defendant at the time the admission was made. *Wolfe v. Hauver*, 1 Gill (Md.) 84.

In an action for injuries received by being struck by a railroad train, to which the defense was that the plaintiff was intoxicated, evidence that shortly before the accident a bar-keeper had told the plaintiff, who had called for liquor, that he had had enough, was excluded. *Lake Erie, etc., Ry. v. Zoffner*, 107 Ill. 199.

In a contest between the creditor of A over his property, evidence of the declarations of A and his wife to the effect that they constituted the firm of A & Co., was held mere hearsay. *Clinton Lumber Co. v. Mitchell*, 61 Iowa 132.

A client buying land on which execution has been levied cannot show that his attorney advised him that the execution was returned satisfied, and the levy was no longer a lien. *Vroman v. Thompson*, 51 Mich. 452.

Entries in a book by a notary of statements made to his clerk and repeated to him are hearsay. *Lewis v. Kramer*, 3 Md. 265.

A witness cannot testify as to whether he "had ever heard" of a contract like the one in issue having been made by an express company. *Adams v. Brown*, 16 Ohio St. 75.

A statement by plaintiff to his attorney to the effect that an agreement had been made between plaintiff and the defendant is hearsay. *Wallace v. Story*, 139 Mass. 115.

A witness may not be asked whether he has any information from any source concerning a certain matter. *Xenia Bank v. Stewart*, 114 U. S. 224.

Statements contained in an inventory filed with an assignment for the benefit of creditors are not admissible against one attaching irrespective of the assignment and not claiming thereunder. *Greer v. Greer*, 38 Hun. (N. Y.) 226.

While a city council in abating a nuisance may act summarily on the report of the board of health, yet, if instead of so acting a formal hearing is granted, the report of the board of health is hearsay, and inadmissible. *Montezuma v. Minor*, 73 Ga. 484.

One who merely glanced at a letter and heard another read it, and cannot remember any sentences word for word, is not competent to prove its contents. *Coxe v. England*, 65 Pa. St. 212.

One who has but a very imperfect knowledge of the English language cannot testify to his impressions of a conversation gathered from declarations of an interpreter. *Plymouth Coal Co. v. Kommisky*, 116 Pa. St. 365.

A person who can neither read nor write cannot testify to the contents of a lost instrument, as his evidence is necessarily hearsay. *Russell v. Broseau*, 65 Cal. 605.

In a controversy over the quantity of saw-logs delivered under a contract,

which provided that they should be measured by the seller, "or one Stewart," the reports of measurements by the employes of either party are hearsay. *Olive v. Hester*, 63 Tex. 190.

Certificates of the master of a vessel of the expenses incurred by an agent thereon are not admissible in an action by the principal against the agent; the master should be produced. *Newson v. Douglass*, 7 H. & J. (Md.) 417; s. c., 16 Am. Dec. 317.

In a suit for breach of a building contract, the statements of workmen as to the condition of the walls and as to what they did toward completing them are hearsay and inadmissible. *Gonzales College v. McHugh*, 26 Tex. 677.

Testimony by a marshal that he sent a deputy to serve a notice, who, upon his return, informed him that he had served it, is mere hearsay. *Elliot v. Shultz*, 10 Humph. (Tenn.) 234.

An answer of a witness in reply to a question as to the situation of a person in regard to property, that "he was considered in good circumstances as to property," is hearsay and incompetent. *Sheldon v. Root*, 16 Pick. (Mass.) 567; s. c., 28 Am. Dec. 266.

Hearsay is not admissible to prove the presence of a person in the State who has been absent for more than seven years. *Smothers v. Mudd*, 9 B. Mon. (Ky.) 490.

Hearsay evidence is not admissible to prove that, at the time an administrator was appointed, the supposed intestate was alive. *Hummel v. Brown*, 24 Pa. St. 310.

The statements of a prosecutor are hearsay. *State v. Maitremme*, 14 La. Ann. 830, 842.

Statements of one partner before the dissolution, that the other had consented to a rescission of a contract on which the succeeding partner was seeking to recover, was *held* to be hearsay. *Shellito v. Sampson*, 61 Iowa 40.

A witness cannot be asked whether he ever heard any one say that another was wanting in mental capacity. *Barker v. Pope*, 91 N. Car. 165.

In an action for the wrongful cutting of wood, evidence, that military officers stated that it was a military necessity to cut the wood, is hearsay. *Merritt v. Mayor of Nashville*, 5 Coldw. (Tenn.) 95.

Hearsay evidence is not admissible to prove the existence of a mob. *State v. Reitz*, 83 N. Car. 634.

In trover against a sheriff for levying

on goods claimed by a partner individually, the declarations of the other partners, that they had sold their interest to the plaintiff, are mere hearsay. *Hartshorn v. Williams*, 31 Ala. 149.

On an indictment for murder, admissions by other persons that they did the killing are hearsay. *State v. Duncan*, 6 Ired. L. (N. Car.) 236.

One accused of a crime cannot prove that another confessed out of court that he committed it. *State v. Haynes*, 71 N. Car. 79.

Evidence of what a witness said out of court cannot be received to support his testimony. *Chapman v. Blakeman*, 31 Kan. 684. *Compare Clever v. Hilberry*, 116 Pa. St. 431.

Upon the question of insanity, a physician cannot testify as to statements concerning the defendant's condition made by his wife, attendants and regular physician. *Heald v. Thing*, 45 Me. 392. See, also, *Kimball v. Currier*, 5 Gray (Mass.) 458; *Cook v. Osborn*, 2 Root (Conn.) 31.

A physician cannot testify as to what other physicians said who saw the injuries for which the suit is brought. *Ponca v. Crawford*, 18 Neb. 551.

A plaintiff cannot testify as to what a physician said about injuries received by plaintiff. *Armstrong v. Ackley*, 71 Iowa 76; Alabama, etc., R. Co., v. Arnold, 80 Ala. 600.

In an action for an assault, the plaintiff's declarations to his physician as to his physical condition are admissible, but not his declarations as to the person and weapon inflicting the injury. *Newman v. Dodson*, 61 Tex. 91.

Inadmissible to Show Bona Fides.—In an action against a person for the price of goods, two others to whom he had made transfers of property were made defendants, and the property was attached. The original defendant defaulted, and the others claimed damages for a wrongful attachment. Upon the trial of that issue the testimony of a witness to admissions of fraud made by the first defendant in the presence of one of the others, he did not know which, and assented to by him, whichever it was, was *held* inadmissible. *Whitney v. Brownell*, 71 Iowa 251.

In an action to set aside an alleged fraudulent conveyance, statements by the vendee's father, to the effect that he intended to give the land subsequently conveyed by him to her husband, were *held* hearsay. *Simpkins v. Smith*, 94 Ind. 470.

In ejectment, involving the validity of a conveyance from a third person to the defendant, evidence of the declarations of such third person cannot be introduced by him to show the *bona fides* of the conveyance. *Chapin v. Pease*, 10 Conn. 69.

Where, in an action of trespass, *de bonis asportatis*, the question is as to the *bona fides* of a sale by a third person to the plaintiff, the evidence of still another person, that in the note book of a corporation kept by the vendor he saw the entry of a note given by the plaintiff to the vendor in consideration of the alleged sale, is hearsay. *Treat v. Barber*, 7 Conn. 274.

Ownership and Value.—Evidence that property was assessed in the name of a certain person is not admissible to show his ownership thereof. *Adams v. Hickox*, 55 Iowa 632; *Tuckwood v. Hanthorn*, 67 Wis. 326.

The appraisement of property sold under execution is not competent evidence of its value against one claiming to be the owner thereof. *Flannigan v. Althouse*, 56 Iowa 513.

The report of a State fair committee is not admissible to prove the value of a drill. *Gatling v. Newell*, 9 Ind. 572.

On an issue as to the value of a fertilizer, the answer of a chemist to an interrogatory that "tests of this guano made in different parts of the State, by the department of agriculture, have been satisfactory as to its value as a food for plants," was *held* inadmissible. *Parrott v. Johnson*, 61 Ga. 475.

A witness who does not deal in hardware cannot testify as to the value of the items in a hardware bill, his evidence being based on information derived from buyers and sellers. *Green v. Caulk*, 16 Md. 556.

In an action to recover the price of goods sold, where a breach of warranty as to quality is set up in the defense, evidence of statements of parties to whom the goods were sold is merely hearsay. *Barrett v. Wheeler*, 71 Iowa 662.

Accounts of sales and prices current sent by a commission merchant to his principal are not evidence of the value or weight of stock in the market. *Hoskins v. Mo. Pac. Ry.*, 19 Mo. Ap. 315.

Evidence of the declarations of persons in charge of cattle was *held* incompetent to prove the ownership thereof. *McClure v. Sheek*, 68 Tex. 426. See, also, *Burns v. Fredericks*, 37 Conn. 86.

Death, Birth and Residence.—The death of a person, disconnected with any question of pedigree, may be proved by hearsay, subject to the same restrictions as in cases where matters of pedigree are involved. *Willson v. Brownlee*, 24 Ark. 586; *Anderson v. Parker*, 6 Cal. 197; *Morton v. Barrett*, 19 Me. 109; *Morrill v. Foster*, 33 N. H. 379; *Jackson v. Boneham*, 15 Johns. (N. Y.) 226; *Primm v. Stewart*, 7 Tex. 178.

Hearsay evidence of the place of birth of a person is inadmissible. *Brooks v. Clay*, 3 A. K. Marsh. (Ky.) 545; *Shearer v. Clay*, 1 Litt. (Ky.) 260; *Wilmington v. Burlington*, 4 Pick. (Mass.) 174; *Greenfield v. Camden*, 74 Me. 56; *Robinson v. Blakely*, 4 Rich. (S. Car.) 586; *Londonderry v. Andover*, 28 Vt. 416.

Hearsay is not admissible to prove the birthplace of a deceased person, unless it comes from the relatives of such person. *Tyler v. Flanders*, 57 N. H. 618.

Evidence of what a brother of a plaintiff heard their father and mother say in relation to the plaintiff's age is inadmissible. *Albertson v. Robeson*, 1 Dall. (U. S.) 9; see, also, *Roe v. Neal*, *Dudley* (Ga.) 168; *compare*, *Watson v. Brewster*, 1 Pa. St. 381.

Evidence of the declarations of a pauper is not admissible to prove his residence in an action to which he is not a party. *Derby v. Salem*, 30 Vt. 722.

General Reputation.—Neighborhood rumor or notoriety is the most vague and uncertain of all the tests of truth, and is only received in a few exceptional instances from necessity. It should not be received to show that a person tried to get possession of his children from their mother before her subsequent marriage. *McGoon v. Irvin*, 1 Pinney (Wis.) 526; s. c., 44 Am. Dec. 409.

The fact of insolvency cannot be proved by hearsay. *Walker v. Forbes*, 25 Ala. 139; s. c., 60 Am. Dec. 498; *Molyneux v. Collier*, 13 Ga. 406; *Vaughan v. Warnell*, 28 Tex. 119; *compare*, *Nininger v. Knox*, 8 Minn. 110; *Angell v. Rosenbury*, 12 Mich. 241; *Bank of Middlebury v. Rutland*, 33 Vt. 414.

On the issue whether one's reputation for pecuniary credit was good, testimony that the witness never heard it called in question, except by members of the witness's own firm, was *held* to be hearsay and inadmissible. *Walker v. Moors*, 122 Mass. 501.

admissible.¹ The following exceptions to the general rule are well established:

IV. EXCEPTIONS TO THE RULE—1. **Matters of Public or General Interest.**—(See **DECLARATIONS.**)

In an action for slander, where the defendant offered evidence to impeach the integrity of plaintiff, the latter was not permitted to give evidence that he had always been reputed and considered among all his acquaintances as a man of integrity. *Dorsey v. Whippa*, 8 Gill. (Md.) 457.

The fact that a number of vessels were sunk by the order of the government of Virginia during the civil war, is not of a nature to be proved as a matter of public history by a witness who has no personal knowledge of it. *Swinnerton v. Columbian Ins. Co.*, 9 Bosw. (N. Y.) 361.

A witness cannot be asked what was the estimated cash value put on lands by the neighborhood generally. *Powell v. Governor*, 9 Ala. 36.

Executors cannot prove their office by general reputation in actions to recover debts due their testator's estate. *Middlesworth v. Nixon*, 2 Mich. 425; s. c., 57 Am. Dec. 136.

Evidence of general reputation is not admissible to charge a party with having altered paper. *Martin v. Good*, 14 Md. 398.

In an action against a railroad company, the carelessness of the defendant cannot be proved by general reputation. *Baldwin v. Western Rd.*, 4 Gray (Mass.) 333.

Proof of a rumor of an adverse claim to property sold is not admissible to affect the question of value. *Prescott v. Hayes*, 43 N. H. 593.

General reputation is not admissible to prove the existence of illness. *Mosser v. Mosser*, 32 Ala. 551.

To prove that a person occupied land as a tenant only. *Moore v. Jones*, 13 Ala. 296.

To show for whom services were rendered. *Trowbridge v. Wheeler*, 1 Allen (Mass.) 162.

To prove who are the officers of a corporation. *Litchfield Iron Co. v. Bennett*, 7 Cow. (N. Y.) 234.

To prove the character of a physician's practice. *Bradbury v. Bardin*, 34 Conn. 452.

To prove a sheriff's sale. *Yarborough v. Moss*, 9 Ala. 382.

To show sanity. *Yeates v. Reed*, 4 Blackf. (Ind.) 463; s. c., 32 Am. Dec.

43. Or insanity. *Ashcraft v. De Armond*, 44 Iowa 229; *Foster v. Brooks*, 6 Ga. 287.

To prove partnership. *Hersom v. Henderson*, 23 N. H. 498; *Hicks v. Cram*, 17 Vt. 449. Or a dissolution of partnership. *Goddard v. Pratt*, 16 Pick. (Mass.) 412.

To prove agency. *Blevins v. Pope*, 7 Ala. 371; *Perkins v. Stebbins*, 29 Barb. (N. Y.) 523.

To show the qualities and value of a horse. *Heath v. West*, 26 N. H. 191.

To prove the ownership of property. *Corley v. State*, 28 Ala. 22; *Whitsett v. Slater*, 23 Ala. 626; *Allen v. Prater*, 30 Ala. 458; *School District v. Blakeslee*, 13 Conn. 227; *Berry v. Osborne*, 15 Ga. 194; *Parker v. Pierce*, 16 Iowa 227; *Howland v. Crocker*, 7 Allen (Mass.) 153; *McKinnon v. Bliss*, 21 N. Y. 206; *Jones v. Jennings*, 10 Humph. (Tenn.) 428. Compare *Daily v. Starr*, 26 Tex. 562.

To prove the absence of a person from the State. *State Bank v. Seawell*, 18 Ala. 616.

To prove that a man and woman are living together in open and notorious lewdness. *Buttram v. State*, 4 Coldw. (Tenn.) 171.

To show which of two persons of the same name was intended by an Indian treaty, reserving land to a person of that name. *Stockton v. Williams*, 1 Dougl. (Mich.) 546; *Campan v. Dewey*, 9 Mich. 381.

1. *Gould v. Smith*, 35 Me. 513.

The statements of third persons to a witness are admissible in evidence when introduced merely to show what called the attention of the witness to a fact. *State v. Fox*, 25 N. J. L. 566.

To Fix Date.—A witness may testify to what was said by a third person for the purpose of identifying a particular occasion or date. *Hill v. North*, 34 Vt. 604; *People v. Zimmerman*, 65 Cal. 307; *Harris v. Central R. Co.*, 3 S. E. Rep. (Ga.) 355.

Loss of Paper.—Evidence as to the loss of a paper being addressed to the court, hearsay is sometimes admissible. *Bridges v. Hyatt*, 2 Abb. Pr. (N. Y.) 449.

Age.—A person may testify to his own age from knowledge necessarily

based on hearsay. *Bain v. State*, 61 Ala. 75; *Cherry v. State*, 68 Ala. 29; *Cheever v. Congdon*, 34 Mich. 296; *State v. Cain*, 9 W. Va. 559.

Other Cases.—To prove that an offence was committed within a certain county, hearsay evidence of the county boundary is admissible. *People v. Velarde*, 59 Cal. 457.

A woman's testimony, that her husband died at a certain time, but that her only knowledge of his death was from what her folks had told her and written her, was held to be competent evidence to prove his death. *Mason v. Fuller*, 45 Vt. 29.

In an action upon a verbal contract, the testimony of the plaintiff as to what his clerk told him defendant had said to the clerk in orally making the contract, was held to be competent. *Frank v. Murray*, 14 Pac. Rep. (Mont.) 654.

A witness testifying to the great speed at which a train was moving, may testify to an exclamation concerning it made at the time by another passenger. *Missouri Pac. Ry. v. Collier*, 62 Tex. 318.

Intent.—In a petition for divorce for voluntary abandonment, evidence of the declarations of the defendant at the time of his departure are admissible to show his intentions. *Besch v. Besch*, 27 Tex. 390.

A party may show his intentions on a question of residence by his own acts and declarations at a time not suspicious. *Gardner v. O'Connell*, 5 La. Ann. 353; *Hayden v. Nutt*, 4 La. Ann. 68; *Gorham v. Canton*, 5 Me. 266; *Braintree v. Hingham*, 1 Pick. (Mass.) 245.

As Explaining Conduct.—When it becomes material on the trial of a cause to show want of due diligence in the service of a former attachment, evidence of answers given by strangers to inquiries made by the officer respecting the debtor, are admissible. *Phelps v. Foot*, 1 Conn. 387.

On the question as to whether an officer making an arrest had reasonable ground to believe that a felony had been committed, evidence of the exclamations of parties, though not connected with the offence, is admissible. *Werner v. Com.*, 80 Ky. 387.

In a suit on a contract for sawing logs, the testimony of a witness that he heard statements going to affect the correctness of the plaintiff's scale may be competent as showing that he had

occasion to doubt its correctness. *Grosvenor v. Ellis*, 44 Mich. 452.

Corroboration.—In a contest involving the identity of the grantee in a land certificate issued by land commissioners, wherein one of the claimants testified that the certificate remained in his possession until 1867, when he sent it to a land agent, a letter from the land agent acknowledging its receipt was held to be admissible in evidence as corroborative of the claimant's testimony. *Baker v. Maloney*, 4 S. W. Rep. (Tex.) 469.

Declarations made by a party at a time when there was no reason to suspect his motives, may be competent evidence to corroborate his testimony in a subsequent action, though they were not made against his interest. *Clever v. Hilberry*, 116 Pa. St. 431.

When Evidence of Common Reputation is Admissible.—The notoriety of a fact in a neighborhood may be proved as tending to show that a party had knowledge of such fact. *Ward v. Haddon*, 5 Port. (Ala.) 382; *Jones v. Hatckett*, 14 Ala. 743; *Stallings v. State*, 33 Ala. 425; *Blagg v. Hunter*, 15 Ark. 246; *Benoist v. Darby*, 12 Mo. 196.

Compare, *Dunbar v. Mulry*, 8 Gray (Mass.) 163.

In order to show knowledge of a fact on the part of the husband, it is not allowable to show that the matter was spoken of in his family and in the presence of his wife. *Oden v. Stubblefield*, 4 Ala. 40.

Common report of a party's intention in purchasing goods is not admissible to charge the vendor with knowledge of such intention. *Hedges v. Wallace*, 2 Bush (Ky.) 442.

Evidence of the general reputation of a person regarding a habit of getting intoxicated is admissible as a circumstance tending to prove the vendor's knowledge of such habit. *Adams v. State*, 25 Ohio St. 584.

Common reputation has been admitted to prove the nationality of a party. *Jackson v. Etz*, 3 Cow. (N. Y.) 414; *Reed v. State*, 16 Ark. 499; *Bryan v. Walton*, 20 Ga. 480.

Reputation in connection with proof of acts of ownership, is admissible to establish a private right in derogation of a public right. *Russell v. Stocking*, 8 Conn. 236.

Marriage may be proved by general reputation and cohabitation, except in a prosecution for bigamy or criminal conversation. *Arthur v. Broadnax*, 3 Ala. 557; s. c., 37 Am. Dec. 707. *Com-*

2. **Declarations as to Ancient Possessions.**—(See DECLARATIONS.)
3. **Declarations as to Pedigree.**—(See DECLARATIONS.)
4. **Declarations Against Interest by Persons since Deceased.**—(See DECLARATIONS.)

5. **Dying Declarations.**—(See DYING DECLARATIONS.)

6. **Evidence in Former Proceedings.**—The testimony of a witness, either oral or written,¹ in a former judicial proceeding,² may be proved in a subsequent action between the same parties³ or their privies⁴

pare Smith v. Smith, 1 Tex. 621; s. c., 46 Am. Dec. 121.

Evidence of the pecuniary responsibility of a person founded on personal acquaintance and reputation in the community where he resided has been admitted to prove such responsibility. Hard v. Brown, 18 Vt. 87.

Evidence of the general reputation in the community of the existence of a bank in another State and that its bills past current was admitted to prove that there was such a *de facto* bank. Jennings v. People, 8 Mich. 81.

1. So depositions taken on a former trial may be introduced in evidence. Johnson v. State, 1 Tex. App. 333; Black v. State, 1 Tex. App. 368.

Evidence may be given of the oral testimony of a witness in a former action notwithstanding a written deposition which he had given in such former cause. Shackelford v. State, 33 Ark. 539; Tod v. Earl of Winchelsea, 3 C. & P. 387.

2. The proceeding must have been before a court of competent jurisdiction but mere informalities will not render evidence of the testimony incompetent. State v. Johnson, 12 Nev. 121. See, also, Rucker v. Hamilton, 3 Dana (Ky.) 36.

Arbitrators.—The testimony of a witness, since deceased, before arbitrators, may be proved on a subsequent trial of the same cause. Calvert v. Friebus, 48 Md. 44; Bailey v. Woods, 17 N. H. 365; Walbridge v. Knipper, 96 Pa. St. 48; McAdams v. Stilwell, 13 Pa. St. 90; Compare, Jessup v. Cook, 6 N. J. L. 434.

Preliminary Examination.—Evidence of the testimony of a witness upon a preliminary examination is admissible on the trial of the case whether such testimony was in writing or not, where the witness is dead or insane, etc. Davis v. State, 17 Ala. 354; State v. Hooker, 17 Vt. 658; U. S. v. Penn., 13 Bankr. Reg. 464.

Witness not sworn.—Evidence of the testimony of a diseased witness on a former trial may be given though he was not sworn where it was agreed on the former trial that he might testify without being sworn. Wheeler v. Walker, 12 Vt. 427.

Proof of Former Proceeding.—The fact of the former trial must be proved by the record; but it may be proved at any time before the party's case is closed. Chambers v. Hunt, 22 N. J. L. 552.

3. But not between different parties. Hughes v. Clark, 67 Ga. 19.

4. Regarding the same subject-matter and upon the same issue. Goodlett v. Kelly, 74 Ala. 213; Indianapolis, etc., Rd. v. Stout, 53 Ind. 143; Yale v. Comstock, 112 Mass. 267; Jackson v. Crissey, 3 Wend. (N. Y.) 251; Jackson v. Lawson, 15 Johns. (N. Y.) 539, 544; Jackson v. Bailey, 2 Johns. (N. Y.) 17; Powell v. Waters, 17 Johns. (N. Y.) 176; Shelton v. Barbour, 2 Wash. (Va.) 64; Outram v. Morewood, 3 East. 346. See, also, Clealand v. Huey, 18 Ala. 343; Lane v. Brainerd, 30 Conn. 565; Ephriams v. Murdock, 7 Blackf. (Ind.) 10; Harper v. Burrow, 6 Ired. L. (N. Car.) 30.

The testimony of a mother in a suit brought by her for injuries may be proved in a suit brought by her child after her death for the homicide. Atlanta, etc., Rd. v. Venable, 67 Ga. 697. See, also, Indianapolis, etc., R. Co., v. Stout, 53 Ind. 143.

The testimony of a witness in a suit against an administrator is not admissible in a subsequent action against the sureties on his bond, though the witness has since died, the parties not being the same. Fellers v. Davis, 22 S. Car. 425.

The testimony of a deceased witness relating to land, in a suit by one tenant in common, is not admissible in a suit by another tenant in common, though for the same land. Norris v. Monen, 3 Watts (Pa.) 465.

where the witness is dead¹ or insane,² or sick and unable to attend,³ or having been summoned appears to have been kept away by the adverse party.⁴ In some States the rule is extended to the testimony of a witness absent from the jurisdiction at the time of the second trial;⁵ and it has been extended to cases

1. *Braynt v. Owen*, 2 Stew. & P. (Ala.) 134; *Clealand v. Huey*, 18 Ala. 543; *Lane v. Brainerd*, 30 Conn. 565; *Evans v. Lampkin, Dudley* (Ga.) 193; *Jackson v. Jackson*, 47 Ga. 99; *Hobson v. Harper*, 2 Blackf. (Ind.) 309; *Letcher v. Norton*, 4 Scam. (Ill.) 575; *Packard v. McCoy*, 1 Iowa 530; *Rucker v. Hamilton*, 3 Dana (Ky.) 136; *O'Brien v. Com.*, 6 Bush (Ky.) 593; *Conway v. Erwin*, 1 La. Ann. 391; *Watson v. Lisbon Bridge*, 14 Me. 201; *Strickland v. Hudson*, 55 Miss. 235; *Costigan v. Lunt*, 127 Mass. 355; *Yale v. Comstock*, 122 Mass. 267; *Calvert v. Coxe*, 1 Gill (Md.) 95; *Jaccard v. Anderson*, 37 Mo. 91; *Harper v. Burrows*, 6 Ired. L. (N. Car.) 30; *Natt v. Thompson*, 69 N. Car. 548; *Jackson v. Lamson*, 15 Johns. (N. Y.) 539; *Powell v. Waters*, 17 Johns. (N. Y.) 176; *Jackson v. Bailey*, 2 Johns. (N. Y.) 17; *Osborn v. Bell*, 5 Den. (N. Y.) 370; *Lightner v. Wike*, 4 S. & R. (Pa.) 203; *Hocker v. Jamison*, 2 W. & S. (Pa.) 438; *Jones v. Wood*, 16 Pa. St. 25; *Mathews v. Colburn*, 1 Strobh. (S. Car.) 258; *Parker v. Leggett*, 12 Rich. (S. Car.) 198; *Sullivan v. State*, 6 Tex. App. 319; *Glass v. Beach*, 5 Vt. 172; *Mathewson v. Sargeant*, 36 Vt. 142; *Ruch v. Rock Island*, 97 U. S. 693; *Mayor v. Day*, 3 Taunt. 262.

An affidavit made in Philadelphia in 1834, stating that affiant was well acquainted with the deceased and his family, was held not admissible in West Virginia in 1882, to prove that deceased died intestate, without showing that the affiant was dead and no persons were living who could testify to the same facts. *Peterson v. Ankrum*, 25 W. Va. 56.

2. *Marler v. State*, 67 Ala. 55; s. c., 42 Am. Rep. 95; *State v. King*, 86 N. Car. 603; *Rex v. Eriswell*, 3 T. R. 721.

3. *Miller v. Russell*, 7 Martin N. S. (La.) 266; *State v. King*, 86 N. Car. 603.

Where the sickness or insanity of a witness seems to be such that he will be able soon to testify, the judge may sometimes, in his discretion, postpone the trial. *Harrison v. Blades*, 3 Campb. 458.

4. *Stout v. Cook*, 47 Ill. 530; *Reynolds v. U. S.*, 1 Utah 319; s. c., 98 U. S. 155; 1 Greenl. Ev. (14th ed.), § 163. Compare *Bergen v. People*, 17 Ill. 426.

Where a witness in behalf of the State was detained from court at the trial by the procurement of the accused, the memorandum made by the committing magistrate of the witness's testimony before him was read in evidence. *Williams v. State*, 19 Ga. 402.

The evidence of a witness before a justice of the peace, who was procured to go away, was shown before a grand jury. *Rex v. Barber*, 1 Root (Conn.) 76.

5. *Dolan v. State*, 40 Ark. 454; *Clinton v. Estes*, 22 Ark. 216; *McTighe v. Herman*, 42 Ark. 285; *Mims v. Sturdevant*, 36 Ala. 636; *Meyer v. Roth*, 51 Cal. 582; *Howard v. Patrick*, 38 Mich. 795; *Magill v. Kauffman*, 4 S. & R. (Pa.) 319; *Noble v. McClintock*, 6 W. & S. (Pa.) 58; *Wright v. Cumptsy*, 41 Pa. St. 102; *Hocker v. Jamison*, 2 W. & S. (Pa.) 438. Compare *Gerhauser v. North British, etc., Ins. Co.*, 7 Nev. 174.

The rule obtains in some States even in criminal cases. *People v. Devine*, 46 Cal. 45; *Summons v. State*, 5 Ohio St. 325. Compare *Collins v. Com.* 12 Bush (Ky.) 271; *People v. Newman*, 5 Hill (N. Y.) 295; *Bragg v. Com.*, 10 Gratt. (Va.) 722; *Finn v. Com.*, 5 Rand. (Va.) 701; *Stephens' Dig. Ev. Art. 32*.

Such evidence should not be received in criminal cases unless diligent inquiry has been made for the absent witness. *Shackelford v. State*, 33 Ark. 539; *Slusser v. Burlington*, 47 Iowa 300. *Sullivan v. State*, 6 Tex. Ap. 319.

Where a witness is only temporarily absent from the State, and it does not appear that he has been subpoenaed or that any effort has been made to procure his attendance or testimony, his evidence in another trial, between other parties, cannot be introduced. *Kellogg v. Secord*, 42 Mich. 318.

It is said that the court may order that the deposition of the absent witness be taken instead of admitting evidence of his testimony on a former trial. *Clinton v. Estes*, 20 Ark. 216. See, also, *Gerhauser v. North British, etc., Ins. Co.*, 7 Nev. 174.

where a witness had been otherwise disqualified since the former proceeding.¹ But the mere absence of a witness does not render evidence of his testimony in a former action or trial admissible.² Evidence of the testimony of a witness in a former proceeding is competent to contradict his testimony in a later action.³ These

"Out of the jurisdiction" in a statute allowing the testimony of a witness on a former trial to be proved in a later one, means out of the reach of a subpoena, out of the State. *Meyer v. Roth*, 51 Cal. 582.

1. Secondary evidence of the testimony of a witness on a former trial has been admitted simply because the witness could not be found at the time of the second trial. *Shackelford v. State*, 33 Ark. 539. See, also, *Rundlett v. Small*, 25 Me. 29. Compare *Harris v. State*, 73 Ala. 495; *Wilbur v. Selden*, 6 Cow. (N. Y.) 162.

In some States a party cannot testify for himself if the other party is dead or otherwise unable to testify; but if the testimony of such dead, absent or disqualified witness is admitted as hearsay, the other party must be permitted to testify. *Strickland v. Hudson*, 55 Miss. 235; *McDonald v. Allen*, 8 Baxt. (Tenn.) 446; 1 Greenl. Ev. (14th ed.), § 168.

The testimony of an intestate upon a former trial cannot be proved in an action by the administrator, where, by statute, the adverse party cannot testify to facts transpiring during the lifetime of the intestate, except where his deposition has been taken. *Hoover v. Jennings*, 11 Ohio St. 624.

Under the New York code, the testimony of a party upon a former trial whose present testimony is incompetent because of the death of his adversary may be read to the jury without first offering the testimony of the deceased adversary. *Lawson v. Jones*, 61 How. Pr. (N. Y.) 424.

Where a witness has become disqualified by a subsequent interest, his testimony in a former action has been rejected when he was living and within reach. *Chess v. Chess*, 17 S. & R. (Pa.) 409; *Irwin v. Reed*, 4 Yeates (Pa.) 512.

Evidence of the testimony of a sheriff on a former trial has been admitted on a second trial, where the sheriff was absent on official duty. *Noble v. Martin*, 7 Martin N. S. (La.) 282.

Where a witness was present but had forgotten the facts, evidence of his testimony in a former action was rejected.

Drayton v. Wells, 1 Nott & McC. 409. And likewise where the witness had become incompetent by having been convicted of an infamous crime. *Le Baron v. Crombie*, 14 Mass. 234. 2. *Harris v. State*, 73 Ala. 495; *Wilbur v. Selden*, 6 Cow. (N. Y.) 162; *State v. Staples*, 47 N. H. 113; *Slusser v. Burlington*, 47 Iowa 300; *Mawich v. Elsey*, 47 Mich. 10; *Mott v. Ramsay*, 92 N. Car. 152; *Richardson v. Stewart*, 2 S. & R. (Pa.) 84. But such evidence has been admitted on behalf of a defendant, where the attendance of the witness could not be procured. *State v. Stewart*, 34 La. Ann. 1037.

Generally it must at least be shown that the attendance of an absent witness could not be secured by due and proper diligence. *Dye v. Com.*, 3 Bush (Ky.) 3; *Wilder v. St. Paul*, 12 Minn. 116.

Secondary evidence of the testimony of a witness on a former trial who has since committed homicide and has not been heard from for several years, was held admissible. *Gunn v. Wades*, 65 Ga. 537.

3. *Nuzum v. State*, 88 Ind. 599; *Johnson v. Clements*, 25 Kan. 376.

Evidence of the testimony of the accused before a committing magistrate is admissible on the trial for this purpose. *State v. M'Lood*, 1 Hawks (N. Car.) 344. So of testimony before a coroner's jury. *Woods v. State*, 63 Ind. 353.

Affidavits.—In the trial of a civil action in which the defendant testified in his own behalf, an affidavit filed by him in the course of criminal proceedings for the same cause of action contradicting his second theory of defense, was admitted on cross-examination as affecting his credibility. *Willson v. Genseal* 113 Ill. 403.

Where the answer of a witness since deceased on a former trial were introduced in evidence, it was held that an affidavit used on the motion for a new trial was not admissible to contradict or explain her answers. *Bessman v. Girardey*, 66 Ga. 18.

The testimony of a witness taken by deposition cannot be impeached by producing his *en parte* affidavit made three

rules are applicable to both civil and criminal actions.¹

The admissibility of evidence of the testimony of a witness in a former proceeding seems to turn upon the right of the adverse party to cross-examine the witness;² and, therefore, where he could not have exercised this right, or the issues in the two actions are different, such evidence is inadmissible.³

Evidence of this character is open to all the objections that

years before under circumstances not disclosed, and to which his attention was not called when the deposition was taken. *Marx v. Heidenheimer*, 63 Tex. 304.

In a criminal trial the testimony of the accused on a former trial is not admissible to show that it was inconsistent with the testimony of his witnesses on the present trial. *Kirby v. Com.*, 77 Va. 681; s. c., 46 Am. Rep. 747. Compare *State v. Jefferson*, 77 Mo. 136. *People v. Arnold*, 43 Mich. 303; s. c., 38 Am. Rep. 182.

1. *Pope v. State*, 22 Ark. 372; *Summons v. State*, 5 Ohio St. 325; *Kendrick v. State*, 10 Humph. (Tenn.) 479; *State v. Atkins*, 1 Overt. (Tenn.) 229; *Johnson v. State*, 1 Tex. App. 333; *Black v. State*, 1 Tex. App. 368; *Finn v. Com.*, 5 Rand. (Va.) 701; *U. S. v. Penn.*, 13 Bankr. Reg. 464. But in some States evidence of the testimony of a witness on a former trial is admissible in cases of death or insanity only. See note 5, p. 333.

O'Brien v. Com., 6 Bush (Ky.) 563; *Breeden v. Feurt*, 70 Mo. 624; *State v. Johnson*, 12 Nev. 121; 1 Greenl. Ev. (14th ed.), § 220.

Thus the testimony of a witness in a suit by A and other plaintiffs against B is admissible after the death of a witness in a suit by B against A relating to the same subject-matter. *Philadelphia, etc., R. Co. v. Howard*, 13 How. (U. S.) 307; *Wright v. Tatham*, 1 Ad. & El. 3. Compare *Louisville, etc., R. Co. v. Atkins*, 2 Lea (Tenn.) 248.

2. *Failure to Cross-Examine.*—The evidence of a witness, since deceased, upon a former trial is admissible, though he was not cross-examined, where the failure to cross-examine resulted from the neglect of the defendant's counsel to appear. *Bradley v. Mirick*, 91 N. Y. 293.

The testimony of a witness, since deceased, at a preliminary examination is admissible on the trial for the crime, where the defendant was voluntarily absent from the examination and was rep-

resented at it by counsel. *State v. Wilson*, 24 Kan. 189.

Privily.—It is sufficient that the right of cross-examination has been exercised by those in privy with the adverse party. See note 4, p. 332.

Coroner's Inquest.—Generally the testimony of a witness at a coroner's inquest is not admissible in an action against one indicted for the crime, because no opportunity for cross-examination was given. *State v. Campbell*, 1 Rich. (S. Car.) 124; *State v. Cecil County*, 54 Md. 426; *Farkas v. State*, 60 Miss. 847; *McLain v. Com.*, 99 Pa. St. 86; *Whitehurst v. Com.*, 79 Va. 556; *Dupree v. State*, 33 Ala. 380. Compare *Brown v. State*, 71 Ind. 470; *Mack v. State*, 48 Wis. 271. Such testimony has been admitted in behalf of the defendant. *State v. McNeill* 33 La. Ann. 1332. Compare *Farkas v. State*, 60 Miss. 847.

It has been said that parol evidence of the testimony of a witness before a coroner's jury is inadmissible where the record can be produced. *Robinson v. State*, 87 Ind. 292.

A deposition taken before a coroner's jury is inadmissible in an action against a railroad for the negligent killing of the plaintiff's intestate, although the witness has since died. *Pittsburgh, etc., R. Co. v. McGrath*, 115 Ill. 172.

3. *Jaccard v. Anderson*, 37 Mo. 91; *Osborn v. Bell*, 5 Den. (N. Y.) 370; *Orr v. Hadley*, 36 N. H. 575; *Sample v. Coulson*, 9 W. & S. (Pa.) 62; *Bishop v. Tucker*, 4 Rich. (S. Car.) 178.

Evidence as to statements made by a witness incidentally, and upon which no cross-examination was permissible by the rules of evidence cannot be received in a subsequent action. *Melvin v. Whiting*, 7 Pick. (Mass.) 79.

Evidence of the testimony of the defendant in an action for malicious prosecution may be given on the trial of the indictment. *Scott v. Wilson*, *Cooke* (Tenn.) 315; *Charlesworth v. Tinker*, 18 Wis. 633.

could be interposed against the original testimony.¹

The former testimony of a witness, where competent, may be proved by any one who heard it,² or by notes of the testimony, the accuracy of which is sworn to by the person taking them;³

1. *Crary v. Sprague*, 12 Wend. (N. Y.) 41; *Wright v. Tatham*, 1 Ad. & El. 21.

The testimony of a witness on a former trial who had since become disqualified by reason of having been convicted of an infamous crime, was not allowed to be proved on a second trial. *Le Baron v. Crombie*, 14 Mass. 234.

Admissions to Avoid Continuance.—

An admission of what an absent witness would testify in order to avoid a continuance is not an admission of the competency nor relevancy of the evidence, and cannot be used at a subsequent trial though the witness has died. *Ryan v. Beard*, 74 Ala. 306.

The affidavit of a deceased witness, the contents of which were admitted on a former trial to avoid a continuance, is not admissible on a second trial. *Powers v. State*, 87 Ind. 144.

2. *Stern v. People*, 102 Ill. 540; *Wade v. State*, 7 Baxt. (Tenn.) 80; *Ruch v. Rock Island*, 97 U. S. 693. By a committing magistrate. *Wade v. State*, 7 Baxt. (Tenn.) 80. By a justice, *Chase v. Debolt*, 7 Ill. 371. By a commissioner to ascertain the boundaries of land. *Bladen v. Cockey*, 1 H. & M. (Md.) 230. By a juror. *Hutchings v. Corgan*, 59 Ill. 70. By a master in chancery, *Yale v. Comstock*, 112 Mass. 267. By an interpreter, *Schearer v. Harber*, 36 Ind. 536; *People v. Ah Yute*, 56 Cal. 119; or by a reporter from memory. *Moore v. Moore*, 39 Iowa 461.

The testimony of a witness before a committing magistrate may be proved orally, though it was reduced to writing. *Smith v. State*, 72 Ga. 114.

The testimony of a witness, since deceased, at a former trial may be proved by one who cannot testify except from minutes taken at the time. *Clark v. Vorce*, 15 Wend. (N. Y.) 193; *Sloan v. Summers*, 20 N. J. L. 66; *Jones v. Ward*, 3 Jones L. (N. Car.) 24; *Rhine v. Robinson*, 27 Pa. St. 30. Compare *Green v. Brown*, 3 Barb. (N. Y.) 119; *Lightner v. Wike*, 4 S. & R. (Pa.) 203.

Evidence of what an interpreter testified as received by him in a foreign language from a witness on a former trial, cannot be given by one who heard the translation by the interpreter, unless

the interpreter is dead, or insane, or out of the jurisdiction, or sick and unable to testify, or having been summoned appears to have been kept away by the adverse party. *Schearer v. Harber*, 36 Ind. 536.

3. *People v. Murphy*, 45 Cal. 137; *Griggs v. State*, 59 Ga. 738; *Riggins v. Brown*, 12 Ga. 271; *Mineral Point Rd. v. Keep*, 22 Ill. 9; *Yale v. Comstock*, 112 Mass. 267; *Labor v. Crane*, 56 Mich. 585; *Sloan v. Summers*, 1 Spencer (N. J.) 66; *Van Buren v. Cockburn*, 14 Barb. (N. Y.) 118; *Ashe v. DeRossett*, 5 Jones L. (N. Car.) 299; *Moore v. Pearson*, 6 W. & S. (Pa.) 51; *Philadelphia, etc. R. Co. v. Spearen*, 47 Pa. St. 300. But it has been held that notes of the testimony of a witness on a former trial cannot be introduced in evidence on a subsequent trial, though verified by oath; but that the witness may use the notes to refresh his memory. *Lipscomb v. Lyon*, 19 Neb. 511; *Drayton v. Wells*, 1 Nott & McC. (S. Car.) 409; *Yancey v. Stone*, 9 Rich. Eq. (S. Car.) 429.

In an action on a note, the defense to which was insanity, the notes of the testimony of a medical expert taken at a former trial were admitted, notwithstanding new evidence was introduced at the second trial on which the expert was not examined. *Easton Bank v. Wirebach*, 106 Pa. St. 37.

If counsel can agree on the testimony the identification thereof by oath is not necessary. *Jackson v. Jackson*, 47 Ga. 99; *Coughlin v. Hanessler*, 50 Mo. 126; *Natt v. Thompson*, 69 N. Car. 548; *Jones v. Ward*, 3 Jones L. (N. Car.) 24; *Clark v. Vorce*, 15 Wend. (N. Y.) 193; *Rhine v. Robinson*, 27 Pa. St. 30; *Earl v. Tupper*, 45 Vt. 275.

Short-hand Reporter's Notes.—In some States the testimony of a witness on a former trial may be proved by the notes of the stenographer verified by his oath. *Stewart v. Port Huron Bank*, 43 Mich. 257; *Labor v. Crane*, 56 Mich. 585; *Quinn v. Halbert*, 57 Vt. 178.

In other States the notes can only be used to refresh the memory of the stenographer. *Lipscomb v. Lyon*, 19 Neb. 511; *Rounds v. State*, 57 Wis. 45; *People v. Chung Ah Chue*, 57 Cal. 567.

but, ordinarily, the judge's notes are not competent evidence for this purpose, unless identified by the oath of the judge.¹

According to some authorities, the precise words of the former witness must be proved;² but, by the better opinion, it is sufficient to give the substance of his testimony.³ But a witness is not

Notes of the evidence taken by a stenographer in a case in another State are inadmissible. *Herrick v. Swomley*, 56 Md. 439.

The short-hand notes of a reporter taken upon a former trial cannot be used, if the reporter is dead. *People v. Qurise*, 59 Cal. 343.

Stenographer's minutes of the testimony of a witness, since deceased, at a former trial cannot be received when they are not shown to be correct. *People v. Sligh*, 48 Mich. 54.

Under a stipulation that the testimony of a witness on a former trial might be used on the next trial, it was held, that the court reporter's report of the testimony was admissible. *Spielman v. Flynn*, 19 Neb. 342.

A stenographer's report of the evidence given by a witness, since deceased, at a former trial, is admissible, although the witness, being dumb, gave his testimony by signs which the stenographer's report describes. *Quinn v. Halbert*, 57 Vt. 178.

The testimony of a reporter based upon his notes is incompetent to prove the testimony of a witness given in a foreign language at a former trial and taken down by the reporter from the interpreter. *People v. Ah Yute*, 56 Cal. 119.

1. Because they are no part of the record. *Schafer v. Schafer*, 93 Ind. 586; *Huff v. Bennett*, 4 Sandf. (N. Y.) 120; *Schall v. Miller*, 5 Whart. (Pa.) 156; *Livingston v. Cox*, 8 W. & S. (Pa.) 61; *Foster v. Shaw*, 7 S. & R. (Pa.) 156; *Miles v. O'Hara*, 4 Binn. (Pa.) 108; *Regina v. Child*, 5 Cox C. C. 197. Compare, *Williams v. State*, 19 Ga. 402; *Doe v. Murray*, 1 Allen (N. Bruns.) 216; *Regina v. Bird*, 5 Cox C. C. 11; 1 Greenl. Ev. (14 ed.), § 166.

The notes of a judge may be used to prove the testimony of a former witness when identified by his oath. *Huff v. Bennett*, 4 Sandf. (N. Y.) 120; *Corby v. Wright*, 9 Mo. App. 5.

On the second trial of an issue sent out of chancery, an order was entered that in the event of the death or inability to attend of witnesses of advanced age, their testimony might be

read from the judge's notes. *Hargrave v. Hargrave*, 10 Jur. 957.

Where a copy taken by another person of the judge's minutes of the testimony of a witness given on a former trial, and since deceased, was offered in evidence, and it was proposed to prove that the original minutes were lost and that the copy was correct, and to prove by the deposition of the judge that the original minutes were full and taken with substantial correctness, it was held, that upon such proof the evidence was admissible. *Whitcher v. Morey*, 39 Vt. 459.

Bill of Exceptions.—The testimony of witnesses subsequently disqualified has been proved by bills of exceptions. *Cantrell v. Hewlett*, 2 Bush (Ky.) 311; *Corby v. Wright*, 9 Mo. App. 5; *Coughlin v. Hanessler*, 50 Mo. 126. Compare, *Stern v. People*, 102 Ill. 540. 2. *Ephriams v. Murdock*, 7 Blackf. (Ind.) 10; *Com. v. Richards*, 18 Pick. (Mass.) 434; *Warren v. Nichols*, 6 Met. (Mass.) 261; *Woods v. Keyes*, 14 Allen (Mass.) 236; *Corey v. Janes*, 15 Gray (Mass.) 543; *Smith v. Smith*, *Wright* (O.) 643; *Bliss v. Long*, *Wright* (O.) 351; *U. S. v. Wood*, 3 Wash. (U. S.) 440. It is said to be sufficient that the witness can give the substance of the words. *Costigan v. Lunt*, 127 Mass. 354.

Where a witness has a distinct recollection that a deceased witness was sworn on a former trial, he may rely on notes taken at the time for his language, if he believes them to be correct. *Sloan v. Summers*, 1 Spencer (N. J.) 66.

3. *Davis v. State*, 17 Ala. 354; *Gildersleeve v. Caraway*, 11 Ala. 260; *Trammell v. Hemphill*, 27 Ga. 525; *Riggins v. Brown*, 12 Ga. 271; *Mitchell v. State*, 71 Ga. 128; *Fell v. Burlington*, etc., Rd., 43 Iowa 177; *State v. Fitzgerald*, 63 Iowa 268; *Harrison v. Charlton*, 42 Iowa 573; *Horne v. Williams*, 23 Ind. 37; *Gannon v. Stevens*, 13 Kan. 447; *Emery v. Fowler*, 39 Me. 326; *Lime Rock Bank v. Hewett*, 52 Me. 531; *Garrott v. Johnson*, 11 G. & J. (Md.) 173; *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479; *Jackson v. Bailey*, 2 Johns. (N. Y.) 17; *Martin v. Cope*, 3 Abb. App. Dec. (N. Y.) 182;

competent to prove the testimony of another unless he can state that he remembers the substance of all that was said, both upon the examination in chief and the cross-examination.¹

7. Admissions.—(a) *Definition.*—An admission is a concession or voluntary acknowledgment made by a party of the existence or truth of certain facts.²

(b) *Character of.*—Admissions may be *direct*³ or *incidental*,⁴

Van Buren v. Cockburn, 14 Barb. (N. Y.) 118; Young v. Dearborn, 22 N. H. 372; Buie v. Carver, 73 N. Car. 264; Ballenger v. Barnes, 3 Dev. L. (N. Car.) 460; Brown v. Com., 73 Pa. St. 321; Hepler v. Mt. Carmel Savings Bank, 97 Pa. St. 420; Jones v. Wood, 16 Pa. St. 25; Gould v. Crawford, 2 Pa. St. 89; Cornell v. Green, 10 S. & R. (Pa.) 14; Wade v. State, 7 Baxt. (Tenn.) 80; Kendrick v. State, 10 Humph. (Tenn.) 479; Wagers v. Dickey, 17 Ohio 439; Thurmond v. Trammell, 28 Tex. 371; Johnson v. Powers, 40 Vt. 611; Williams v. Willard, 23 Vt. 369; State v. Hooker, 17 Vt. 568; Caton v. Lenox, 5 Rand. (Va.) 31; Ruch v. Rock Island, 97 N. S. 693; U. S. v. Macomb, 5 McLean (U. S.) 286; Rex v. Rowley, 1 Mood. Cr. Cas. 111.

1. Gildersleeve v. Caraway, 11 Ala. 260; Puryear v. State, 63 Ga. 602; Jackson v. Soude, R. M. Charl. (Ga.) 38; Harrison v. Charlton, 42 Iowa 573; Fell v. Burlington, etc., R. Co., 43 Iowa 177; Black v. Woodson, 39 Md. 194; Wood v. Keyes, 14 Allen (Mass.) 236; Tibbetts v. Flanders, 18 N. H. 284; Wright v. Stowe, 4 Jones L. (N. Car.) 516; Wolf v. Wyeth, 11 S. & R. (Pa.) 149; Hepler v. Mt. Carmel Savings Bank, 97 Pa. St. 420; s. c., 39 Am. Rep. 813; Wade v. State, 7 Baxt. (Tenn.) 80; Marsh v. Jones, 21 Vt. 378.

The rule that a witness is not competent to testify to what a deceased witness swore on a former trial, unless he says that he is able to state the substance of all the testimony of the deceased witness, does not apply where such evidence is offered to rebut the evidence of the adverse party as to the testimony of such deceased witness. Crawford v. Loper, 25 Barb. (N. Y.) 449.

The testimony of a witness, since deceased, at a former trial, is sufficiently proved by a witness who testifies that he gives the substance of the testimony of the deceased witness in his very words, but does not recollect anything he said on cross-examination, though had there been anything in the cross-examination altering the testimony in chief, he thinks

he would recollect it. Williams v. Willard, 23 Vt. 369.

An attorney was permitted to read in evidence notes of the defendant's testimony, though they did not contain the cross-examination, where the defendant was present at the time, and had an opportunity to prove what he testified to on cross-examination. Johnson v. Powers, 40 Vt. 611.

A party putting in evidence the testimony given on a former trial need not read all of it, but his adversary may read the omitted portions. Parmenter v. Boston, etc., Ry., 37 Hun. (N. Y.) 354.

2. Bouv. L. Dict.

Civil Transactions.—"In our law, the term *admission* is usually applied to *civil transactions*, and to those matters of fact in criminal cases which do not involve criminal intent; the term *confession* being generally restricted to *acknowledgments of guilt*." 1 Greenl. Ev. (14th ed.), § 170.

3. Bouv. L. Dict.

Marriage may be proved by admissions. Whart. Ev. (3rd ed.), § 1006; Greenawalt v. McEnelley, 85 Pa. St. 352; Forney v. Hallacher, 8 S. & R. (Pa.) 159. Made in some other connection or involved in the admission of some other fact. Bouv. L. Dict.

4. Maltby v. Christie, 1 Esp. 342; Rankin v. Horner, 16 East. 193; Marshall v. Cliff, 4 Camp. 133; Holt v. Squire, Ry. & M. 282.

If an administrator concedes a judgment against himself, he thereby admits that he holds assets of the estate. Whart. Ev. (3rd ed.), § 1113.

The payment of money into court admits every fact that the plaintiff must prove in order to recover. 1 Greenl. Ev. (14th ed.), § 205; Bacon v. Charlton, 7 Cush. (Mass.) 581; Huntington v. American Bank, 6 Pick. (Mass.) 340. See, also, Whart. Ev. (3rd ed.), § 1114.

Where there are several counts, the payment of a part only of the sum demanded is not an admission of liability under all or any particular one of the counts. Hubbard v. Knons, 7 Cush. (Mass.) 556; Ribbans v. Crickett,

or implied from assumed character¹ or conduct,² or silence and acquiescence³ under circumstances properly and naturally calling for some action or reply.⁴

1 B. & P. 264; 1 Greenl. Ev., § 205. See, also, Gould v. Oliver, 2 M. & Gr. 208.

1. Whart. Ev. (3rd ed.), §§ 1151, 1153; 1 Greenl. Ev. (14th ed.), § 195; Trowbridge v. Baker, 1 Cow. (N. Y.) 251; Beevan v. Williams, 3 T. R. 635; Rex v. Borrett, 6 C. & P. 124; Peacock v. Harris, 10 East. 104; Dickenson v. Coward, 1 B. & Ald. 677.

2. Whart. Ev. (3rd ed.), § 1081; 1 Greenl. Ev. (14th ed.), § 196.

Admission by Conduct.—The entry of a charge against a particular person, or making a bill in his name, is evidence that credit was furnished on his account. Thompson v. Davenport, 9 B. & C. 78; Storr v. Scott, 6 C. & P. 241.

Omitting a debt in a schedule of debts due an insolvent is evidence against him that it was not due. Nicholls v. Downes, 1 M. & Rob. 13; Tilghman v. Fisher, 9 Watts (Pa.) 441.

Acting under a commission of bankruptcy is evidence that it was duly issued. Like v. Howe, 6 Esp. 20.

On an issue as to whether a landlord or his tenant was to keep a platform in repair, it is evidence against the former that after an injury caused by a defect he repaired the platform. Readman v. Conway, 126 Mass. 374.

The suppression of documents is an admission that they are unfavorable to the party suppressing them. James v. Biou, 2 Sim. & Stu. 600; Eldridge v. Hawley, 115 Mass. 410.

An attempt to suborn perjury is evidence that the party's cause is unjust. Moriarty v. London, etc., Ry., L. R. 5 Q. B. 314.

Payment of money is evidence that the receiver is the proper person to receive it, but not that the payer is the proper person to pay it. Chapman v. Beard, 3 Anstr. 942; James v. Biou, Sim. & Stu. 600.

Letters written by or at the instigation of a party to an action to third persons, warning them not to aid the other party, or to testify, or urging them to testify to a particular state of facts, are in the nature of admissions by conduct and are admissible in evidence. Snell v. Bray, 56 Wis. 156.

For further illustrations, see title ESTOPPEL, vol. VII. p. 1.

3. Moye v. State, 66 Ga. 740.

The rule that an admission may be implied from the silence of a party, applies to a prosecutor. State v. Burton, 94 N. Car. 947.

4. **Silence.**—No admission can be implied from the silence of a party, if the circumstances of the case did not make it his duty to speak. Lawson v. State, 20 Ala. 65; Wilkins v. Stidger, 22 Cal. 231; Rolfe v. Rolfe, 10 Ga. 143; Slattery v. People, 76 Ill. 217; Broyles v. State, 47 Ind. 251; State v. Hamilton, 55 Mo. 520; Brainard v. Buck, 25 Vt. 573.

If duty required the party to speak, his silence is an admission against him. Abercrombie v. Allen, 29 Ala. 281; Carter v. Bennett, 4 Fla. 283; Pierce v. Goldsberry, 35 Ind. 317; Mix v. Osby, 62 Ill. 193; Drury v. Hervey, 126 Mass. 519; Corser v. Paul, 41 N. H. 24; Edwards v. Williams, 3 Miss. (2 How.) 846.

The undenied statements of one party made in the presence of the other are generally competent evidence in favor of the party making them. Block v. Hicks, 27 Ga. 522; Bailey v. Woods, 17 N. H. 365; McClenkan v. McMillan, 6 Pa. St. 366.

But a person under arrest is not called upon to deny criminal charges, and no admission can be implied from his silence. Bob v. State, 32 Ala. 560; Com. v. Walker, 13 Allen (Mass.) 570; Noonan v. State, 1 Sm. & M. (Miss.) 562. Nor can an admission be implied from the failure to contradict an adverse witness. State v. Boyle, 13 R. I. 537.

And an uncontradicted statement by his own witness is not competent evidence against a party on another trial. McDermott v. Hoffman, 70 Pa. St. 31; Whart. Ev. (3rd ed.), § 1136. Compare Blanchard v. Hodgkins, 62 Me. 120.

If after an account is rendered no objection is made to it after due opportunity to do so, its correctness is admitted. McCulloch v. Judd, 20 Ala. 703; Brown v. Brown, 16 Ark. 202; Whart. Ev. (3rd ed.), § 1140. Compare Darlington v. Taylor, 3 Grant's Cas. (Pa.) 195. But it is said that a bill rendered by an attorney for services is not an admission of their value against the attorney. Gartner v. Beller, 54 Mich. 333.

The possession of unanswered letters is not an admission of the truth of their

They may be made to the adverse party or a third person.¹

Statements may be proved as admissions, though contained in instruments inoperative for the purpose intended,² or in pleadings in a former action,³ or in pleadings stricken out or withdrawn in the present action,⁴ or in affidavits,⁵ or depositions⁶ in a former action, or in depositions improperly taken or otherwise incompetent as such.⁷

(c) *Of the Persons Making the Admission.*—Admissions are

contents. *Hunter v. Randall* 69 Me. 183; *Com. v. Eastman*, 1 Cush. (Mass.) 189; *Waring v. United States Tel. Co.* 44 How. Pr. (N. Y.) 69; *Learned v. Tillotson*, 97 N. Y. 1; 8. c., 49 Am. Rep. 508; *Willett v. People*, 27 Hun. (N. Y.) 469; *Meguire v. Corwine*, 3 MacArthur (D. C.) 81. But a reference to a letter in a reply thereto makes it competent evidence so far as is necessary to understand the reply. *Trischet v. Hamilton Ins. Co.* 14 Gray (Mass.) 456. And of the truth of statements in the original letter which would naturally be denied if untrue. *Fenno v. Weston*, 31 Vt. 345.

1. *Brown v. Matthews*, 4 S. E. Rep. (Ga.) 13; *Carpenter v. Tucker*, 98 N. Car. 316.

2. *Bishop v. Fletcher*, 48 Mich. 555; *Whart. Ev.* (3rd ed.), § 1124.

3. *In Pleadings.*—The admissions of a party in pleadings are admissible against him in another suit in behalf either of the adverse party or a stranger, provided they were signed by him personally, or are of such a character that they must have been drawn under special instructions from the client. *Johnson v. Russell*, 124 Mass. 409; *Williams v. Cheney*, 3 Gray (Mass.) 215; *Callan v. McDaniel*, 72 Ala. 96; *McCafferty v. Heritage*, 5 Del. 220; *Rudolph v. Landwerlen*, 92 Ind. 34; *Boots v. Canine*, 94 Ind. 408; *Wells v. Compton*, 3 Rob. (La.) 171; *Parsons v. Copeland*, 33 Me. 370; *Eaton v. Telegraph Co.*, 68 Me. 63; *Adams v. Utley*, 87 N. Car. 356; *Guy v. Manuel*, 89 N. C. 83; *Cook v. Barr*, 44 N. Y. 156; *State v. Littlefield*, 3 R. I. 124; *Church v. Shelton*, 2 Curt. (U. S.) 271; *Lyster v. Stickney*, 4 McCrary (U. S.) 109; *Pope v. Allis*, 115 (U. S.) 363; *Whart. Ev.* (3rd ed.), §§ 110, 119.

But statements contained in pleadings signed only by the attorney and drawn under general instructions from the client are not competent evidence against the latter in another suit where the statements were made without his knowledge or sanction. *Duff v. Duff*,

71 Cal. 513; *Crump v. Geroch*, 40 Miss. 765; *Dennie v. Williams*, 135 Mass. 28. Compare *Guy v. Manuel*, 89 N. Car. 83.

The answer of an infant defendant in chancery cannot be read against the infant in another suit. *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 365; 1 Greenl. Ev. (14th ed.), § 179.

It has been held that the joint answer of a married woman and her husband could not be used against her in another suit. *Hodgson v. Merest*, 9 Price 563; *Elston v. Wood*, 2 My. & K. 678.

Admissions made by an administrator in a bill in chancery are not available to affect the estate. *Crandall v. Gallup*, 12 Conn. 365; *Marshall v. Adams*, 11 Ill. 37; *Dent v. Dent*, 3 Gill (Md.) 482; *Mangun v. Webster*, 7 Gill (Md.) 78; *Fellows v. Fellows*, 37 N. H. 75; *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398.

4. The admissions contained in an answer filed in an equity case, but afterward withdrawn, are competent evidence against defendant. *Daub v. Engleback*, 109 Ill. 267. So of an answer stricken out on plaintiff's motion. *Peckham Iron Co. v. Harper*, 41 Ohio St. 100. See, also, *Boots v. Canine*, 94 Ind. 408.

It is said that the averments in an original complaint cannot be used to disprove those of the amended one, but may be introduced on cross-examination to impeach plaintiff. *Johnson v. Powers*, 65 Cal. 179.

5. *Hyman v. Wheeler*, 29 Fed. Rep. 347; *Albertson v. Williams*, 97 N. Car. 264; *Whart. Ev.* (3d ed.), § 1119.

6. *Williams v. Cheney*, 3 Gray (Mass.) 215; *Judd v. Gibbs*, 3 Gray (Mass.) 539; *Phoenix Mut. Life Ins. Co. v. Clark*, 58 N. H. 164; *State v. Littlefield*, 3 R. I. 124. *Church v. Shelton*, 2 Curt. (U. S.) 271. Although the witness was not a party to the former suit. *Wheat v. Summers*, 13 Ill. App. 444.

7. *State v. Chatham Bank*, 80 Mo. 626; *Edwards v. Norton*, 55 Tex. 405.

receivable in evidence against the person making them,¹ and also against persons jointly interested with him,² except for the purpose of proving the joint interest.³ Thus, the admissions of a

1. But in the absence of any joint interest, the admissions of one defendant are not competent evidence against a co-defendant. *Sodusky v. McGee*, 7 J. J. Marsh. (Ky.) 266; *Thompson v. Richards*, 14 Mich. 172; *Burnham v. Sweatt*, 16 N. H. 418; *State v. Ah Tom*, 8 Nev. 213; *Dan v. Brown*, 4 Cow. (N. Y.) 483; *Lenhart v. Allen*, 32 Pa. St. 312.

An admission is competent evidence against the person making it, however, where he has any interest in the suit, whether there are other parties on the same side or not. *Mandeville v. Welsh*, 5 Wheat. (U. S.) 277; *Bauerman v. Radenius*, 7 T. R. 663.

The answer of one defendant in chancery cannot be read against another, unless there is a joint interest or one claims under or through the other. *McElroy v. Ludlum*, 32 N. J. Eq. 828; *Leeds v. Marine Ins. Co.*, 2 Wheat. (U. S.) 380; *Morris v. Nixon*, 1 How. (U. S.) 118; *Jones v. Turberville*, 2 Ves. Jr. 11.

The admissions of executors, administrators, trustees and the like made in their representative capacity and in the performance of their duty, are admissible in evidence against them in such capacity. *Dobyns*, 4 Dana (Ky.) 220; *Emerson v. Thompson*, 16 Mass. 429; *Atkins v. Sanger*, 1 Pick. (Mass.) 192; *Hill v. Buckminster*, 5 Pick. (Mass.) 391; *Heywood v. Heywood*, 10 Allen (Mass.) 105; *Matoon v. Clapp*, 8 Ohio 248; *Halyburton v. Kershaw*, 3 Desaus. (S. Car.) 105; *Helm v. Steele*, 3 Humph. (Tenn.) 72. But not so an admission made in the representative's individual capacity. *Jeter v. Sandall*, 10 La. Ann. 237.

A party's declarations are generally incompetent in evidence in his own favor. *Hall v. Hall*, 34 Ind. 314; *Nicholson v. Tarpey*, 70 Cal. 608; *Lehman v. Sherger*, 68 Wis. 145.

But the declarations of a party in possession of land may sometimes be proved to show the character of his possession, even in his own favor. *Ozmore v. Hood*, 53 Ga. 114; *Hancock v. Kelly*, 81 Ala. 368; *Stone v. O'Brien*, 7 Col. 458; *Mooring v. McBride*, 62 Tex. 309; *Hardy v. Moore*, 62 Iowa 65.

3. *Coit v. Tracy*, 8 Conn. 268; *White v. Hale*, 3 Pick. (Mass.) 291;

Martin v. Root, 17 Mass. 222; *Getchell v. Heald*, 7 Greenl. (Me.) 26; *Owings v. Low*, 5 G. & J. (Md.) 83; *Beitz v. Fuller*, 1 McCord (S. Car.) 541; *Van Reimsdyk v. Kane*, 1 Gall. (U. S.) 635; *Irby v. Brigham*, 9 Humph. (Tenn.) 750; *Forsyth v. Doolittle*, 120 U. S. 73. But see, *Derby v. Rounds*, 53 Cal. 659; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Wallis v. Randall*, 81 N. Y. 164.

Joint Interest.—The admissions of a joint contractor were admitted in evidence against his fellow contractor. *Rotan v. Nichols*, 22 Ark. 244; *U. S. Bank v. Lyman*, 20 Vt. 666. So of the admissions of a joint covenantor. *Walling v. Roosevelt*, 16 N. J. L. 41.

The admissions of one of joint makers of a promissory note are competent evidence against all, at least until it is shown, that the party making the admissions is not jointly interested with the others. *Camp v. Dill*, 27 Ala. 553; *Bound v. Lathrop*, 4 Conn. 336; *Barrick v. Austin*, 21 Barb. (N. Y.) 241.

The former English rule that an admission by one obligor binds others whom he is bound to indemnify or contribute to does not prevail in Alabama. *Rapier v. La. Equit. Life Ins. Co.*, 57 Ala. 100. See, also, *Abel v. Forgue*, 1 Root (Conn.) 502.

In an action to recover land where plaintiff seeks to invalidate a decree of a court of equity for fraud, it is competent to prove the declarations of one of the parties to the equity suit, not a party to the present action. *Rollins v. Henry*, 84 N. Car. 569.

The admission of one of two joint beneficiaries under an insurance policy was admitted in evidence for the defendant in an action on the policy. *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 535.

At a joint trial of petitions, for damage against a city for the taking of several parcels of land in constructing water-works, the admission of one of the petitioners, who was at the time a member of the city government, to the effect that the lands in the neighborhood would be benefited by the water-works, was admitted in evidence against all the petitioners. *Williams v. Taunton*, 125 Mass. 34.

3. *Buckman v. Barnum*, 15 Conn. 68; *Aiken v. Cato*, 23 Ga. 154; *Dickinson*

partner made during the continuance¹ of the partnership and within the scope² of the partnership business, are competent evidence against all the partners for most purposes,³ but not to prove the existence of the partnership. The fact of partnership must be shown by evidence *aliunde*, before the admissions of a person are receivable against his alleged co-partners.⁴

v. Clark, 5 W. Va. 280; 1 Greenl. Ev. (13th ed.), § 177; Whart. Ev. (3rd ed.), § 1200.

In an action against one of two joint makers of a note, the execution of which is denied, what the other maker said at the time of delivering the note is not competent evidence. *Smith v. Wagaman*, 58 Iowa 11.

1. **Partners.**—After the dissolution of the partnership, the admissions of one partner relating to partnership transactions arising prior to the dissolution are generally incompetent as evidence against the other partners, unless made by him as the authorized agent of the others. *Rowland v. Boozer*, 10 Ala. 690; *Miller v. Neimerick*, 19 Ill. 172; *Winslow v. Newlan*, 45 Ill. 145; *Craig v. Alvarson*, 6 J. J. Marsh. (Ky.) 609; *Walker v. Duberry*, 1 A. K. Marsh. (Ky.) 189; *Stockton v. Johnson*, 6 B. Mon. (Ky.) 409; *Johnson v. Marsh*, 2 La. Ann. 772; *Flowers v. Helen*, 29 Mo. 324; *Baker v. Stackpoole*, 9 Cow. (N. Y.) 420; *Flanagin v. Champion*, 1 Green. Ch. (N. J.) 51; *Hogg v. Orgill*, 34 Pa. St. 344; *Whart. Ev.* (3rd ed.), § 1196. *Compare* *Cochran v. Cunningham*, 16 Ala. 448; *Hitt v. Allen*, 13 Ill. 592; *Curry v. Kurtz*, 33 Miss. 24; *Bridge v. Gray*, 14 Pick. (Mass.) 55; *Pierce v. Woods*, 23 N. H. 519; *Meyers v. Standart*, 11 Ohio St. 29; *Nalle v. Gates*, 20 Tex. 315; *Loomis v. Loomis*, 26 Vt. 198.

2. *Wells v. Turner*, 16 Md. 133. See also *Nixon v. Jenkins*, 1 Hill (N. Y.) 318.

The admissions of a partner are not competent evidence against his co-partners upon the issue of whether it was a partnership transaction. *Scott v. Dansby*, 12 Ala. 714; *Tuttle v. Cooper*, 5 Pick. (Mass.) 414; *Uhler v. Browning*, 29 N. J. L. 79; *Elliott v. Dudley*, 19 Barb. (N. Y.) 326; *White v. Gibson*, 11 Ired. L. (N. Car.) 283. *Compare* *Hurd v. Haggerty*, 24 Ill. 171.

3. *Park v. Wooten*, 35 Ala. 242; *Smitha v. Cureton*, 31 Ala. 652; *Fail v. McArthur*, 31 Ala. 26; *Mamlock v. White*, 20 Cal. 598; *Munson v. Wick-*

wire, 21 Conn. 513; *McCutchin v. Bankston*, 2 Ga. 244; *Holmes v. Budd*, 11 Ia. 186; *Fickett v. Swift*, 41 Me. 65; *Pennoyer v. David*, 8 Mich. 407; *Odiorne v. Maxcy*, 15 Mass. 39; *Collett v. Smith*, 143 Mass. 473; *Little v. Ferguson*, 11 Mo. 598; *Am. Iron Co. v. Evans*, 7 Mo. 552; *Rich v. Flanders*, 39 N. H. 304; *Webster v. Stearns*, 44 N. H. 498; *Harris v. Wilson*, 7 Wend. (N. Y.) 57; *McKee v. Hamilton*, 33 Ohio St. 7; *Hutzler v. Phillips*, 26 S. Car. 136; *Hunter v. Hubbard*, 26 Tex. 537; *Western Assurance Co. v. Towle*, 65 Wis. 247; *Weed v. Kellogg*, 6 McLean (U. S.) 44.

In a number of States the admissions of a partner or joint debtor cannot take a joint liability out of the statute of limitations as to his co-partners or joint debtors. *Bush v. Stowell*, 71 Pa. St. 208; *Hance v. Hair*, 25 Ohio St. 349; *Wallis v. Randall*, 81 N. Y. 164; *Van Keuren v. Parmalee*, 2 N. Y. 523; *Rogers v. Clements*, 92 N. Car. 81; *Whart. Ev.* (3rd ed.), § 1195. *Compare* *Bissell v. Adams*, 35 Conn. 299; *Caldwell v. Sigourney*, 19 Conn. 37; *Buxton v. Edwards*, 134 Mass. 567; *Shepley v. Waterhouse*, 22 Me. 497; *Merritt v. Day*, 38 N. J. L. 32.

4. *Campbell v. Hastings*, 29 Ark. 512; *Berry v. Lathrop*, 24 Ark. 12; *Humes v. O'Bryan*, 74 Ala. 64; *Buckman v. Barnum*, 15 Conn. 68; *Pierce v. McConnell*, 7 Blackf. (Ind.) 170; *Burgess v. Lane*, 3 Greenl. (Me.) 165; *Clark v. Huffaker*, 26 Mo. 264; *Allcott v. Strong*, 9 Cush. (Mass.) 323; *Dutton v. Woodman*, 9 Cush. (Mass.) 255; *Winchester v. Whitney*, 138 Mass. 549; *Flanagin v. Champion*, 2 N. J. Eq. (1 Green) 51; *Jones v. O'Farrel*, 1 Nev. 354; *Whitney v. Ferris*, 10 Johns. (N. Y.) 66; *Harris v. Wilson*, 7 Wend. (N. Y.) 57; *Davidson v. Hutchins*, 1 Hilt. (N. Y.) 123; *Kirby v. Hewitt*, 26 Barb. (N. Y.) 607; *Henry v. Willard*, 73 N. Car. 35; *Rich v. Flanders*, 39 N. H. 304; *Latham v. Kenniston*, 13 N. H. 203; *Grafton Bank v. Moore*, 13 N. H. 99; *Cowan v. Kinney*, 33 Ohio St. 423; *Richardson v. Aldrich*, 6 Phila. (Pa.) 534; *McCorkle v. Doby*, 1

It is a joint interest and not a mere community of interest that renders the admission of one person receivable in evidence against another.¹ There is no such joint interest among tenants in common,² nor between the tenant for life and the remainderman,³ nor among heirs, distributees, devisees, legatees or *cestuis que trust ent*;⁴ nor among executors, administrators or trustees;⁵ nor among the

Strobb. (S. Car.) 396; Nicholls v. Dowding, 1 Stark. 81.

The court must determine when a *prima facie* case of partnership is shown. Hilton v. McDowell, 87 N. Car. 364.

The declarations of a partner made under indifferent circumstances have been admitted in evidence to disprove a partnership in an action by a third person. Danforth v. Carter, 4 Iowa 230. Compare Carlyle v. Plumer, 11 Wis. 96.

As against the person making them, admissions are competent evidence to prove the partnership. Edwards v. Tracy, 62 Pa. St. 374; Dutton v. Woodman, 9 Cush. (Mass.) 255; Grafton Bank v. Moore, 13 N. H. 99.

1. Whart. Ev. (3rd ed.), § 1199; 1 Greenl. Ev. (14th ed.), § 176.

Community of Interest.—There is no such privity or joint interest as to make the admissions of one competent evidence against the other, between a surviving promisor and the executor of his co-promisor. Hathaway v. Haskell, 9 Pick. (Mass.) 42; Atkins v. Tregold, 2 B. & C. 23; Whart. Ev. (3rd ed.), § 1201; Slater v. Lawson, 1 B. & Ad. 396. Nor between a joint promisor with a *feme sole* and her husband after marriage. Pittam v. Foster, 1 B. & C. 248. Nor between indorsers, unless the indorsement is in concert. Whart. Ev. (3rd ed.), § 1199; Slaymaker v. Gundacker, 10 S. & R. (Pa.) 75. Nor between underwriters. Lambert v. Smith, 1 Cranch C. C. (U. S.) 361. Nor between co-obligors in an action against one only. Abel v. Forgue, 1 Root (Conn.) 502. Nor between the trustee and the administrator of the grantor of land conveyed in trust. Harrison v. Mock, 16 Ala. 616. Nor between an obligor and obligee, in the absence of fraud. Bredin v. Bredin, 3 Pa. St. 81; Thomas v. Thomas, 2 J. J. Marsh. (Ky.) 60.

In an action on a life policy by the beneficiary, it has been *held* that admissions by the insured were not admissible. Supreme Lodge v. Schmidt, 98 Ind. 374; see, also, Rawle v. American Life Ins. Co., 36 Barb. (N. Y.) 357.

The admissions of the father of a girl who had brought suit against a railroad company for an injury to her, were *held* inadmissible in evidence against her administrator afterwards prosecuting the suit, in the absence of any showing that the father was interested in the result. Taylor v. Grand Trunk R. Co., 48 N. H. 304.

2. Eakle v. Clarke, 30 Md. 322; Bryant v. Booze, 55 Ga. 438; Ozment v. Anglin, 60 Ga. 242; McLellan v. Cox, 36 Me. 95; Page v. Swanton, 39 Me. 400; Dan v. Brown, 4 Cow. (N. Y.) 483; The New Orleans, 106 U. S. 13. But the admission of a tenant in common in the presence and hearing of a co-tenant may be competent evidence against the latter. Crippen v. Morris, 49 N. Y. 63.

3. Pool v. Morris, 29 Ga. 374; Hill v. Roderick, 4 W. & S. (Pa.) 221; McCune v. McCune, 29 Mo. 117.

4. Dye v. Young, 55 Iowa 433; McMullan v. McDill, 110 Ill. 47; Hayes v. Burkam, 67 Ind. 359; Prewett v. Land, 36 Miss. 495; Prewett v. Coopwood, 30 Miss. 369; Thompson v. Thompson, 13 Ohio St. 356; Hanberger v. Root, 6 W. & S. (Pa.) 431; Irwin v. West, 81* Pa. St. 157; LaBau v. Vanderbilt, 3 Redf. (N. Y.) 384; Forney v. Ferrell, 4 W. Va. 729.

5. Roberts v. Trawick, 13 Ala. 68; Finnern v. Hinz, 38 Hun. (N. Y.) 465; Berdan v. Allan, 10 Ill. App. 91; Hammon v. Huntley, 4 Cow. (N. Y.) 493; Walker v. Dunsbaugh, 20 N. Y. 170; Church v. Howard, 79 N. Y. 415; Walkup v. Pratt, 5 Har. & J. (Md.) 41; Hueston v. Hueston, 2 Ohio St. 488; Pease v. Phelps, 10 Conn. 62; Norwood v. Cobb, 20 Tex. 588; Davies v. Ridge, 3 Esp. 101. But the admission of a legatee who is also an executor under a will has been *held* competent evidence upon the trial of a caveat to the will. Williamson v. Nabers, 14 Ga. 286; Peeples v. Stephens, 8 Rich. (S. Car.) 198.

Evidence of the admission of an administrator has been admitted against his successor in trust. Eckert v. Triplett, 48 Ind. 174; Lashlee v. Jacobs, 9 Humph. (Tenn.) 718.

inhabitants of a territorial political division;¹ nor among the members of a board of officers of a municipal or other corporation;² nor among stockholders.³

As a rule, the admissions of a principal, not made during the transaction of the business for which the surety is bound so as to become part of the *res gestae*,⁴ are not competent evidence against the surety.⁵

Where two or more persons are associated for the accomplishment of the same illegal purpose, the admissions of one of them made during the pendency⁶ of the unlawful enterprise and in furtherance of its objects,⁷ are receivable in evidence against one or all of them.⁸ But a foundation for the introduction of such

1. *Petition of Landaff*, 34 N. H. 164; *Watertown v. Cowen*, 4 Paige (N. Y.) 510; *Low v. Perkins*, 10 Vt. 532; compare 1 Greenl. Ev. (14th ed.), § 175.

2. *Lockwood v. Smith*, 5 Day (Conn.) 315. See, also, notes on ADMISSIONS OF AGENTS, *infra*.

3. *Hartford Bank v. Hart*, 3 Day (Conn.) 495; *Turnpike Co. v. Thorp*, 13 Conn. 173.

4. *Whart. Ev.* (3d ed.), § 1212; *Union Savings Assn. v. Edwards*, 47 Mo. 445.

5. *Bank of Monroe v. Gifford*, 70 Iowa 580; *Keegan v. Carpenter*, 47 Ind. 597; *Lee v. Brown*, 21 Kan. 458; *Pollard v. Louisville, etc., R. Co.*, 7 Bush (Ky.) 597; *Cheltenham Brick Co. v. Cook*, 44 Mo. 29; *Dexter v. Clemans*, 17 Pick. (Mass.) 175; *Chelmsford Co. v. Demarest*, 7 Gray (Mass.) 1; *Tenth National Bank v. Darragh*, 1 Hun. (N. Y.) 111; *Hatch v. Elkins*, 65 N. Y. 489; *White v. German Bank*, 9 Heisk. (Tenn.) 475; *Evans v. Beattie*, 5 Eap. 26; *Wheeler v. State*, 9 Heisk. (Tenn.) 393.

Principal and Surety.—Where the surety authorizes the principal to make a parol contract, the admissions of the latter are competent evidence against the former to prove the contract. *Fenner v. Lewis*, 10 Johns. (N. Y.) 38; *Meade v. McDowell*, 5 Binn. (Pa.) 195.

Where the surety is sued for the default of his principal and gives the latter notice of the pendency of the suit, the admissions of the principal are evidence against the surety. 1 Greenl. Ev. (24th ed.), § 188.

Admissions of a surety are evidence against both himself and his principal. *Chapel v. Washburn*, 11 Ind. 393; *Brown v. Munger*, 16 Vt. 12.

The admissions of a debtor are competent evidence against a guarantor. *Walker v. Forbes*, 25 Ala. 139.

The admissions of the maker of a note are not admissible in evidence against an indorser. *Baker v. Briggs*, 8 Pick. (Mass.) 122.

6. Unlawful Design.—An admission, made by one of two or more persons, after the completion or abandonment of the common enterprise, is competent evidence against the person making it, but not against the others. *People v. Moore*, 45 Cal. 19; *People v. English*, 52 Cal. 212; *Clinton v. Estes*, 20 Ark. 216; *State v. Jackson*, 29 La. Ann. 354; *State v. Duncan*, 64 Mo. 262; *State v. Ross*, 29 Mo. 32; *Lynes v. State*, 36 Miss. 617; *Benford v. Sanner*, 40 Pa. St. 9; *Phillips v. State*, 6 Tex. App. 364; *Hunter v. Com.*, 7 Gratt. (Va.) 641; *U. S. v. Hartwell*, 3 Cliff. (U. S.) 221.

7. *State v. Daubert*, 42 Mo. 239; *Browning v. State*, 30 Miss. 656; *Hudson v. Com.*, 2 Duv. (Ky.) 531; *Republica v. Langcake*, 1 Yeates (Pa.) 415; *Strady v. State*, 5 Coldw. (Tenn.) 300; *Hightower v. State*, 22 Tex. 605.

8. *Smith v. State*, 52 Ala. 407; *Stewart v. State*, 26 Ala. 44; *Clinton v. Estes*, 20 Ark. 216; *Colt v. Eves*, 12 Conn. 243; *Chicago, etc., R. Co. v. Collins*, 56 Ill. 212; *Philpot v. Taylor*, 75 Ill. 309; *State v. Nash*, 7 Iowa 347; *Williams v. State*, 47 Ind. 568; *State v. Ross*, 29 Mo. 32; *Street v. State*, 43 Miss. 1; *Mask v. State*, 32 Miss. 405; *State v. Soper*, 16 Me. 293; *People v. Pitcher*, 15 Mich. 397; *Com. v. Brown*, 14 Gray (Mass.) 419; *Bryce v. Butler*, 70 N. Car. 585; *Jacobs v. Shorey*, 48 N. H. 100; *State v. Larkin*, 49 N. H. 39; *Lee v. Lamprey*, 43 N. H. 13; *Patton v. Freeman*, 1 N. J. L. (Coxe) 113; *Legg v. Olney*, 1 Den. (N. Y.) 202; *Davis v. Newkirk*, 5 Den. (N. Y.) 92; *Dart v. Walker*, 3 Daly (N. Y.) 138; *Kelley v. People*, 55 N. Y. 565; *Oldham v. Bentley*, 6 B. Mon. (Ky.) 428;

evidence must first be laid by showing, *prima facie*, the existence of the common design.¹

The admissions of a person in disparagement of his title are competent evidence against those claiming under or through him,²

State v. Havelin, 6 La. Ann. 167; *Fouts v. State*, 7 Ohio St. 471; *Deakers v. Temple*, 41 Pa. St. 234; *Taylor v. Stute*, 3 Tex. App. 169; *State v. Thibau*, 30 Vt. 100; *Clayton v. Anthony*, 6 Rand. (Va.) 285; *Tuttle v. Turner*, 28 Tex. 759; *Ellis v. Dempsey*, 4 W. Va. 126; *Lincoln v. Clafin*, 7 Wall. (U. S.) 132; *Carr v. Gale*, 3 Woodb. & M. (U. S.) 38. But see *Kenyon v. Woodruff*, 33 Mich. 310.

1. *Hutchings v. Castle*, 48 Cal. 152; *Foster v. Thrasher*, 45 Ga. 517; *Wiggins v. Leonard*, 9 Iowa 194; *Reid v. Louisiana, etc., Co.*, 29 La. Ann. 388; *Mawich v. Elsey*, 47 Mich. 10; *Hamilton v. People*, 29 Mich. 195; *Com. v. Crowninshield*, 10 Pick. (Mass.) 497; *Garrard v. State*, 50 Miss. 147; *Ormsby v. People*, 53 N. Y. 472; *State v. Pike*, 51 N. H. 105; *Kimmell v. Geeting*, 2 Grant Cas. (Pa.) 125; *Kelsey v. Murphy*, 26 Pa. St. 78; *Triplett v. Goff*, 83 Va. 784; *Carskadon v. Williams*, 7 W. Va. 1; *U. S. v. McKee*, 3 Dill. (U. S.) 546.

2. In *Disparagement of Title*.—The rule applies to heirs, devisees, legatees, donees, executors, etc., to grantees and assignees where they succeed to the title as it stood at the time of the transfer only, to judgment creditors, lessees, etc. *Alexander v. Caldwell*, 55 Ala. 517; *Lide v. Lide*, 32 Ala. 449; *Dubose v. Young*, 14 Ala. 139; *Allen v. McGaughey*, 31 Ark. 252; *Gallagher v. Williamson*, 23 Cal. 331; *McFadden v. Ellmaker*, 52 Cal. 348; *Ramsbottom v. Phelps*, 18 Conn. 278; *Mueller v. Rebban*, 94 Ill. 142; *Lewis v. Adams*, 61 Ga. 559; *Eckert v. Triplett*, 48 Ind. 174; *McSweeney v. McMillen*, 96 Ind. 298; *Bevins v. Cline*, 21 Ind. 37; *Compton v. Fleming*, 8 Blackf. (Ind.) 153; *Nash v. Gibson*, 16 Iowa 305; *Robinson v. Robinson*, 22 Iowa 427; *Anderson v. Kent*, 14 Kan. 207; *Murray v. Oliver*, 18 Mo. 405; *Fellows v. Smith*, 130 Mass. 378; *Pickering v. Reynolds*, 119 Mass. 111; *Hayden v. Stone*, 121 Mass. 413; *Brown v. McGraw*, 20 Miss. 267; *Wentworth v. Wentworth*, 71 Me. 72; *Hatch v. Dennis*, 1 Fairf. (Me.) 244; *Hunt v. Haven*, 56 N. H. 87; *Putnam v. Osgood*, 52 N. H. 148; *State v. Vale Mills*, 63 N. H. 4; *Eaton v. Cook*, 25 N. J. Eq. 55; *Ten Eyck v. Runk*, 26 N. J. L. 513;

Gidney v. Logan, 79 N. Car. 214; *Harshaw v. Moore*, 12 Ired. L. (N. Car.) 247; *Rose v. Adams*, 22 Hun. (N. Y.) 389; *Enders v. Sternberg*, 2 Abb. App. Dec. (N. Y.) 31; *Foot v. Beecher*, 78 N. Y. 155; *Platner v. Platner*, 78 N. Y. 90; *Chadwick v. Fonner*, 69 N. Y. 404; *Adams v. Davidson*, 10 N. Y. 309; *Gibblehouse v. Stong*, 3 Rawle (Pa.) 437; *Biddle v. Moore*, 3 Pa. St. 161; *Gordner v. Hefley*, 49 Pa. St. 163; *Willard v. Willard*, 56 Pa. St. 119; *McClendon v. Wells*, 20 S. Car. 514; *Burckmeyer v. Mairs*, Riley (S. Car.) 208; *Harrington v. Chambers*, 3 Utah 94; *Alger v. Andrews*, 47 Vt. 238; *Downs v. Beldon*, 46 Vt. 674; *Hale v. Rich*, 48 Vt. 217; *Walthall v. Johnston*, 2 Call. (Va.) 275; *Roebke v. Andrews*, 26 Wis. 311. *In re Clark*, 9 Blatchf. (U. S.) 379; *Samson v. Blake*, 6 Bankr. Reg. 410. But see *Vidvard v. Powers*, 34 Hun. (N. Y.) 221; *Dodge v. Freedman's, etc., Co.*, 93 U. S. 379; *Whart. Ev.* (3rd ed.), §§ 1159, 1160.

The rule has been applied to a purchaser at an execution sale. *Walker v. Elledge*, 65 Ala. 51.

In an action by a father for the death of his son, the declarations of the latter as to the cause of the injury were permitted to be shown. *Stern v. Railroad*, 7 Leg. Gaz. (Pa.) 223.

The admissions of a mortgagee as to the consideration of the mortgage are admissible in evidence against his privies by representation. *Parkhurst v. Higgins*, 38 Hun. (N. Y.) 113. See, also, *Merrick v. Hulbert*, 15 Ill. App. 606.

For the purpose of showing the true boundary line of land, declarations of the mortgagor in possession are admissible against one claiming under a foreclosure of the mortgage. *Flagg v. Mason*, 141 Mass. 64.

In an action to recover possession of property where both parties claim under the same person, one under an execution sale and the other by deed made prior to such sale, it is competent in order to establish the *bona fides* of the deed to prove declarations of the vendor made before suit was commenced and before the contract of sale, admitting an indebtedness to the grantee. *McCaules v. Reynolds*, 67 N. Car. 268.

so far as there is identity of interest.¹ Such evidence is not admitted to dispute a record title.² The admission must have been made while the title was in the person making it, neither before it was acquired, nor after it had been transferred;³ except, that where there is other evidence of a design between the predecessor

Where property claimed by the wife was taken under execution against the husband, evidence of his statements made before the taking that it was the separate property of the wife was admitted, but evidence of his contradictory statements made since the taking offered in rebuttal was rejected. *Hackett v. Amsden*, 59 Vt. 553.

Evidence of a grantor's declaration in disparagement of his title made while he was the owner of the land and upon it, introduced by a party claiming adversely to the grantee cannot be explained or contradicted by evidence of such grantor's declarations made on other occasions in behalf of the same title, whether the last declarations were made before or after the conveyance to the grantee. *Royal v. Chandler*, 79 Me. 265.

The statement of a deceased person made to a third party to the effect that he had made a gift and had delivered the property to the party who claimed to be the donee, is competent evidence to prove that fact. *Pritchard v. Pritchard*, 69 Wis. 373.

1. The admissions of a former holder of negotiable paper are not admissible in evidence against an assignee for value receiving the paper before maturity and without notice of such admissions. *Hackett v. Martin*, 8 Greenl. (Me.) 77; *Blanc-jour v. Tutt*, 32 Mo. 576; *Paige v. Cagwin*, 7 Hill (N. Y.) 361; *Bristol v. Dann*, 12 Wend. (N. Y.) 142; *Barrough v. White*, 4 B. & C. 325.

Where the demand is already stale or infected with suspicion at the time it is negotiated, the admissions of the assignor are competent evidence against the assignee. *Glanton v. Griggs*, 5 Ga. 424; *Williams v. Judy*, 8 Ill. 282; *Sandifer v. Howard*, 59 Ill. 246; *Abbott v. Muir*, 5 Ind. 444; *Blount v. Riley*, 3 Ind. 471; *Pilcher v. Kerr*, 7 La. Ann. 144; *Bond v. Fitzpatrick*, 4 Gray (Mass.) 89; *Sylvester v. Crapo*, 15 Pick. (Mass.) 92; *Criddle v. Criddle*, 21 Mo. 522; *Robb v. Schmidt*, 35 Mo. 200; *Shirley v. Todd*, 9 Greenl. (Me.) 83; *McLanathan v. Patten*, 39 Me. 142; *Fisher v. True*, 38 Me. 534; *Miller v. Bingham*, 29 Vt. 82; *Drennon v. Smith*, 3 Head (Tenn.) 389; *Whart. Ev.* (3rd ed.), § 1163 a.

But in some States the admissions of the assignors of unnegotiable choses in action and negotiable paper overdue when assigned are not admitted in evidence against assignees for value without actual notice. *Booth v. Swezey*, 8 N. Y. 276; *Tousley v. Barry*, 16 N. Y. 497; *Clews v. Kehr*, 90 N. Y. 633; *Truax v. Slater*, 86 N. Y. 630; *Shober v. Jack*, 3 Mon. (Ky.) 351. *Compare Harrison v. Vallance*, 1 Bing. 45; *Pocock v. Billing*, 2 Bing. 269; *Shaw v. Broom*, 4 Dow. & Ry. 730.

In an action by the assignee of a deed of trust, admission of payment made by the assignor while he had the deed and notes, though before their maturity, was held competent evidence against the assignee. *Merrick v. Hulbert*, 15 Ill. App. 606.

One who buys land with an accompanying apparent easement in its favor is not affected by declarations of his grantor in derogation thereof of which he has no knowledge. *Root v. Wadhams*, 35 Hun. (N. Y.) 57.

2. *John Hancock Ins. Co. v. Moore*, 34 Mich. 41; *Yates v. Yates*, 76 N. Car. 142; *Roberts v. Roberts*, 82 N. Car. 29; *Dodge v. Freedman's, etc. Co.*, 93 N. S. 379; *Whart. Ev.* (3rd ed.) § 1157.

3. *State v. Jennings*, 10 Ark. 428; *Patton v. Gee*, 36 Ark. 506; *Smith v. Hamlet*, 43 Ark. 320; *Crow v. Watkins*, 48 Ark. 169; *Rush v. French*, 1 Ariz. 99; *Walden v. Purvis*, 73 Cal. 518; *Garlick v. Bowers*, 66 Cal. 122; *Harrell v. Culpepper*, 47 Ga. 635; *Howell v. Howell*, 47 Ga. 492; *Cornett v. Fain*, 33 Ga. 219; *Howard v. Snelling*, 32 Ga. 195; *Marion v. Hoyt*, 72 Ga. 117; *Monroe v. Napier*, 52 Ga. 385; *Burkholder v. Casad*, 47 Ind. 418; *Proctor v. Cole*, 104 Ind. 373; *Hubble v. Osborn*, 31 Ind. 249; *Campbell v. Coon*, 51 Ind. 76; *Lister v. Boker*, 6 Blackf. (Ind.) 439; *Keystone Mfg. Co. v. Johnson*, 50 Ia. 142; *Benson v. Lundy*, 52 Iowa 265; *Bixby v. Carskaddon*, 63 Iowa 164; *Edwards v. Hamilton*, 19 Ill. App. 340; *Bunker v. Green*, 48 Ill. 243; *Randegger v. Ehrhardt*, 51 Ill. 101; *Deasey v. Thurman*, 1 Idaho N. S. 775; *Crane v. Gunn*, 4 B. Mon. (Ky.) 10; *Carpenter v. Carpenter*, 8 Bush. (Ky.)

in title and his successor to defraud creditors, the admissions of the former, made after parting with the title, are receivable against the latter.¹

283; *Sumner v. Cook*, 12 Kan. 162; *Crust v. Evans*, 37 Kan. 263; *Carrollton Bank v. Cleveland*, 15 La. Ann. 616; *Roberts v. Medbery*, 132 Mass. 100; *Holbrook v. Holbrook*, 113 Mass. 74; *Stockwell v. Blamey*, 129 Mass. 312; *Noyes v. Morrill*, 108 Mass. 396; *Bridge v. Eggleston*, 14 Mass. 245; *Clarke v. Waite*, 12 Mass. 439; *Bartlett v. Delprat*, 4 Mass. 702; *Porter v. Rea*, 6 Mo. 48; *Weinrich v. Porter*, 47 Mo. 293; *Gordon v. Ritenour*, 87 Mo. 54; *Taylor v. Webb*, 54 Miss. 36; *Cooke v. Cooke*, 29 Md. 538; *Matthews v. Houghton*, 10 Me. 420; *Smith v. Schanck*, 18 Barb. (N. Y.) 344; *Chadwick v. Fonner*, 69 N. Y. 404; *Smith v. Exchange, etc., Ins. Co.*, 40 N. Y. Super. Ct. 492; *People v. Dayton*, 50 How. Pr. (N. Y.) 143; *Hutchins v. Hutchins*, 98 N. Y. 56; *Sanford v. Ellithorp*, 95 N. Y. 48; *Roebor v. Bowe*, 30 Hun. (N. Y.) 379; *Headen v. Womack*, 88 N. Car. 468; *Burbank v. Wiley*, 79 N. Car. 501; *Gidney v. Logan*, 79 N. Car. 214; *Hirschfeld v. Williamson*, 18 Nev. 66; *Pringle v. Pringle*, 59 Pa. St. 281; *McLaughlin v. McLaughlin*, 91 Pa. St. 462; *Magee v. Raignel*, 64 Pa. St. 110; *Bailey v. Clayton*, 20 Pa. St. 295; *Garrahy v. Green*, 32 Tex. 202; *Wilson v. Simpson*, 68 Tex. 306; *Caraway v. Caraway*, 7 Coldw. (Tenn.) 245; *Burton v. Scott*, 3 Rand. (Va.) 399; *Downs v. Belden*, 46 Vt. 674; *Houston v. McClung*, 8 W. Va. 135; *Venable v. United States Bank*, 2 Pet. (U. S.) 107; *Many v. Jagger*, 1 Blatchf. (U. S.) 372; *Tierney v. Corbett*, 2 Mackey (D. C.) 264. *Compare* *Lemon v. Jenkins*, 48 Ga. 313; *Howell v. Howell*, 47 Ga. 492. The admissions of the assignor made after an assignment for the benefit of creditors are not competent evidence to impeach the assignment. *Myers v. Kinzie*, 26 Ill. 36; *Wynne v. Glidewell*, 17 Ind. 446; *Bartlett v. Marshall*, 2 Bibb. (Ky.) 467; *Burt v. McKinstry*, 4 Minn. 146; *Heywood v. Reed*, 4 Gray (Mass.) 574; *Frear v. Evertson*, 20 Johns. (N. Y.) 142; *Flagler v. Wheeler*, 40 Hun. (N. Y.) 125, 178; *Peck v. Crouse*, 46 Barb. (N. Y.) 151; *Careton v. Baldwin*, 27 Tex. 572; *Bates v. Ableman*, 13 Wis. 644.

Declarations of a judgment creditor made thereafter are not admissible in

evidence against a purchaser of property at a sale under his execution. *Agnew v. Adams*, 26 S. Car. 101.

Admissions by the payee of a note after parting with his interest are not competent evidence against the assignee. *Scripture v. Newcomb*, 16 Conn. 588; *Fleming v. Newman*, 5 Blackf. (Ind.) 220; *Stoner v. Ellis*, 6 Ind. 152; *Wilson v. Bowden*, 113 Mass. 422; *Beach v. Wise*, 1 Hill (N. Y.) 612; *Paige v. Cagwin*, 7 Hill (N. Y.) 361; *Osborn v. Robbins*, 37 Barb. (N. Y.) 481; *Washburn v. Ramsdell*, 17 Vt. 299. *Compare* *Whittier v. Vose*, 16 Me. 403.

Admissions made by a debtor after an attachment of his property are not admissible to defeat the attachment lien in favor of the plaintiff in a replevin suit claiming that the debtor purchased the goods from her by false representations of his financial condition. *Tarr v. Smith*, 68 Me. 97.

A letter written by a distributee after assigning his share of the estate is not admissible for any purpose in a suit to settle the estate. *Strother v. Mitchell*, 80 Va. 149.

It has been held that an admission of indebtedness is not competent evidence as against a previous creditor. *Taylor v. Branch Bank of Huntsville*, 14 Ala. 633; *Hooper v. Edwards*, 18 Ala. 280. *Compare* *Strong v. Wheeler*, 5 Pick. (Mass.) 410; *Lambert v. Craig*, 12 Pick. (Mass.) 199.

1. When there is other evidence of a common design to defraud creditors, the admissions of a predecessor in title are competent evidence against his grantee, assignee, etc. *Hodge v. Thompson*, 9 Ala. 131; *Tibballs v. Jacobs*, 31 Conn. 428; *Hutchings v. Castle*, 48 Cal. 152; *Ewing v. Gray*, 12 Ind. 64; *Daniels v. McGinnis*, 97 Ind. 549; *DeFrance v. Howard*, 4 Iowa 524; *Boyd v. Jones*, 60 Mo. 454; *Cuyler v. McCartney*, 33 Barb. (N. Y.) 165; *Perkins v. Towle*, 59 N. H. 583; *Hartman v. Diller*, 62 Pa. St. 37; *Pier v. Duff*, 63 Pa. St. 59; *Souder v. Schechterly*, 91 Pa. St. 83.

Where the vendor remained in the possession of property after the execution of a conveyance thereof, his statements were admitted in evidence against the vendee, fraud in the con-

The admissions of an agent are competent evidence against his principal if made during the continuance¹ of the agency and so connected with a transaction within its scope² as to become part

veyance being charged by a creditor. *Williams v. Hart*, 65 Ga. 201. But see *McCormicks v. Fuller*, 56 Iowa 43.

1. **Agency.**—The admissions or declarations of an agent made either before the agency commenced, or after it ended, are not admissible against the principal. *Levy v. Mitchell*, 6 Ark. 138; *Colquitt v. Thomas*, 8 Ga. 268; *Wiggins v. Leonard*, 9 Iowa 194; *Waterman v. Peet*, 11 Ill. 648; *Davis v. Whitesides*, 1 Dana (Ky.) 177; *Reynolds v. Rowley*, 2 La. Ann. 890; *Haven v. Brown*, 7 Me. 421; *Polleys v. Ocean Ins. Co.*, 14 Me. 141; *Stiles v. Western R. Co.*, 8 Met. (Mass.) 44; *Caldwell v. Garner*, 31 Mo. 131; *Williams v. Williamson*, 6 Ired. L. (N. Car.) 281; *Vail v. Judson*, 4 E. D. Smith (N. Y.) 165; *Raiford v. French*, 11 Rich. (S. Car.) 367; *Brigham v. Carr*, 21 Tex. 142.

2. *Edmunds v. Curtis*, 8 Col. 605; *Citizens' Gaslight Co. v. Granger*, 19 Ill. App. 201; *Chicago, etc. R. Co., v. Lee*, 60 Ill. 501; *Rowell v. Klein*, 44 Ind. 290; *McPherrin v. Jennings*, 66 Iowa 622; *Donnel v. Clark*, 12 Kan. 154; *Branch v. Wilmington, etc. R. Co.*, 88 N. Car. 573; *Anderson v. Rome, etc. R. Co.*, 54 N. Y. 334; *Mars v. Virginia Home Ins. Co.*, 17 S. Car. 514; *Coyle v. Baltimore, etc. R. Co.*, 11 W. Va. 94; *Baltimore, etc. R. Co. v. Christie*, 5 W. Va. 325.

An admission by an agent in his individual capacity is not competent evidence against the principal. *Bernstein v. Bernstein*, 11 Ill. App. 238.

An agent appointed to take care of the principal's property can not bind the principal by admissions as to how the latter acquired it. *Winchester, etc. Co. v. Creary*, 116 U. S. 161.

The price put on a commodity by an agent appointed to sell it, is evidence of its value as against the principal. *Banks v. Gidrot*, 19 Ga. 421.

An agent to construct a building can bind his employer by his admissions explaining certain payments relating thereto. *Cook v. Hunt*, 24 Ill. 535. See, also, *Hudspeth v. Allen*, 26 Ind. 165.

An agent to receive money has no authority to make any declarations in relation thereto which can affect his principal. *Hyland v. Sherman*, 2 E. D. Smith (N. Y.) 234; *Gould v. Tatum*,

21 Ark. 329. Except an admission of payment. *Click v. Hamilton*, 7 Rich. (S. Car.) 65.

Where a person authorized another to send goods to his agent, the admissions of the agent of such receipt are admissible in evidence against the principal. *Webster v. Clark*, 30 N. H. 245. Compare *Griffith v. Turner*, 4 Gill (Md.) 111.

The declaration of a bank cashier as to the ownership of stock, made at the time of a payment on account of the stock by a third person, is competent evidence against the bank on the question of ownership. *Xenia Bank v. Stewart*, 114 U. S. 224.

Admissions by the manager of a railroad company contained in a letter to plaintiff's attorney are admissible against the defendant company. *McCammon v. Detroit, etc., R. Co.*, 33 N. W. Rep. (Mich.) 728.

A conversation between a chief civil engineer, in charge of repairs, and the division roadmaster, is competent evidence on the question of whether a railroad was in proper repair at the time of an accident. *St. Louis, etc., R. Co. v. Weaver*, 35 Kan. 412.

Master and Servant.—The admissions of a servant are not competent evidence against the master, unless they are part of the *res gestae* of a transaction with the scope of his employment. *Abbott v. Hutchins*, 14 Me. 390; *Corbin v. Adams*, 6 Cush. (Mass.) 93; *McGregor v. Wait*, 10 Gray. (Mass.) 72; *Price v. New Jersey R. Co.*, 31 N. J. L. 229.

Owner and Crew.—Admissions made by a person in charge of a vessel are competent evidence against the owner if made in the performance of his duties as master, etc. *Bailey v. New World*, 2 Cal. 370; *Gerke v. Cal. Steam Nav. Co.*, 9 Cal. 251; *Withers v. El Paso*, 24 Mo. 204; *Price v. Thornton*, 10 Mo. 135; *Price v. Powell*, 3 N. Y. 322; *Higgins v. Solomon*, 2 Hall (N. Y.) 482; *Reed v. Dick*, 8 Watts (Pa.) 479. Compare *Clay v. Smith*, 4 Bibb (Ky.) 255.

Evidence of the declarations of a pilot has been held inadmissible against the owner of the vessel. *Ready v. Steamboat Highland Mary*, 20 Mo. 264. So of the declarations of a stevedore. *Mallory v. Perkins*, 9 Bosw. (N. Y.) 572.

of the *res gestae*.¹

Public Officers and Officers of Corporations.—The admissions of public officers, of individual trustees, directors and other officers of corporations, of inhabitants of a municipality, stockholders of corporations, etc., are not competent evidence against the corporation, unless specially authorized or made in the course of an authorized transaction and relating thereto. *Robinson v. Lane*, 19 Ga. 337; *Thomas v. Rutledge*, 67 Ill. 213; *Peck v. Detroit Novelty Works*, 29 Mich. 313; *Franklin Bank v. Cooper*, 36 Me. 179; *Lime Rock Bank v. Hewett*, 52 Me. 531; *Chelmsford Co. v. Demarest*, 7 Gray (Mass.) 1; *Waiker v. Dunsbaugh*, 20 N. Y. 170; *Schroepell v. Syracuse Plank Rd.*, 7 How. Pr. (N. Y.) 94; *First Natl. Bank v. Ocean Natl. Bank*, 60 N. Y. 278; *Low v. Connecticut, etc. R. Co.*, 45 N. H. 370; *Pemigewassett Bank v. Rogers*, 18 N. H. 255; *Hogg v. Zanesville Manufacturing Co.*, *Wright (O.)* 139; *Green v. North Buffalo*, 56 Pa. St. 110; *Bank of Northern Liberties v. Davis*, 6 W. & S. (Pa.) 285; *Salado College v. Davis*, 47 Tex. 131; *Green v. Woodbury*, 48 Vt. 5; *Folsom v. Underhill*, 36 Vt. 580.

But the authorized admissions of such persons are admissible in evidence against the corporation. *Green v. Ophia, etc., Co.*, 45 Cal. 522; *Chicago, etc., R. Co., v. Coleman*, 18 Ill. 297; *Blanchard v. Blackstone*, 102 Mass. 343; *Cortland County v. Herkimer County*, 44 N. Y. 22; *Sewanee Mining Co. v. McMahon*, 1 Head (Tenn.) 582.

A county is not bound by the statement of its general attorney that it will pay a certain debt. *Holton v. Lake County*, 55 Ind. 194.

In an action against a town on the question of a pauper settlement, a casual remark of one of the overseers of the poor, unconnected with any official act, was held inadmissible. *Brighton v. St. Albans*, 77 Me. 177.

1. *Strawbridge v. Spann*, 8 Ala. 820; *Bohannon v. Chapman*, 13 Ala. 641; *Williams v. Shackelford*, 16 Ala. 318; *Neely v. Naglee*, 23 Cal. 152; *Perkins v. Burnet*, 2 Root (Conn.) 30; *Webb v. Smith*, 6 Col. 365; *Galceran v. Noble*, 66 Ga. 367; *Adams v. Humphreys*, 54 Ga. 496; *Newton Mfg. Co. v. White*, 53 Ga. 395; *Pavey v. Winthrode*, 87 Ind. 379; *Heller v. Crawford*, 37 Ind. 279; *Howe Machine Co. v. Snow*, 32 Iowa 433; *Mix v. Osby*, 62 Ill.

193; *Swenson v. Aultman*, 14 Kan. 273; *Covington, etc., Rd. v. Ingles*, 15 B. Mon. (Ky.) 637; *Roberts v. Burks*, Litt. Sel. Cas. (Ky.) 411; *Yocum v. Barnes*, 8 B. Mon. (Ky.) 496; *Thomas v. Steinheimer*, 29 Md. 268; *Beardslee v. Steinmesh*, 38 Mo. 168; *Peck v. Ritchey*, 66 Mo. 114; *Hammott v. Emerson*, 27 Me. 308; *McCormick v. Demary*, 10 Neb. 515; *Gutchess v. Gutchess*, 66 Barb. (N. Y.) 483; *Halsey v. Lehigh Valley Ry.*, 45 N. J. L. 26; *State v. Lemon*, 92 N. Car. 790; *Burnside v. Grand Trunk R. Co.*, 47 N. H. 554; *Central Pa. Telephone Co. v. Thompson*, 112 Pa. St. 118; *Moor v. Bettis*, 11 Humph. (Tenn.) 67; *Tutte v. Turner*, 28 Tex. 759; *McAulay v. Western, etc. R. Co.*, 33 Vt. 311; *Mason v. Gray*, 36 Vt. 308; *Cliquot's Champagne*, 3 Wall. (U. S.) 114.

The admissions and declarations of an agent made after the transaction took place and not specially authorized by the principal are not competent evidence against the latter, although the relation of principal and agent still exists. *Governor v. Baker*, 14 Ala. 652; *Winter v. Burt*, 31 Ala. 33; *Byers v. Fowler*, 14 Ark. 87; *Garfield v. Knight's Ferry, etc., Co.*, 14 Cal. 35; *Turnpike Co. v. Thorp*, 13 Conn. 173; *Tillinghast v. Nourse*, 14 Ga. 641; *Mason v. Croom*, 24 Ga. 211; *Chicago, etc., Rd. v. Fietsam*, 19 Ill. App. 55; *Whiteside v. Margarel*, 51 Ill. 507; *Michigan Central R. Co., v. Gongar*, 55 Ill. 503; *Hynds v. Hays*, 25 Ind. 31; *Board of Comrs. of Franklin County v. Bunting*, 111 Ind. 143; *Worden v. Humeston, & Shenandoah R. Co.*, 72 Iowa 201; *Osgood v. Bringolf*, 32 Iowa 265; *Bradford v. Williams*, 2 Md. Ch. 1; *Dietrich v. Baltimore, etc., R. Co.*, 58 Md. 347; *Phelps v. George's Creek, etc., R. Co.*, 60 Md. 536; *Union Pacific Ry. v. Fray*, 35 Kan. 700; *Murphy v. May*, 9 Bush. (Ky.) 33; *Aldridge v. Midland, etc., Co.*, 78 Mo. 559; *McDermott v. Hannibal, etc., R. Co.*, 73 Mo. 516; s. c., 40 Am. Rep. 526; *Gooch v. Bryant*, 13 Me. 386; *Burnham v. Ellis*, 39 Me. 319; *Craig v. Gilbreth*, 47 Me. 416; *Memphis, etc., R. Co., v. Cock*, 64 Miss. 713; *Dorne v. Southwork Mfg. Co.*, 11 Cush. (Mass.) 209; *Converse v. Blumrich*, 14 Mich. 109; *Lowry v. Harris*, 12 Minn. 166; *Woods v. Banks*, 14 N. H. 101; *Batchelder v. Emery*, 20 N. H. 165; *Demeritt v. Meserve*, 39 N. H. 521; *Stults v. New Brunswick, etc., Co.*, 9

But the fact of the agency must be proved by other evidence.¹

Distinct and formal admissions by an attorney of record made for the purpose of dispensing with the proof of some fact, or to modify the severity of some rule of evidence, are receivable against the client, even upon a new trial;² but the admissions of

Atl. Rep. (N. J.) 193; *Runk v. Ten Eyck*, 24 N. J. L. 756; *Fogg v. Child*, 13 Barb. (N. Y.) 246; *American Steamship Co. v. Landreth*, 102 Pa. St. 131; s. c., 48 Am. Rep. 196; *Patten v. Messenger*, 25 Pa. St. 393; *Raiford v. French*, 11 Rich. (S. Car.) 367; *Cobb v. Johnson*, 2 Sneed (Tenn.) 73; *Austin v. Chittenden*, 33 Vt. 553; *Barnard v. Henry*, 25 Vt. 289; *Hayward Rubber Co. v. Duncklee*, 30 Vt. 29; *Randall v. Northwestern Tel. Co.*, 54 Wis. 140; s. c., 41 Am. Rep. 17; *Goetz v. Kansas City Bank*, 119 U. S. 551, 318; *Packet Co. v. Clough*, 20 Wall. (U. S.) 528.

Under this rule statements by railroad conductors, brakemen, etc., as to the cause of an accident made after the accident are generally excluded. *East Tennessee, etc., R. Co. v. Maloy*, 2 S. E. Rep. (Ga.) 941; *Michigan Central R. Co. v. Carrow*, 73 Ill. 348; *Furst v. Second Ave. R. Co.*, 72 N. Y. 542.

In an action for the specific performance of a parol agreement entered into by an agent on behalf of his principal, declarations by such agent a year or two after the consummation of the agreement with respect to its terms are inadmissible against the principal. *Clunie v. Sacramento Lumber Co.*, 67 Cal. 313.

In an action by a telephone company against a railroad company for removing the plaintiff's telephone poles, the declarations of a servant of the defendant made before the removing of the poles that he "would obey orders, if it broke owners," was admitted as showing the animus of the defendant. *International, etc., R. Co. v. Telephone Tel. Co.*, 5 S. W. Rep. (Tex.) 517.

In an action by A against B for tortiously taking property of the former in satisfaction of an execution against C, evidence of declarations of C while acquiring the property as the agent of A, that he was purchasing it for himself was admitted. *McNeeley v. Hunton*, 24 Mo. 281.

In an action against two persons there was evidence that one had said that he authorized the other to make the contract sued on, and that the latter said that he had made the contract. It was held, that evidence of the latter was mere hearsay as against the former.

Stringfellow v. Montgomery, 57 Tex. 349.

1. *Galbreath v. Cole*, 61 Ala. 139; *Wailes v. Neal*, 65 Ala. 59; *Howcott v. Kilbourn*, 44 Ark. 213; *Union Gold Mining Co. v. Rocky Mt. Bank*, 2 Colo. 565; *Wood Mowing Machine Co. v. Crow*, 70 Iowa 340; *Moffitt v. Cressler*, 8 Iowa 122; *Fitch v. Chapman*, 10 Conn. 8; *Mapp v. Phillips*, 32 Ga. 72; *Wabash, etc., Canal v. Bledsoe*, 5 Ind. 133; *Breckenridge v. McAfee*, 54 Ind. 141; *Farmer v. Lewis*, 1 Bush (Ky.) 66; *Hatch v. Squires*, 11 Mich. 185; *Bacon v. Johnson*, 56 Mich. 182; *McCormick v. Roberts*, 13 Pac. Rep. (Kan.) 827; *Bowker v. Delong*, 141 Mass. 315; *Richmond Iron Works v. Hayden*, 132 Mass. 190; *Caldwell v. Henry*, 76 Mo. 254; *Craighead v. Wells*, 21 Mo. 404; *Rosentock v. Tormey*, 35 Md. 169; *Woodbury v. Larned*, 5 Minn. 271; *Sencerbox v. McGrade*, 6 Minn. 334; *Royal v. Sprinkle*, 1 Jones L. (N. Car.) 505; *Munroe v. Stutts*, 9 Ired. L. (N. Car.) 49; *Francis v. Edwards*, 77 N. Car. 271; *Gifford v. Landrine*, 37 N. J. Eq. 127; *Ellis v. Messervies*, 11 Paige (N. Y.) 467; *Wendell v. Abbott*, 45 N. H. 349; *Robeson v. Schuylkill Nav. Co.*, 3 Grant Cas. (Pa.) 186; *Renneker v. Warren*, 17 S. Car. 139; *Jordan v. Stewart*, 23 Pa. St. 244; *Latham v. Pledger*, 11 Tex. 439.

The declarations of an alleged agent are not competent to prove the fact of agency between the members of a family. *Grandy v. Ferebee*, 68 N. Car. 356; *Second National Bank v. Miller*, 2 Thomp. & C. (N. Y.) 104.

For sufficient proof of agency, see *Pinnix v. McAdoo*, 68 N. Car. 56.

The declarations of an alleged agent have been held incompetent to disprove agency. *Short Mt. Coal Co. v. Hardy*, 114 Mass. 197.

Where some evidence of the existence of the relation of principal and agent has been given, the acts and declarations of the agent respecting the subject-matter of his authority have been admitted in evidence. *Cole v. Bean*, 1 Ariz. 377. Compare *Brigham v. Peters*, 1 Gray (Mass.) 139.

2. *Attorney and Client.*—*McRea v. Insurance Bank*, 16 Ala. 755; *Mather*

an attorney in common conversation, and not authorized by the client, are not to be received in evidence against him.¹

The admissions of the wife are not competent evidence against the husband,² even where he sues in her right,³ unless she had authority to make them as his agent.⁴ Nor are the admissions of

v. Phelps, 2 Root (Conn.) 150; *Perry v. Simpson Mfg. Co.*, 40 Conn. 313; *Cent. Branch U. P. R. Co. v. Shoup*, 28 Kan. 394; s. c., 42 Am. Rep. 163; *Doe v. Bird*, 7 C. & P. 6; *Langley v. Ld. Oxford*, 1 M. & W. 508. Compare *Wilkins v. Stidger*, 22 Cal. 231.

In criminal cases counsel cannot make admissions of material facts in the government's case, to dispense with proof thereof. *Clayton v. State*, 4 Tex. App. 515.

Admissions by an attorney are evidence whether made before or during the pendency of a suit if the attorney was authorized to make them. *Marshall v. Cliff*, 4 Campb. 133; *Wagstaff v. Wilson*, 4 B. & Ad. 339. And the admissions of the attorney's clerk are regarded as his own. *Taylor v. Willans*, 2 B. & Ad. 845; *Griffiths v. Williams*, 1 T. R. 710; 1 Greenl. Ev. (14th ed.), § 186. The admissions of an attorney made before or after the term of his employment, are not competent evidence against the client. *Janeway v. Skerritt*, 30 N. J. L. 97; *Moffitt v. Witherspoon*, 10 Ired. L. (N. Car.) 185.

An affidavit by an attorney of record as to what an absent witness would testify made to obtain a continuance, was held inadmissible against his client where the witness afterwards attended the trial and testified differently, the client not having authorized the affidavit. *Murray v. Chase*, 134 Mass. 92. But see *Reineman v. Blair*, 96 Pa. St. 155.

Statements as to what a party would testify made by his attorney in his presence, in aid of a motion, are competent evidence to contradict the party in another case. *Lord v. Bigelow*, 124 Mass. 185. Compare *Adde v. Howe*, 15 Hun. (N. Y.) 20.

1. *Thomas v. Kinsey*, 8 Ga. 421; *Saunders v. McCarthy*, 8 Allen (Mass.) 42; *Underwood v. Hart*, 23 Vt. 120; *Watson v. King*, 8 C. B. 608; *Young v. Wright*, 1 Campb. 139.

Admissions of an attorney made in an unauthorized letter to one against whom a suit is contemplated, do not bind the client. *Solomon R. Co. v. Jones*, 34 Kan. 443.

The declarations of an attorney to the sheriff are inadmissible to prove or

disprove malice on the part of the attachment plaintiff. *Floyd v. Hamilton*, 33 Ala. 235.

2. **Husband and Wife.**—*Rochelle v. Harrison*, 8 Port. (Ala.) 351; *Hussey v. Elrod*, 2 Ala. 339; *Perry v. Graham*, 18 Ala. 822; *Higham v. Vanosdol*, 101 Ind. 160; *Collis v. Bowen*, 8 Blackf. Ind. 262; *Coryell v. Stone*, 62 Ind. 307; *Rose v. Chapman*, 44 Mich. 312; *Hunt v. Strew*, 33 Mich. 85; *Butler v. Price*, 115 Mass. 578; *Johnson v. Sherwin*, 3 Gray (Mass.) 374; *State v. Jaeger*, 66 Mo. 173; *Ross v. Winners*, 6 N. J. L. 366; *Snover v. Blair*, 25 N. J. L. 94; *May v. Little*, 3 Ired. L. (N. Car.) 27; *Dewey v. Goodenough*, 56 Barb. (N. Y.) 54; *Logne v. Link*, 4 E. D. Smith (N. Y.) 163; *Lay Grae v. Peterson*, 2 Sandf. (N. Y.) 338; *Riley v. Suydam*, 4 Barb. (N. Y.) 222; *Bergman v. Roberts*, 61 Pa. St. 497; *Park v. Hopkins*, 3 Bailey (S. Car.) 408; *Queener v. Morrow*, 1 Coldw. (Tenn.) 123; *Churchill v. Smith*, 16 Vt. 560; *Goodrich v. Tracy*, 43 Vt. 314.

The declarations of a wife made before marriage respecting her right to property, have been admitted in evidence against the husband. *Brush v. Blanchard*, 10 Ill. 31; *Willis v. Snelling*, 6 Rich. L. (S. Car.) 280; *Claussen v. La Franz*, 1 Iowa 226.

In an action for homestead the declarations of the alleged wife are competent to prove that the plaintiffs are not married. *Poole v. Gerrard*, 9 Cal. 593.

3. *Burnett v. Burkhead*, 21 Ark. 77; *Jordan v. Hubbard*, 26 Ala. 433; *Coe v. Turner*, 5 Conn. 93; *Lasselle v. Brown*, 8 Blackf. (Ind.) 221; *White v. Holman*, 12 Me. 157; *McGregor v. Wait*, 10 Gray (Mass.) 72; compare, *Hollinshead v. Allen*, 17 Pa. St. 275; *Hackman v. Flory*, 16 Pa. St. 196.

If, pending a suit against husband and wife, the husband die, and the suit proceed against the wife alone, her admissions of the debt made during coverture are competent evidence against her. *Lasselle v. Brown*, 8 Blackf. (Ind.) 221.

4. *Pickering v. Pickering*, 6 N. H. 120; *Chamberlain v. Davis*, 33 N. H. 121; *Murphy v. Hubert*, 16 Pa. St. 50; *McLean v. Jagger*, 13 How. Pr. (N. Y.)

the husband respecting the wife's separate estate receivable in evidence against her,¹ except where he acts as her agent.²

The admissions of a third person are admissible in evidence against a party who has expressly referred another to him for information regarding a disputed or uncertain matter.³ But if a third person is referred to for information in regard to certain facts, his admissions as to other facts are not to be received in evidence.⁴

Evidence of the admissions of the real party in interest in a suit is admissible against the nominal party.⁵ Evidence of the admissions of the nominal party made after suit was brought, is not to be admitted to defeat the claim of the real party in interest.⁶

404; *Colgan v. Phillips*, 7 Rich. (S. Car.) 359.

The fact of agency must be proved by evidence *aliunde* and evidence of the relationship is not sufficient. *Hunt v. Strew*, 33 Mich. 85; *Butler v. Price*, 115 Mass. 578; *Deck v. Johnson*, 1 Abb. App. Dec. (N. Y.) 497.

1. *Brunson v. Brooks*, 68 Ala. 248; *Murphree v. Singleton*, 37 Ala. 412; *State v. Chatham Bank*, 10 Mo. App. 482; *Keller v. Sioux City, etc., R. Co.*, 27 Minn. 178; *Campbell v. Quackenbush*, 33 Mich. 287; *Kingen v. State*, 50 Ind. 557; *McKay v. Treadwell*, 8 Tex. 176; *Deck v. Johnson*, 1 Abb. App. Dec. (N. Y.) 497; *Smith v. Scudder*, 11 S. & R. (Pa.) 325; *Livesley v. Lasalette*, 28 Wis. 38.

The admissions of the husband in derogation of his own title and in favor of the wife's title are competent evidence against him and his privies. *Lide v. Lide*, 32 Ala. 449; *Linscott v. Trask*, 38 Me. 188; *Sharp v. Maxwell*, 30 Miss. 589; *Bachanan v. Killinger*, 55 Pa. St. 414; *Compare Parvin v. Capewell*, 45 Pa. St. 89. So against a purchaser at a judgment sale. *Cole v. Varner*, 31 Ala. 244. But not where the admission is made after judgment. *Kinzer v. Mitchell*, 8 Pa. St. 64.

His admissions in his wife's favor have been rejected when offered in evidence against his creditors. *Brooks v. Dent*, 1 Md. Ch. 523. See, also, *Kline's Appeal*, 39 Pa. St. 463.

The admissions of a husband made after a conveyance to his wife, are not admissible in evidence to show that the conveyance was in fraud of creditors, unless there is other evidence of a common design to defraud. *Dawson v. Hall*, 2 Mich. 390; *Aldrich v. Earle*, 13 Gray (Mass.) 578.

Where a husband bought land and caused a deed of gift to be made by the

vendor to his wife, his statements made after the execution of the deed, to the effect that the title was held for the benefit of a third person who furnished the purchase money, were admitted in evidence. *Wormouth v. Johnson*, 58 Cal. 621.

2. Admissions of a husband are not competent evidence to prove him her agent respecting her separate property. *Whitescarver v. Bonney*, 9 Iowa 480.

The admission of the husband of the receipt of her property which he had a right to receive is admissible in evidence against her after his death. *Dodge v. Manning*, 11 Paige (N. Y.) 334.

3. *Chadsey v. Greene*, 24 Conn. 562; *Chapman v. Twitchell*, 37 Me. 59; *Wehle v. Spelman*, 1 Hun. (N. Y.) 634; *Bedeel v. Commercial, etc., Co.*, 3 Bosw. (N. Y.) 147; *People v. Clauson*, 2 Utah 502; But see *Rosenbury v. Angell*, 6 Mich. 508.

4. *Barnard v. Macy*, 11 Ind. 536; *Duval v. Covenhoven*, 4 Wend. (N. Y.) 561; *Lambert v. People*, 6 Abb. N. Cas. (N. Y.) 181; *Allen v. Killinger*, 8 Wall. (U. S.) 480.

5. *Real and Nominal Parties.*—*McLemore v. Nuckolls*, 1 Ala. Sel. Cas. 591; *Bayley v. Bryant*, 24 Pick. (Mass.) 198; *Tyler v. Ulmer*, 12 Mass. 166; *Savage v. Balch*, 8 Greenl. (Me.) 27; *Clark v. Carrington*, 7 Cranch (U. S.) 308, 322. *Compare Dickinson v. Clarke*, 5 W. Va. 280.

But the admissions of the *cestui que trust* are not admissible in evidence to defeat the estate of the trustee, where the latter is not the mere representative of the former. *Osgood v. Manhattan Co.*, 3 Cow. (N. Y.) 612; *Dillard v. Dillard*, 2 Strobb. (S. Car.) 89;

6. *Head v. Shaver*, 9 Ala. 791; *Sykes v. Lewis*, 17 Ala. 261; *Dazey v. Mills*, 10 Ill. 67; *Moyers v. Inman*, 2 Swan (Tenn.) 80; *Sargeant v. Sergeant*, 18

The admissions of a trustee, made before he was clothed with the trust, or of a next friend, made before the suit was commenced, cannot afterwards be received against him in his representative capacity.¹

The admissions of strangers to the suit are competent evidence where the issue is substantially upon the rights and obligations of such persons at a particular time, and the admissions would be receivable in evidence in an action against them.²

(d) *Of the Admissibility and Proof and Effect of Admissions.*—An admission of matters stated as *facts* is receivable in evidence against the party making it, whether true or false, and whether based upon personal knowledge or not;³ but matters stated as *mere hearsay* are not so receivable.⁴

Admissions made expressly for the purpose of effecting a compromise of a matter in controversy⁵ and offers of money to buy peace,⁶ cannot be proved against the party making them; but

Vt. 371; Hough v. Barton, 20 Vt. 455; See, also, Whart. Ev. (3rd ed.), § 1207.

The admissions of the trustees have been rejected when offered in evidence against the *cestui que trust*. Eitelgeorge v. Mutual House Bldg. Assn., 69 Mo. 52; Waterman v. Wallace, 13 Blatchf. (U. S.) 128; Graham v. Lockhart, 8 Ala. 9; Thompson v. Drake, 32 Ala. 99.

1. Plant v. McEwen, 4 Conn. 544; Mertz v. Detweiler, 8 W. & S. (Pa.) 376; Moore v. Butler, 48 N. H. 161; Webb v. Smith, R. & M. 106; Fraser v. Marsh, 2 Stark. 41; Metters v. Brown, 32 L. J. Ex. 140; Legge v. Edmonds, 25 L. J. Ch. 125.

2. *Strangers.*—Sloman v. Herne, 2 Esp. 695; Clay v. Langslow, 1 M. & M. 45; 1 Greenl. Ev. (14th ed.), § 181.

The declarations of a bankrupt after bankruptcy are not competent evidence, except against himself. Robson v. Kemp, 4 Esp. 234; Hoare v. Coryton, 4 Taunt. 560.

In an action against an officer for an escape on *mesne* process, the admissions of the defendant in the original suit may be proved to show a cause of action in such suit. Hart v. Stevenson, 25 Conn. 499.

The statement, verbal or written, of a person entitled to receive money is evidence of its payment in a controversy between other persons. Lee v. Virginia, etc., Co., 18 W. Va. 299.

3. Kitchens v. Robbins, 29 Ga. 713; Sparr v. Wellman, 11 Mo. 230; Chapman v. Chicago, etc., R. Co., 26 Wis. 295; 1 Greenl. Ev. (14th ed.), § 208.

4. Merchants', Etc., Co. v. Joesting, 89 Ill. 152; Stephens v. Vroman, 16 N.

Y. 381; Roe v. Ferrars, 3 B. & P. 548. Compare Chapman v. Chicago, etc., Ry., 26 Wis. 295. See, also, Berryhill v. McKee, 1 Humph. (Tenn.) 31.

5. Wilson v. Hines, 1 Minor (Ala.) 255; Wood v. Wood, 3 Ala. 756; Williams v. State, 52 Ala. 299; Jackson v. Clopton, 66 Ala. 29; Duff v. Duff, 71 Cal. 513; Keaton v. Mayo, 71 Ga. 649; Mundheuk v. The Central Iowa R. Co., 57 Iowa 718; Dailey v. Coons, 64 Ind. 545; Barker v. Bushnell, 75 Ill. 220; Campau v. Dubois, 39 Mich. 274; Webber v. Dunn, 71 Me. 331; Williams v. Thorp, 8 Cow. (N. Y.) 201; Rideout v. Newton, 17 N. H. 71; Perkins v. Concord Rd., 44 N. H. 223; Gay v. Bates, 99 Mass. 263; Daniels v. Woonsocket, 11 R. I. 4; Strong v. Stewart, 9 Heisk. (Tenn.) 137; International, etc., R. Co. v. Ragsdale, 67 Tex. 24; State Bank v. Dutton, 11 Wis. 371; West v. Smith, 101 U. S. 263; Jones v. Foxall, 13 Eng. L. & Eq. 140.

It must appear that the admission was made in confidence of a compromise, or it will be admissible in evidence. Campau v. Dubois, 39 Mich. 274; Manistee Bank v. Seymour, 31 N. W. Rep. (Mich.) 140.

Admissions made to a third person not an attorney, and not under any pledge of confidence, are competent evidence against the person making them, notwithstanding they were made with intent to promote a compromise of the demand to which they relate. Ashlock v. Linder, 50 Ill. 159.

6. Williams v. State, 52 Ala. 411; Barker v. Bushnell, 75 Ill. 220; Draper v. Hatfield, 124 Mass. 53; Durgin v. Somers, 117 Mass. 56; Gay v. Bates, 99

admissions of independent facts are receivable in evidence, though made during negotiations for a compromise.¹

Evidence of an admission is not excluded in a *civil* case, because it was made under legal compulsion,² if the person making it was not imposed upon or under duress.³

An admission which is competent evidence against one only of joint defendants, will not be excluded, because it may affect the case of his co-defendants; but the latter are entitled to an instruction to the jury limiting the application of the evidence.⁴

Parol admissions made *in pais* are competent evidence of such facts only as may be proved by parol evidence;⁵ not to contradict documentary proof,⁶ or to supply existing evidence by matter of record.⁷

Mass. 263; *Gerrish v. Sweetser*, 4 Pick. (Mass.) 374; *Batchelder v. Batchelder*, 2 Allen (Mass.) 105; *Reynolds v. Manning*, 15 Md. 510; *Payne v. Street Railroad*, 40 N. Y. Super. Ct. 8; *Daniels v. Woonsocket*, 11 R. I. 4; *Strong v. Stewart*, 9 Heisk. (Tenn.) 137.

1. *Fuller v. Hampton*, 5 Conn. 416; *Hartford Bridge Co. v. Granger*, 4 Conn. 142; *Mayor v. Howard*, 6 Ga. 213; *Cates v. Kellogg*, 9 Ind. 506; *Church v. State*, 1 A. K. Marsh. (Ky.) 328; *Central Branch U. P. R. Co., v. Butman*, 22 Kan. 446; *Cole v. Cole*, 33 Me. 542; *Snow v. Batchelder*, 8 Cush. (Mass.) 513; *Marsh v. Gold*, 2 Pick. (Mass.) 285; *Garner v. Myrick*, 30 Miss. 448; *Eastman v. Amoskeag*, 44 N. H. 143; *Sanborn v. Neilson*, 4 N. H. 501; *Hamblett v. Hamblett*, 6 N. H. 333; *Plummer v. Currier*, 53 N. H. 287; *Bartlett v. Tarbox*, 1 Abb. App. Dec. (N. Y.) 120; *Murray v. Coster*, 4 Cow. (N. Y.) 617, 635; *Marvin v. Richmond*, 3 Den. (N. Y.) 58; *Arthur v. James*, 28 Pa. St. 236; *Doon v. Ravey*, 49 Vt. 293.

Evidence of an offer of compromise may be admissible to prove that a compromise was actually affected. *Collier v. Nokes*, 2 C. & K. 1012.

2. *Newhall v. Jenkins*, 2 Gray (Mass.) 562; *Collett v. Lord Keith*, 4 Esp. 212; *Stockfleth v. De Tastet*, 4 Campb. 10; *Robson v. Alexander*, 1 Moore & P. 448.

But confessions made under undue influence are not admissible in evidence in criminal law. See *CONFESSIONS*, vol. III, p. 439.

3. *Tilley v. Damon*, 11 Cush. (Mass.) 247; *Whart. Ev.* (3rd ed.), § 1099.

4. *Lewis v. Lee County*, 66 Ala. 480; *Rogers v. Suttle*, 19 Ill. App. 163; *State v. Brite*, 73 N. Car. 26.

5. *Greenl. Ev.* (14th ed.), § 203;

Bivins v. McElroy, 11 Ark. 23; *Mason v. Park*, 3 Scam. (Ill.) 532; *Jameson v. Conway*, 10 Ill. 227; *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 480; *Jenner v. Joliffe*, 6 Johns. (N. Y.) 9; *Scott v. Clare*, 3 Campb. 236.

Such evidence is generally inadmissible where evidence of a higher nature is obtainable. *Morris v. Wadsworth*, 17 Wend. N.Y.) 103; *Barrett v. Wright*, 13 Pick. (Mass.) 45; *Whart. Ev.* (3rd ed.), § 1094; cases cited *supra*. But the rule does not extend to rejecting evidence of admissions generally, because the party making them is present at the trial and may be sworn as a witness. *Whart. Ev.* (3rd ed.), § 1094.

It is said that the general rule goes rather to the effect of evidence of admissions of this nature than to its utter exclusion. 1 *Greenl. Ev.* (14th ed.), § 203.

The admissions of a party are not evidence either of the conveyance of land in another State, or that by the law of that State, judgments are a lien on land. *Morgan v. Patrick*, 7 Ala. 185.

6. 1 *Greenl. Ev.* (14th ed.), § 203.

But the contents of a writing may be proved by parol admissions. *Crichton v. Smith*, 34 Md. 42; *Loomis v. Wadhams*, 8 Gray (Mass.) 557; *Taylor v. Peck*, 21 Gratt. (Va.) 11. Such evidence has been rejected where the absence of the writing was not accounted for. *Threadgill v. White*, 11 Ired. L. (N. Car.) 591. And should always be carefully scrutinized. *Whart. Ev.* (3rd ed.), § 1093.

A writing cannot be proved by evidence of parol admissions when it is of a nature to be proved by attesting witnesses only. *Whart. Ev.* (3rd ed.), § 1095.

7. 1 *Greenl. Ev.* (14th ed.), § 203; *Whart. Ev.* (3rd ed.), § 1098; *Ware*

Admissions may be proved by any competent witness who heard them.¹ The whole admission must be proved, both the favorable and unfavorable parts;² but the rule does not extend to matters distinct from the admissions³ and contradictory statements made at other times.⁴ If the admission was made in a conversation, the witness may testify to such portions of the conversation as he heard.⁵ While the whole admission must be proved, the jury may believe the unfavorable parts and reject the parts that are favorable.⁶

v. Robeson, 18 Ala. 105. *Compare* *Edgar v. Richardson*, 33 Ohio St. 581.

1. *Wilcox v. Green*, 28 Conn. 572; *Com. v. Griffin*, 110 Mass. 181; *Green v. Cawthorn*, 4 Dev. L. (N. C.) 409; *Reed v. Rice*, 25 Vt. 171; *Miller v. Wood*, 44 Vt. 378.

Admissions are not receivable in evidence in chancery in England, unless put in issue by the pleadings. 1 Greenl. Ev. (14th ed.), § 171 n.; *Austin v. Chamber*, 6 Clark & Fin. 1; *Attwood v. Small*, 6 Clark & Fin. 234; *Copland v. Toulmin*, 7 Clark & Fin. 350. But it is sufficient in the United States that the proposition to be established by the admission is stated in the bill. *Brandon v. Cabiness*, 10 Ala. 156; *Smith v. Burnham*, 2 Sumn. (U. S.) 612.

2. *Wilson v. Calvert*, 8 Ala. 757; *Yarborough v. Moss*, 9 Ala. 382; *Ward v. Winston*, 20 Ala. 167; *Trammel v. Bassett*, 24 Ark. 499; *People v. Murphy*, 39 Cal. 52; *Barnum v. Barnum*, 9 Conn. 242; *Bristol v. Warner*, 19 Conn. 7; *Morris v. Stokes*, 21 Ga. 552; *Arnold v. Johnson*, 1 Scam. (Ill.) 196; *Moore v. Wright*, 90 Ill. 470; *Taylor v. Whiting*, 2 B. Mon. (Ky.) 268; *Withers v. Richardson*, 5 T. B. Mon. (Ky.) 94; *Simmons v. Haas*, 56 Md. 153; *Turner v. Jenkins*, 1 H. & J. (Md.) 161; *Storer v. Gowen*, 18 Me. 174; *Reeves v. Hardy*, 7 Mo. 348; *Whitwell v. Wyer*, 11 Mass. 6; *O'Brien v. Cheney*, 5 Cush. (Mass.) 148; *Garey v. Nicholson*, 24 Wend. (N. Y.) 350; *Enders v. Sternbergh*, 2 Abb. App. Dec. (N. Y.) 31; *Gildersleeve v. Mahony*, 5 Duer (N. Y.) 383; *Kelsey v. Bush*, 2 Hill (N. Y.) 440; *Perego v. Purdy*, 1 Hilt. (N. Y.) 269; *Overman v. Coble*, 13 Ired. L. (N. Car.) 1; *Searles v. Thompson*, 18 Minn. 316; *Barry v. Davis*, 33 Mich. 515; *Miller v. Wildcat*, etc., Co., 52 Ind. 51; *Devlin v. Killcrease*, 2 McMull. (S. Car.) 425; *Adams v. Eames*, 107 Mass. 275.

Whole Admission Must be Proved.—Where the admissions are contained in

a conversation, the questions and responses of both parties thereto should be given. *Grand Rapids, etc., Co. v. Diller*, 110 Ind. 223.

Where an admission of the correctness of an account rendered is implied, the credits as well as the debits, should be considered. *Fitzpatrick v. Harris*, 8 Ala. 32.

At common law, where any pleading of the adverse party was read in evidence as an admission, it was necessary to read the whole pleading. *Whart. Ev.* (3rd ed.), § 1105. But a different rule obtained in equity. *Whart. Ev.*, § 1104. As to exhibits, see *Whart. Ev.*, § 1106. If the testimony on a former trial is read, all that is relevant must be given. *Whart. Ev.*, § 1109. So the whole of legal proceedings applicatory to a subject. *Whart. Ev.*, § 1107.

3. *Sturge v. Buchanan*, 2 M. & Rob. 90; *Darby v. Ouseley*, 1 H. & N. 1; *Catt v. Howard*, 3 Stark. N. P. 3.

4. *Edwards v. Ford*, 2 Bailey (S. Car.) 461; *People v. Green*, 1 Park. Cr. (N. Y.) 11; *Hatch v. Potter*, 2 Gilm. (Ill.) 725.

5. *Denver & R. I. R. Co. v. Neis*, 56 Colo. 56; *Williams v. Keyser*, 11 Fla. 234; *Westmoreland v. State*, 45 Ga. 225; *Mays v. Deaver*, 1 Iowa 216; *Milton v. Hunter*, 13 Bush (Ky.) 163; *State v. Pratt*, 88 N. Car. 639; *State v. Covington*, 2 Bailey (S. Car.) 569.

The witness may state the substance of the admission. *Kittridge v. Russell*, 114 Mass. 67.

6. *Wilson v. Calvert*, 8 Ala. 757; *Licett v. State*, 23 Ga. 57; *Green v. State*, 130 Mo. 382; *Coon v. State*, 21 Miss. 246; *Field v. Hitchcock*, 17 Pick. (Mass.) 182; *Pearson v. Sabin*, 10 N. H. 205; *Mattocks v. Lyman*, 18 Vt. 98; *Brown's Case*, 9 Leigh (Va.) 633; *Adkins v. Hershy*, 14 Ark. 442; *Roberts v. Gee*, 15 Barb. (N. Y.) 449; *Ayers v. Metcalfe*, 39 Ill. 307. But see *Fox v. Lambson*, 8 N. J. L. 275.

HEARSAY EVIDENCE—HEAT OF PASSION.

Evidence of extra judicial¹ admissions not made as the basis of a contract,² should be received with caution.³ Such admissions may generally be contradicted by other evidence.⁴ Their true meaning and import should not be extended.⁵

8. Confessions.—(See CONFESSIONS.)

HEAT OF PASSION.—*Iracundiæ calore*. A term used in defining manslaughter, for whose technical meaning see **HOMICIDE**.⁶

1. A *judicial* admission is generally conclusive, but if made improvidently or by mistake it may be relieved against by the court. 1 Greenl. Ev. (14 ed.), §§ 186, 206.

2. If a fact is admitted as the basis of a contract, the party is estopped to deny it. See **ESTOPPEL**, vol. VII, p. 1.

3. **Weight as Evidence.**—Wittick v. Keiffer, 31 Ala. 199; Prater v. Frazier, 11 Ark. 249; Ector v. Welsh, 29 Ga. 443; Fidler v. McKinley, 21 Ill. 308; Ray v. Bell, 24 Ill. 444; Mauro v. Platt, 62 Ill. 450; Chandler v. Schoonover, 14 Ind. 324; Myers v. Baker, Hard. (Ky.) 553; Higgs v. Wilson, 3 Met. (Ky.) 337; Hope v. Evans, 1 Sm. & M. (Miss.) 195; Durkee v. Stringham, 8 Wis. 1; Saveland v. Green, 40 Wis. 431. See, also, Glazier v. Streamer, 57 Ill. 91. Especially where the admission is implied from the silence of the party. 1 Greenl. Ev. (14th ed.), § 199; But admissions are said not to be an inferior kind of evidence. James v. Mickey, 26 S. Car. 270, and cases cited *supra*.

Made in loose conversation they are of little weight, if other evidence can be procured. Printup v. Mitchell, 17 Ga. 558; Clark v. Larkin, 9 Iowa 391; Vaughn v. Haun, 6 B. Mon. (Ky.) 338; O'Brien v. Flynn, 8 La. Ann. 307; Homer v. Speed, 2 Patt. & H. (Va.) 616. See, also, Church v. Howard, 79 N. Y. 415.

Admissions made by persons since deceased, and proved by witnesses who cannot be contradicted, are said to be the weakest kind of evidence. Dupre v. McCright, 6 La. Ann. 146; Wilder v. Franklin, 10 La. Ann. 279.

Doubtless admissions may be the best or weakest evidence according to the attendant circumstances. Parker v. McNeill, 20 Miss. 355.

An instruction that "evidence of casual statements or admissions made by a party made in casual conversations, and to disinterested persons, are regarded by law as very weak testi-

mony, owing to the liability of the witness to be misunderstood or to forget what was really said or intended by the party," was *held* to be strictly correct. Haven v. Markstrum, 67 Wis. 493.

4. Wynn v. Garland, 16 Ark. 440; Stewart v. Conner, 13 Ala. 94; Stewart v. Sherman, 5 Conn. 244; Carter v. Bennett, 4 Fla. 283; Young v. Foute, 43 Ill. 33; Houghtaling v. Kelderhouse, 1 Park. Cr. (N. Y.) 241; Pecker v. Hoit, 15 N. H. 143; Rice v. Railroad Bank, 7 Humph. (Tenn.) 39; 1 Greenl. Ev. (13th ed.), § 209.

A party may show that the admission was jocularly made. Beebe v. DeBaun, 8 Ark. 510. Or that he was suffering from poor health. Brackett v. Wait, 6 Vt. 411. Or that he was intoxicated. State v. Bryan, 74 N. Car. 351. But he cannot weaken the force of an admission by evidence of his own declarations made at another time. Roberts v. Trawick, 22 Ala. 490; Hunt v. Roylance, 11 Cush. (Mass.) 117; Tucker v. Frederick, 28 Mo. 574; McPeake v. Hutchinson, 5 S. & R. (Pa.) 295; Jones v. State, 13 Tex. 168.

As to conclusiveness of admissions see title **ESTOPPEL**, and 1 Greenl. Ev. (13th ed.), §§ 210, 212.

5. Smith v. Jones, 15 Johns. (N. Y.) 229; Clarendon v. Weston, 16 Vt. 332; Ripley v. Paige, 12 Vt. 353.

A simple admission of indebtedness does not admit the amount due. Douglass v. Davie, 2 McCord (S. Car.) 219; Harrison v. McKinney, 2 Bay (S. Car.) 412; Quarles v. Littlepage, 2 Hen. & Mun. (Va.) 401.

6. This phrase, as used in Missouri in the definition of murder of the second degree, is not used in its technical sense, but to denote a condition of mind contradistinguished from that cool state of the blood indicated by the term "deliberate." State v. Wieners, 66 Mo. 14; State v. Lewis, 3 Crim. L. Mag. 78. "One in 'a heat of passion' may premeditate without deliberating.

HEAVY—HEIFER—HEIR APPARENT—HEIRLOOMS.

HEAVY.—See note 1.

HEIFER.—A young cow that has not had a calf.²

HEIR.—One who, upon the death of another, acquires or succeeds to his estate by right of blood, and by operation of law. The person who takes an estate in lands or tenements by descent from another, as distinguished between an *alienee* who takes by deed and a *devisee* who takes by will. He upon whom the law casts his ancestor's estate immediately on the death of the ancestor.³

In the Roman law and in the modern civil law, *haeres* or *heir* has a more extended signification than in the common law. The term is applied to all persons entitled to succeed to the estate of one deceased, whether by act of the party or by operation of law, and whether the property be real or personal in its nature. In the Scotch law, "heir" also includes those who succeed to personal property.⁴ For the meaning of the word in various connections see the cross-references given in the note.⁵

HEIR APPARENT.—Heirs apparent are such whose right of inheritance is indefeasible, provided they outlive the ancestor, as the eldest son or his issue, who must, by the course of the common law, be heir to the father whenever he happens to die.⁶

HEIRLOOMS.—Such goods and chattels as, contrary to the nature of chattels, go by special custom to the heir, along with

Deliberation is only exercised in a 'cool state of the blood,' while premeditation may be either in that state of the blood or in 'heat of passion.' Mental excitement is not 'heat of passion.' 'Heat of passion' is a legal phrase, to which a definite meaning has been attached, and although a homicide committed in a technical 'heat of passion' was only manslaughter at common law, yet, if notwithstanding there was lawful provocation, there was time for the blood to cool before the commission of the act, the heat of passion was not a palliation, and the homicide was murder." *State v. Kotovsky*, 74 Mo. 247.

1. In a charter of a railroad company prescribing a maximum rate of charge for transportation of heavy articles by the hundred pounds and of articles of measurement by the cubic foot, the meaning of "heavy" must be determined by proof of the custom in practice prevailing at the time of granting the charter. *Bonham v. C. C. & A. R. Co.*, 13 S. Car. 267; 16 S. Car. 633.

2. *Johnson v. Babcock*, 8 Allen (Mass.) 583; *Milligan v. Jefferson Co.*, 2 Mon. 543. "The correct definition of the term heifer is a female calf of the bovine species, from the end of the first

year until she has had a calf." *Freeman v. Carpenter*, 10 Vt. 433; s. c., 33 Am. Dec. 210. Heifers are included in the term "cows," in statutes exempting the latter from execution. *Nichols v. Prince*, 8 Allen (Mass.) 404; *Johnson v. Babcock*, 8 Allen (Mass.) 583; *Freeman v. Carpenter*, 10 Vt. 433. The term "heifer," in a taxation act, does not include "calves." *Milligan v. Jefferson Co.*, 2 Mon. 543. The term is more strictly construed at the criminal law. An indictment for larceny of a cow is not sustained by proof of larceny of a heifer. *Rex v. Cook*, 1 Leach 105; *contra*, *Parker v. State*, 39 Ala. 365, where a heifer between two and three years old, that had never had a calf, was held to be properly described in an indictment as a cow.

3. 2 Bl. Com. 201; Co. Litt. 7 b.; 2 Burr. L. Dict.

4. Abb. L. Dict.

5. For its use as a word of limitation, see ESTATES; SHELLEY'S CASE, RULE IN.

In testamentary instruments, see LEGACY AND DEVISE; WILLS.

See, also, CHILDREN; ISSUE; LIMITATION; REMAINDER.

6. II Blackstone's Com. 208.

the inheritance, and not to the executor.¹

HELP.—See note 2.

HENCEFORWARD.—Hereafter.³

HER.—See SHE.

HERBAGE.—The produce or vesture of land which is fed upon by cattle in the fields.⁴

1. 2 Bl. Com. 427; Bouv. L. Dict. They are generally such things as cannot be taken away without damaging or dismembering the freehold. Fish in a pond, the keys of a house, the deeds and other evidences of title to land are heirlooms. By special custom, which must be strictly proved, any sort of chattel may pass as an heirloom. Though the owner may during his lifetime dispose of heirlooms as he pleases, he cannot devise them away from the heir. 2 Bl. Com. 427, 430.

The term is often applied to certain chattels directed by will or settlement to follow the limitations thereby made of some family estate. The word is not here used in its proper sense, and the disposition itself is beyond a certain point ineffectual; for the articles will belong absolutely to the first person who, under the limitations, would take a vested estate of inheritance in them supposing them to be real estate, and if he dies intestate, will pass to his personal representative and not to his heirs. 2 Bl. Com. 430, Stephen's note; Wharton's Law Lex.

2. Where a dealer in pianos engaged a truckman to remove pianos and agreed to "find help" for removing them, he is bound to furnish such manual labor on request as the truckman may reasonably need in addition to his own services in order to accomplish the work of removal, but he is not liable for compensation for the use of a machine or rigging invented and used by the truckman whereby manual labor was saved. Ladd v. Patten, 66 Me. 97.

A warden of a prison who has power to appoint "all necessary help" is the proper officer to appoint a prison physician, and not commissioners, who have control of the prison grounds, property and labor, and of the purchase of supplies. State v. Hobart, 13 Nev. 419.

3. "The word *henceforward* does not necessarily convey the idea of perpetuity; it means no more than *hereafter*, which may import a permanent or temporary arrangement according to the general tenor of the instrument, and the nature of the subject-matter about

which it is used." Opinion of the Justices, 17 Pick. (Mass.) 127 n.

4. Burr. L. Dict.

"It is very apparent, from several passages in Bracton, that the word *herbage*, in his day, meant feed for cattle in fields and pastures, and nothing more. . . . Bracton, 222. Here the *Herbagium* is manifestly used to denote a species of pasturage. . . . It is expressly declared that the right of cutting grass is not '*Herbagium*.' And again, . . . acorns, chestnuts, beech nuts, figs and the like are said not to be herbage.

"The term *vesture*, according to Lord Coke, was used to denote corn, grass, underwood and the like. Co. Litt. 4 b.; 2 Rolle's Ab. 2. The terms *Herbagium terrae* and 'the herbage of the woods' are mentioned by Coke, but not defined. Co. Litt. 4 b. Shepherd, in his Touchstone, 97, seems to speak of the terms *vesture* and *herbage* as having the same meaning. But this is not the sense of the passage. . . . The terms *vesture* and *herbage* are coupled by Shepherd, not because they mean the same thing, but because they are words by which a particular interest will pass.

"Jacob, in his dictionary, says: '*Herbage* is the green pasture and fruit of the earth provided by nature for the food or bite of cattle.' And the word seems to have been used in the same sense in 8 East. 38, Johnson v. Hodgson, which was trespass for breaking and entering a certain close of the plaintiff, etc., and depasturing and taking the *herbage* there.

"Indeed, it is very clear that the word *herbage*, when used as a legal term, means now precisely what it meant in Bracton's time, and we are of opinion that a right to *herbage* does not include a right to cut grass, or dig potatoes, or pick apples, and that the plea in this case is insufficient." Richardson, C. J., in Simpson v. Coe, 4 N. H. 302.

Common of pasturage and *herbage* does not include the right to cut and carry away brakes, fern, heather and

HEREAFTER—HEREBY—HEREDITAMENTS.

HEREAFTER.—See note 1.

HEREBY.—See note 2.

HEREDITAMENTS.—Whatsoever may be inherited.⁸

Hereditaments are of two kinds, corporeal and incorporeal. Corporeal hereditaments, which lie in livery, consist of those

litter. The commoners have "a right in respect of their tenements to feed upon this waste by the mouths of their cattle, taking not merely the grass, but whatever the cattle would eat, which I take to be included under the word 'herbage.'" Brett, L. J., *De La Ware v. Miles*, 17 Ch. Div. 535, 580.

A grant of herbage or feeding of land does not convey a fee. The grantees have no seisin and cannot maintain a writ of entry. They have a right to enter to take care of the land and to fit it for production of grass, etc.; and perhaps they may maintain trespass *quare clausum*, etc., for injury to the herbage. *Rehoboth v. Hunt*, 1 Pick. (Mass.) 224.

1. A railroad in course of construction, and partially completed, its whole line having been located, at the time of the passage of an act of the legislature, is not a road "hereafter constructed" within the meaning of that act. *Atty. Genl. v. W. R. R. Co.*, 115 Mass. 400.

In a statute which is amendatory of a former statute, enacting that the former one "is amended so as to read," and then incorporating the changes and additions with so much of the former statute as is retained, "hereafter" means, as to the original provisions, subsequent to their original enactment, and as to the new provisions, subsequent to the time when the amendment went into effect. *Ely v. Holton*, 15 N. Y. 595; *Moore & Mausert*, 49 N. Y. 332.

In a statute providing that "Hereafter any person of the age of twenty-one years having the other qualifications mentioned . . . shall be deemed to have gained a settlement," etc., "hereafter applies as well to the qualifications as to being deemed to have gained a settlement, so that both are prospective. *Com. v. Inhabs. of Sudbury*, 106 Mass. 268.

2. In the residuary clause of a will whereby the testator bequeath all the rest and residue of his "other property" to his four children, and directed that if any of his daughters should die without leaving children "their property hereby given" should go over, the word "hereby" refers to the residue mentioned

in the clause, and not the dispositions of the entire will. *Renwick v. Smith*, 11 S. Car. 294.

3. 2 Bl. Com. 17; Co. Litt. 6; *Challis on Real Prop.* 38; *Canfield v. Ford*, 28 Barb. (N. Y.) 338. "Hereditaments is a very comprehensive word whereby everything passes which may be inherited, corporeal or incorporeal, real, personal or mixed. 4 Comyn's Dig. 413;" *Canal Comrs. v. People*, 5 Wend. (N. Y.) 433. "A hereditament includes whatever may be inherited, and extends to a movable, such as an heirloom, and even to the condition of a bond, which may descend to a man from his ancestor. *Mitchell v. Warner*, 5 Conn. 518. See *Winchester's Ca.* 3 Co. 2 b.

A term of years is not an hereditament. *Mayor, etc. of N. Y. v. Marble*, 13 N. Y. 159; nor is a privilege of sporting on land. *Dayrell v. Hoare*, 12 A. & E., 356.

"The term includes a few rights unconnected with land, but it is generally used as the widest expression for real property of all kinds, and is therefore employed in conveyances after the words 'lands' and 'tenements' to include everything of the nature of realty which they do not cover." *Repalje & L. L. Dict.*

The word has to some extent a double meaning. When used in relation to land it sometimes denotes the land itself as a physical object, and sometimes the estate in the land. *Challis on Real Prop.* 38. "When applied to realty it generally denotes the subject of property, apart from its nature and extent, but when applied to personality it does not then denote the subject, but signifies some inheritable right of which the subject is susceptible." *Wharton Law Lex.*

The use of the word "hereditament" in a conveyance is not alone sufficient to pass a fee. "The settled sense of the word is to denote such things as may be the subject-matter of inheritance, but not the inheritance itself, and cannot, therefore, by its own intrinsic force enlarge an estate, *prima facie* a life estate into a fee." *Denn v. Moor*, 2 B. & P. 247, in the house of lords, revers-

HEREDITAMENTS—HEREIN—HEREINBEFORE.

which are substantial and permanent, visible and tangible. They are comprehended under the general denomination land.¹

Incorporeal hereditaments are heritable rights issuing out of things corporate, or concerning, or annexed to, or exercisable within the same.² These are classified by Blackstone as advowsons, tithes, dignities, pensions, franchises, offices, commons, ways, annuities, and rents.³ The first four of these are unknown to American law.⁴ Incorporeal hereditaments lie in grant, being insusceptible to seisin.⁵

Hereditaments are also divided into real, mixed and personal.⁶

HEREIN.—See note 7.

HEREINAFTER.—See note 8.

HEREINBEFORE.—See note 9.

ing *Denn v. Moor*, 1 B. & P. 558, and affirming *Denn v. Mellor*, 5 T. R. 558. "It is not so strong a word as *tenement*; is merely a description of the thing itself, and not of the quality of it, or the interest in it." *Kenyon, C. J., in Doe v. Allen*, 8 T. R. 497.

In *Colebrook v. Tickell*, 4 A. & E. 916, the word taken in connection with the context of an act was construed to be confined to corporeal hereditaments.

1. 2 Bl. Com. 17; 3 Kent Com. 401; Wms. Real Prop. 10; *Rex v. Trustee*, etc., of Shrewsbury, 3 B. & Ad. 216. "The phrase [corporeal hereditaments] therefore includes only lands regarded as a physical object, and legal estates of inheritance in possession." *Challis on Real Prop.* 41.

2. 2 Bl. Com. 19; 3 Kent Com. 402.

3. 2 Bl. Com. 21. Reversions and remainders are by some included among incorporeal hereditaments, but the classification is regarded as incorrect. *Repalje & L. Law Dict.*; Wms. Real Prop. 241, 322; and see *Co. Litt.* 47a. This classification serves no convenient purpose, and probably arises from the double meaning which the word hereditament bears.

4. 3 Kent Com. 403. And it may be questioned whether heritable offices and franchises are known to our law. 3 Kent Com. 454, 458.

5. *Challis on Real Prop.* 4.

6. Real hereditaments are "lands regarded as a physical object, and legal estates of inheritance in lands, whether in possession, remainder or reversion." Mixed hereditaments include "all estates of inheritance which, as the phrase goes, savor of the realty," as equitable estates of inheritance in land and tithes.

"The phrase personal hereditaments

includes certain inheritable rights, either having no connection with lands . . . or having a connection which implies no participation either in the land or its profits," as annuities and certain dignities. *Challis on Real Prop.* 39, 40; *Wharton Law Lex.*

7. "Not otherwise herein provided for" in a customs act, means provided for in the act in which the words occur and not by some previous act. *Movius v. Arthur*, 95 U. S. 144.

"Herein" in a statute has reference to the clause in which it is used and not to the whole act. *McGill v. Munic. Council of Peterborough*, 12 U. C. Q. B. 44.

In an act amendatory of Revised Statutes, which provided that "every person, etc., shall be punished as herein provided;" "herein provided" has reference to the provision for punishment contained in the act and not that mentioned in the Revised Statutes. *Hartung v. People*, 28 N. Y. 404.

8. "Hereinafter" will be construed "hereinbefore" when it is necessary to effectuate the meaning of the legislature. *Waring v. C. & D. R. R. Co.*, 16 S. Car. 425; or the intent of a testator. *Bengough v. Edridge*, 1 Sim. 173, 270.

9. "Hereinbefore contained" in a statute has reference to matters contained in the section in which it is used and does not extend to earlier portions of the act. *In re Cambrian Ry. Co's. Scheme*, L. R. 3 Ch. 278.

"Hereinbefore mentioned" used in a second or subsequent count of an indictment, does not amount to an allegation that qualities so described belong to the subject to which they are averred to belong in a previous count, unless they are inseparable from it.

HERETOFORE—In time past.¹

HIGH—Elevated; prominent, in a good or bad sense.² Open; public; common.³

The terms are merely descriptive. Reg. v. Waverton, 17 Q. B. 562.

1. "The word *heretofore* simply denotes time past in distinction from time present and time future." An allegation in a declaration that "defendants *heretofore* did seize, etc.," is not a sufficient averment of the time when the act was done. The use of the past tense alone denotes as much. Andrews v. Thayer, 40 Conn. 156.

For the sake of a sensible construction, *heretofore* is frequently given the sense of *theretofore*, meaning time past as to a definite point of future time. A statute providing for the transfer of a suit to another jurisdiction whenever the judge "has *heretofore* been consulted or employed as counsel in the subject-matter of the litigation in said suit," is not limited to cases of consultation and employment before the passage of the act, but has reference to all cases of such occurring before the time of application for transfer. "Legislatures are not grammar schools," said the court, "and in this country at least, it is hardly reasonable to expect legislative acts to be drawn with strict grammatical or logical accuracy." Whipple v. Judge of Saginaw Circ., 26 Mich. 340. The same construction was put upon the word in an act providing for the laying out of roads which forbade the pulling down of encroaching buildings *heretofore* erected. "Heretofore" was interpreted to mean before the opening of the road. State v. Troth, 34 N. J. 377. And in an act relating to the unlawful closing of roads *heretofore* accustomed to be used, *heretofore* has reference not to the time of the passage of the act, but of the doing of the prohibited act. Perrine v. Farr, 2 Zab. (N. J.) 356.

"Judgments *heretofore* rendered" in an amendatory act, applies to those rendered previous to the date of *that* act, although the rule is that an amended statute is to be understood as if it had read from the beginning as amended. This rule must not be so applied as to defeat the plain intention of the legislature in making the amendment. Parsons v. Wayne Circ. Judge, 37 Mich. 287.

A constitutional provision that "The trial by jury in all cases in which it has

been *heretofore* used, shall remain inviolate forever" includes in its application all cases before the date of the constitution and is not limited to those before the date of a former constitution from which this provision was transcribed. Wynehamer v. People, 13 N. Y. 358, 427; Sheppard v. Steele, 43 N. Y. 57.

"Heretofore given" in a will was construed "hereinbefore given" in Allison v. Chaney, 63 Mo. 279; Crane's Ap., 2 Root (Conn.) 487.

2. Burr. L. Dict. *s. g.*, high sheriff, high treason.

High Crimes and Misdemeanors are such immoral and unlawful acts as are nearly allied and equal in guilt to felony, yet owing to some technical circumstances do not fall within the definition of felony. 1 Russ. on Cr. 61; State v. Knapp, 6 Conn. 415; *s. c.*, 16 Am. Dec. 68.

High School.—"A school in which higher branches of learning are taught than in the common schools." Atty. Genl. v. Butler, 123 Mass. 306.

3. Burr. L. Dict.

High Seas.—The main sea, from low water-mark. 1 Bl. Com. 110; De Lovio v. Boit, 2 Gall. (C. C.) 428; U. S. v. Seagrist, 4 Blatchf. (C. C.) 423. "But," says Story, J., "though this may be one sense of the term, to distinguish the divided empire of which the admiralty possesses between high water and low water-mark, when it is full sea, from that which the common law possesses, when it is ebb sea, yet the more common sense is, to express the open, uninclosed ocean or that portion of the sea which is without the *faucibus terrarum* on the sea coast, in contradistinction to that which is surrounded or inclosed between narrow headlands or promontories." This latter is the sense in which the term is used in the acts defining the criminal jurisdiction of the federal courts. U. S. v. Grush, 5 Mas. (C. C.) 290; U. S. v. Robinson, 4 Mas. (C. C.) 307. "That the lakes are not 'high seas' is too clear for argument. These words have been employed from time immemorial to designate the ocean below low water-mark, and have rarely if ever been applied to interior or land-locked waters of any kind." *Ex parte* Byers, 32 Fed. Rep.

HIGH CRIMES AND MISDEMEANORS.—See IMPEACHMENT.

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HIGHWAY.—(See CROSSINGS, EASEMENT, MUNICIPAL CORPORATIONS, RAILROADS.)

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I. DEFINITION.—From one standpoint a highway may be defined as a public easement, by virtue whereof everyone may pass and re-pass over a particular strip of land. Looked at from another point of view, a highway is a road or street maintained by the public for the general convenience.² The distinction between a

406; *Miller's Case*, 1 Bro. Ad. (U. S.) 156; *Johnson v. 21 Bales, etc.*, 2 Paine (C. C.) 619. "If the words be taken according to the common understanding of mankind—if they be taken in the popular and received sense—the 'high seas' if not in all instances confined to the ocean which washes a coast, can never extend to a river, about half a mile wide, and in the interior of a county." *U. S. v. Wiltberger*, 5 Wheat. (U. S.) 94. In a piracy act, the words were held by Story, J., to "mean any waters on the sea coast, which are without the boundaries of low-water mark; although such waters may be in a roadstead or bay within the jurisdictional limits of a foreign government." *U. S. v. Ross*, 1 Gall. (C. C.) 624.

1. Where land is to be sold to the highest bidder, the meaning is the best *bona fide* bidder, and unless there are more than one bidder there is no highest bidder, and the sale cannot be made. There can, in such a case, be no comparison. "The word highest was used in order that there should be no sale unless there should be a real competition." *Fairfax v. Hopkins*, 2 Cr. (C. C.) 134.

Where a statute authorized the sale for taxes to the highest bidder of so much of the real estate subject to the tax as may be necessary to pay it, the "highest bidder" is the one who will pay the tax for the least quantity of the land. *Lovejoy v. Lunt*, 48 Me. 377.

2. **Definition.**—A highway is a public road which every citizen has a right

highway and a private right of way is that the former is free to all, while the latter belongs to particular parties.

II. Kinds.—Highways are sometimes divided into smaller classes, viz., footways, foot and horseways, and cartways. Another class sometimes mentioned is the driftway, over which cattle may be

to use. Angell & Durfee on Highways (3rd ed.), § 2; 3 Kent Com. 32; *Makepeace v. Worden*, 1 N. H. 16; *Peck v. Smith*, 1 Conn. 103; *Stachpole v. Healy*, 16 Mass. 33; *State v. Proctor*, 90 Mo. 334. The following definitions and *indicia* of a highway are not without interest, and may properly be quoted here:

A public highway is one under the control of and kept up by the public, and must either be established in a regular proceeding for that purpose, or be generally used by the public for twenty years, or dedicated by the owner of the soil and accepted by the proper authorities of a county. *Kennedy v. Williams*, 87 N. Car. 6.

A way is shown to be a public highway by proof of dedication, of a survey and removal of obstructions by the public authorities, the putting down of water pipes and a sewer, and public use and travel. *People v. Loeffhelm*, 102 N. Y. 1.

A way which has become public by user is such, independent of utility. *Washington Ice Co. v. Lacy*, 103 Ind. 48.

A road used as a public road for ten years by the owner's consent is a public road within the purview of the statute authorizing an indictment for obstructing a public road. *State v. Proctor*, 90 Mo. 334.

Evidence to Show What is a Highway.

—On the question whether a certain strip of land in a city is a public alley, evidence is admissible to show that such strip has been taxed by the city ever since its organization; that it has been sold by the county, with other lands, for taxes, and deeds given on such sales; that it appeared as an alley on none of the authorized maps of the city; that the city has never authorized or accepted the dedication; that the strip has never been used by the public, but only by the adjoining lot-owners; and that plaintiff went into possession of it more than ten years before the action, and fenced it in with her adjoining lot, has cultivated and built upon it, and has paid taxes upon it every year for about ten years, except when it was sold for taxes; such evi-

dence tending strongly to show both a non-acceptance of the alleged dedication, and a title in plaintiff by adverse possession. *Lemon v. Hayden*, 13 Wis. 160, distinguished; *Trerice v. Barteau*, 54 Wis. 99.

Where the owner of land, in fencing it, left a strip for the purpose of a public road, which was, for more than ten years continuously, claimed, used, traveled, worked and repaired as a public road, with the knowledge and acquiescence of the owner and occupant of the land, such road became a public road, for the willful obstruction of which the obstructor could be proceeded against by indictment. *State v. Proctor*, 90 Mo. 335.

Where, upon the trial of an indictment for a nuisance in obstructing a city street, it was proved that a map was made by the owner of the land, laying out the street and dedicating it to the public use; that a resolution was passed by the common council directing a survey of the street as thus dedicated, and ordering the removal of obstructions therefrom; also, that the city authorities put down water pipes and built a sewer through the same, and assessed the costs upon adjoining property, and that the public used and traveled it to its full width, except where prevented by obstructions; *held*, that the evidence was sufficient to authorize the submission of the question to, and to justify a finding by the jury that the street was a public highway; that it was not necessary to show a public record of it as such, or a judgment establishing it. *People v. Loeffhelm*, 102 N. Y. 1.

A road that has never been regularly laid out or opened by the proper authorities, and which is, in fact, unused and is unfit for travel and closed against the public, is not a "highway" within the meaning of the provision of the railroad law which makes a company laying track across public highways liable for injuries resulting from neglect to restore them to proper condition, even though the owners of land along the road had moved their fences back so as to open it as a highway and had been paid for their lands

driven.¹ A highway is not necessarily a thoroughfare, since a *cul de sac* has been held to be a highway.²

1. Turnpikes.—Turnpike roads form a class of highways upon which the company operating them has a right to set up gates and levy tolls. A turnpike is, nevertheless, a public easement, and every traveller, on paying the legal rate of toll, is entitled to use it.³ Turnpikes are defined as highways over which the public have a right to travel upon the payment of toll, and on which the parties entitled to such toll have the right to erect gates and bars to insure payment.⁴

by the township, and a bridge had been built upon it by the public authorities. Flint, etc., Ry. Co. v. Willey, 47 Mich. 88.

1. Footways, Driftways, Etc.—Every highway includes and implies a footway. Angell & Durfee on Highways (3rd ed.), § 3.

Under the public statutes of Massachusetts, ch. 112, § 125, authorizing a highway or a tramway to be laid out across a railroad previously constructed, it has been held that a footway may be laid out. Boston, etc., R. Co. v. Boston, 140 Mass. 87. See, also, B. & M. Association v. Boston, 139 Mass. 290.

In general a public highway is open to cattle. Ballard v. Dyson, 1 Taunt. 285.

A carriageway includes a horseway and a footway. Ballard v. Dyson, 1 Taunt. 285; Tyler v. Sturdy, 108 Mass. 196; Boston, etc., R. Co. v. Boston, 140 Mass. 87.

The term highway includes public ways of all classes. Allen v. Ormond, 8 East. 4.

2. Cul de sac.—The fact that a road as opened and used is a *cul de sac* is not conclusive evidence that it is not a highway. Schatz v. Pfel, 56 Wis. 429.

A *cul de sac* may be a highway. Saunders v. Townsend, 26 Hun. (N. Y.) 308.

See, also, Woodyer v. Hadden, 5 Taunt. 125; Wood v. Veal, 5 B. & Ald. 454; Wiggins v. Tallmage, 11 Barb. (N. Y.) 457; Holdane v. Coldspring, 21 N. Y. 474; People v. Kingman, 24 N. Y. 559; People v. Jackson, 7 Mich. 432; Danforth v. Durell, 8 Allen (Mass.) 242; Bartlett v. Bangor, 67 Me. 460.

3. Turnpikes.—The distinction between a turnpike and an ordinary public highway is found in the manner in which the expense of maintaining the former is defrayed, namely, by levying tolls upon passengers. Northern Bridge & Road Co. v. London, etc., Ry., 6 M.

& W. 428; Com. v. Wilkinson, 16 Pick. (Mass.) 175.

A turnpike is a public highway and a public easement. Every traveller has the same right to use it upon payment of the toll established by law, as he would have to use any other public highway. Com. v. Wilkinson, 16 Pick. (Mass.) 175. See, also, Buncombe Turnpike Co. v. Baxton, 10 Ired. (N. C.) 222; Louisville, etc., Co. v. Nashville, etc., Co., 2 Swan (Tenn.) 282; Sturtevant v. County of Plymouth, 12 Met. (Mass.) 7; Brown v. Winooski Turnpike Co., 23 Vt. 104; Mallory v. Austin, 7 Barb. (N. Y.) 626; Bullock v. Fallmouth, etc., Road, 3 S. W. Rep. (Ky.) 129; Darnell v. State, 48 Ark. 321; Lewis, etc., Road Co. v. Thomas, 3 S. W. Rep. (Ky.) 907; State v. Essex Public Road Board, 48 N. J. L. 366; Balt, etc., Turnpike Co. v. Routzahn, 65 Md. 113.

A road constructed by a turnpike company is a public highway and does not lose its character by the forfeiture of the company's charter. Pittsburgh, etc., R. Co. v. Com., 104 Pa. St. 583.

The legislature is empowered to authorize a company to lay out a turnpike upon a public highway. State v. Hampton, 2 N. H. 22. In such a case the turnpike company would be held to the same care in protecting passengers over the turnpike against accident, as towns or counties are held to in maintaining public highways in repair.

Tolls.—Toll-houses may be erected under such charters, but they will be forfeited if turned to uses foreign to the collection of toll. Fisher v. Coyle, 3 Watts (Pa.) 407.

A turnpike or canal company may commute tolls for an annual sum paid by persons using the road or canal. Com. v. Allegheny Bridge Co., 8 Harris. (Pa.) 185; Del. & H., etc., Co. v. Pa. Canal Co., 9 Harris. (Pa.) 131.

4. Bouv. L. Dict., tit. TURNPIKE.

2. Plank Roads and Railroads.—Plank roads, so called from the material of which they are made, may also be highways.¹ *Railroads*, too, are public highways, although to be used in a different manner from the ordinary road.² Consequently, the company owning the road may be compelled to reinstate their road if they destroy it.³ (See RAILROADS.)

3. Bridges.—A bridge may also be a public highway.⁴ The term bridge embraces every structure used for passage over an opening in the ground, whether over a large stream or a narrow ditch, a valley, gorge or other place, and may include a culvert. Water need not flow under it.⁵ Public bridges comprise those owned by the town, county, city or State, and used freely without toll; those owned by companies and used on paying toll; and also those built by private individuals, but dedicated to the public.⁶

A public bridge, being a highway, the principles of the common law of highways are applied to such bridges.⁷ But the term *highway* does not import a bridge, and, for example, neglect to repair a bridge cannot be charged in an indictment as a neglect to repair a highway.⁸

The State legislatures have power to build bridges without an express grant of that power in the constitution, and this over navigable waters within the limits of the State.⁹ But if a bridge

1. Fort Edward, etc., Plankroad Co. v. Bayne, 17 Barb. (N. Y.) 567; Rensselaer, etc., P. R. Co. v. Wetsel, 21 Barb. (N. Y.) 56; Plankroad Co. v. Thomas, 8 Harris. (N. J.) 91.

2. **Railroads.**—A railroad established and existing by virtue of a charter of incorporation is a public highway. Keppel v. Bailey, 1 Myl. & Keen 547. And the legislature, if any individual refuses to have a railroad made through his land for a fair compensation, may lawfully appropriate it, upon paying a just compensation to the owner. Beekman v. Saratoga, etc., R. Co., 3 Paige Ch. (N. Y.) 74. See, also, Angell & Durfee on Highways (3rd ed.), p. 14, and cases there cited. See RAILROADS. The following cases will also be found useful:

March v. Portsmouth, etc., R. Co., 19 N. H. 372; Taylor v. County Comrs., 13 Met. (Mass.) 449; Wyman v. Lexington & W. Cambridge R. Co., 13 Met. (Mass.) 316; Haswell v. Vermont Cent. R. Co., 23 Vt. 228. Hamilton v. Annapolis, etc., R. Co., 1 Md. Ch. 107; Polly v. Saratoga, etc., R. Co., 9 Barb. (N. Y.) 449.

Authority given to build a railroad between certain points, but not specifying the exact course it shall take, does not, *prima facie*, permit the laying of the track upon an existing highway,

but the legislature may grant such a power, either expressly or by implication. Springfield v. Conn. R. Co., 4 Cush. (Mass.) 63.

3. People v. Albany, etc., R. Co., 24 N. Y. 261.

4. **Bridges.**—Angell on Highw. (3rd ed.), § 35, etc.; Proprietors, etc., v. Hoboken Land Co., 10 N. J. 504; Bridge Co. v. Hoboken Land Imp. Co., 1 Wall. (U. S.) 116; McLeod v. Savannah, etc., R. Co., 25 Ga. 445; Mohawk Bridge Co. v. Utica & Schenectady R. Co., 6 Paige (N. Y.) 554; Enfield Tollbridge Co. v. Hartford & New Haven R. Co., 17 Conn. 56.

5. Rex v. Derbyshire, 22 B. 145.

6. Angell on Highw. (3rd ed.), § 38.

7. Angell on Highw. (3rd ed.), § 40.

8. State v. Canterbury, 8 Foster (N. H.) 195. The term *bridge* includes the necessary walls, abutments, embankments, etc. Sussex v. Strader, 3 Har. (N. J.) 102.

Proprietors, etc., v. Hoboken Land Co., 10 N. J. 504. Tolland v. Willington, 26 Conn. 578; White v. Quincy, 97 Mass. 430. Hayes v. N. Y. Cent., etc., R. Co., 6 Hun. (N. Y.) 63; Little Rock, etc., R. Co. v. Chapman, 39 Ark. 463.

9. Piscataqua Bridge Co. v. New Hampshire Bridge Co., 7 N. H. 35; South Car. R. Co. v. Jones, 4 Rich. (S. Car.) 459; Hall v. Boyd, 14 Ga. 1; Erie

extends out of the State which gave authority for its erection, the corporation could not enforce payment of tolls against a person passing over that part beyond the limits of that State.¹ (See BRIDGE.)

4. Ferries.—A ferry is also in a sense a highway.² They are established in England by royal grant or by prescription. In the United States ferries are authorized by legislative authority, either expressly exercised, or delegated. The duty of the ferryman is to have the landing in condition to receive travellers, and to provide proper facilities for entering the boat. (See FERRIES.)

5. Canals.—Canals are highways also, of a particular kind, when made by public authority, and the right of taking tolls upon them may be granted as upon a turnpike. Independent of its charter, a canal company is not bound to erect and maintain bridges where highways are laid across the canal subsequent to its construction.³ (See NAVIGABLE STREAMS, WATERS and WATER-COURSES.)

III. PRESCRIPTION.—(See PRESCRIPTION.) A highway arises by prescription when there has been an adverse user of that easement continued for the period fixed by law. Anciently this could be only by immemorial user, but the statute of 21 James I, ch. 16, fixed twenty years as the period within which actions could be instituted for the recovery of lands, and the courts, following the analogy of the statute, held a user of twenty years as sufficient proof of a grant of an easement. The necessary length of time is still twenty years in many States, but it varies over the Union.⁴

City v. Schwingle, 10 Harr. (Pa.) 384; *Indianapolis v. McClure*, 2 Cart. (Ind.) 147; *Harrell v. Ellsworth*, 17 Ala. 576. *Fort Blain Bridge Co. v. Smith*, 30 N. Y. 44, decides that in these three cases: where it is intended to charge toll, where the stream is navigable, and where the State owns the bed of the stream—a bridge can be erected only after authority is granted by the State.

1. *President, Managers, etc., v. Trenton City Bridge Co.*, 13 N. J. 46; *Hannibal, etc., R. Co. v. Mississippi River Packet Co.*, 125 U. S. (L. ed.) 260.

2. **Ferries.**—*Angell & Durfee on Highways*, 3rd ed., § 46; *Rex v. Nicholson*, 12 East. 334; *Dundy v. Chambers*, 23 Ill. 312; *Bidelman v. State*, (N. Y.) 13 Cent. Rep. 403.

3. **Canals.**—*Rogers v. Bradshaw*, 20 Johns. (N. Y.) 735; *Com. v. Fisher*, 1 Tenn. 462; *Farnum v. Blackstone Canal Co.*, 1 Sumn. (U. S.) 46; *Riddle v. Merrimack Locks, etc.*, 7 Mass. 169.

4. **Time.**—It is twenty years in Maryland. *Day v. Allender*, 22 Md. 511. In Indiana, *Shellhouse v. State*, 110 Ind. 509. In New Jersey, *South Branch R. Co. v. Parker*, 41 N. J. Eq. 489.

User for twenty years constitutes a road a public highway. *Ross v. Thompson*, 78 Ind. 90.

Under section 5035, R. S. 1881, it is the twenty years' use of a road that makes it a public highway regardless of its origin, and it is immaterial whether the use is with the consent or over the objections of the adjoining landowners. *Statements in Board, etc. v. Huff*, 91 Ind. 333, in conflict with this holding, are disapproved. *Strong v. Makever*, 102 Ind. 578.

In Pennsylvania it is twenty-one years.

In Missouri and Iowa it is ten years. *State v. Wells*, 70 Mo. 635.

In Texas it is two years. *Haers v. Choussard*, 17 Tex. 588.

In Michigan it is twenty-five years. In California it is five years. *Bolger v. Foss*, 65 Cal. 250. See *Angell on Limitations* (4th ed.) Appendix for other States.

In 1836, the city council of Boston voted "that it is expedient to erect an iron fence around the Common;" and in the same year the city built a fence, setting it back from the line of Park

Statutes of limitation do not apply in express terms to highways, but the analogies of these statutes were long since adopted by the courts in fixing the rights of claimants of such easements. When a grant of a right of way was claimed, it was held that upon proof of user for the usual period of limitations in cases of rights in land, a grant would be presumed. Later it was held that roads by prescription rest upon uninterrupted adverse user for twenty-one years.¹

This decision avoided the fiction of a presumed grant and rested upon the analogy to the statutory provisions in case of actions for the possession of real estate.

1. The Element of Time.—The length of time required for the public use of a way is generally twenty years, but it varies in different States.

2. Adverse User.—Following out the analogy of the statute of limitations, this user must be adverse, and no permissive user is sufficient.²

street, and thus throwing a part of the Common into the street. The city also made a brick sidewalk, outside of the fence, upon the land which had formed part of the Common, and it was thereafter used by the public. No record of this widening of the street was made, *Held*, in an action against the city for personal injuries sustained in consequence of the defective condition of this sidewalk, that if there had been for more than twenty years a constant and uninterrupted use of the sidewalk by the public, under a claim of right to use it as a part of the public street and not as a part of the Common, this would establish it by prescription as a part of the street. *Veale v. Boston*, 135 Mass. 187. *McWhorter v. State*, 43 Tex. 666.

In Illinois user for twenty years without objection by the landowner may establish a highway, if it has connection with prominent places. *Harper v. Dodds*, 3 Ill. App. 331. Streets and alleys of a town, as fixed by continuous user for more than twenty years, will prevail as against a prior invalid statutory dedication. *Wattman v. Rund*, 109 Ind. 366.

The California Pol. Code, § 2619 providing that all roads used as such for a period of more than five years are highways, gives a prescriptive right after use for five years. *Bolger v. Foss*, 65 Cal. 250.

See, also, *Valentine v. Boston*, 22 Pick. (Mass.) 75; *Com. v. Old Colony Ry. Co.*, 14 Gray (Mass.) 93; *Brownell v. Balmer*, 22 Conn. 107; *State v.*

Green, 41 Iowa 693; *Chicago v. Wright*, 69 Ill. 318.

Amount of Travel.—There is no particular amount of travel necessary to establish a highway by user; it will be sufficient if traveled over as much, or about as much, as it would have been had it been laid out according to statute, and as much as the circumstances of the surrounding population required. *Baldwin v. Herbst*, 54 Iowa 168.

1. *State v. Boscawen*, 32 N. H. 331. *In re Krier's Private Road*, 73 Pa. St. 109.

2. **Adverse user.**—*Blanchard v. Moulton*, 63 Me. 434; *Lanier v. Booth*, 50 Miss. 410.

A permissive use cannot be adverse, and will not serve as a basis of a claim of right of way. *Pentland v. Keep*, 41 Wis. 490; *Chestnut Hill, etc., Co. v. Piper*, 77 Pa. St. 432; *Jones v. Davis*, 35 Wis. 376; *State v. Green*, 41 Iowa 698; *Green v. Betha*, 30 Ga. 896; *Talbott v. Grace*, 30 Ind. 389.

Permissive Use.—Vacant Land.—Where land is vacant and unoccupied, the mere fact that individuals travel over it and use it as a road for more than fifteen years, is not sufficient to constitute it a public highway. *State v. Horn*, 35 Kan. 717.

The public cannot acquire any right by use alone for twenty years to pass over vacant, uninclosed land. *Fox v. Virgin*, 11 Ill. App. 513.

The fact that the owner of certain land had allowed those wishing to drive their sheep to a lake to pass and repass, and others had also crossed in

3. Interruptions.—The user must also be continuous and uninterrupted.¹

The user must be under a claim of right, and must be confined to the very way claimed.² The road or tract must be well defined.³ The length of time which it must continue is often a

various directions for fifty years, did not establish a highway, although the passing of the sheep had been confined to one path. *People v. Livingston*, 27 Hun. (N. Y.) 105; s. c., 63 How. (N. Y.) Pr. 242.

Silent acquiescence in the use of a way is not sufficient in itself to show dedication. *Cyr v. Madore*, 73 Me. 53.

Where the owners of land devote a portion of it to use as an alley or passage-way for their own private purposes, such alley or passage-way will not be converted into a public highway simply because the public also use it by permission from the owners. *Shellhouse et al. v. State*, 110 Ind. 509.

After twenty-six years uninterrupted use of a way, all presumptions are against the owner. His occasionally piling things upon it, and on one occasion building a calf pen in it will not prevent the running of the statute. *Torf v. Decatur*, 19 Ill. App. 204.

Encroachments upon a road or changes in the line of travel at other and distant points, do not prevent the road from becoming a public highway by user at points where the line of travel has remained substantially unchanged. *Hart v. Red Cedar*, 63 Wis. 634.

At the trial of an indictment charging the defendant with erecting and maintaining a fence within the limits of a highway, witnesses over seventy years of age testified that the travelled track used by the public for more than fifty years, prior to 1878, and as long as they could remember, extended over the land inclosed by the defendant; and that a stone wall, which stood on a curved line where the corner of the highway intersected another road, and which was claimed by the government to be the boundary of the highway, about two feet distant from the travelled track, had been there for the same period, and until taken down by the defendant before he built the fence. *Held*, that this evidence was competent, and would justify the jury in finding a way by prescription, a portion of which the defendant had inclosed, and in return-

ing a verdict of guilty. *Com. v. Coupe*, 128 Mass. 63.

The purpose for which a person travels on a road does not affect the question whether such travel is a *public use* of the same. *Schatz v. Pfeil*, 56 Wis. 429.

1. *Bodfish v. Bodfish*, 105 Mass. 317.

2. Claim of Right.—Before a highway can be established by prescription, it must appear that the general public, under a claim of right and not by mere permission of the owner, used some defined way, without interruption, or substantial change, for a period of twenty years or more. When the use of a way is interrupted, prescription is annihilated, and must begin again, and any unambiguous act by the owner, such as closing the way at night, or erecting gates or bars, which evinces his intention to exclude the public from its uninterrupted use, destroys the prescriptive right. *Shellhouse et al. v. The State*, 110 Ind. 509.

The mere use of a way over land for a long number of years, does not constitute it a highway, nor does a mere permissive use of it imply a dedication. The use must be adverse to the owner, and as of right, manifested by some appropriate action of the proper public authorities. *Stewart v. Frink*, 94 N. Car. 487; s. c., 55 Am. Rep. 618.

See *State v. Purify*, 86 N. Car. 681; *Kennedy v. Williams*, 87 N. Car. 6; *State v. McDaniel*, 8 Jones (N. Car.) 284; *Boyd v. Achenback*, 79 N. Car. 540.

3. Well Defined.—To establish a by-road from twenty years' uninterrupted adverse enjoyment, there must be a certain well defined line of travel in the same place over the entire route for all that time. *South Branch R. R. Co. v. Parker*, 41 N. J. Eq. 489.

Evidence tending to prove that a road had been travelled over uninclosed prairie land for forty years, in a general direction, but the line of travel varying considerably, and had been changed within twenty years past, is insufficient to show a road by user or prescription over a particular place in

matter of statutory regulation. In some States prescription for ways is not recognized.¹

IV. GRANT.—Inasmuch as a way is an easement, it may originate in a grant, like any other interest in land. The rules governing the transfer of interests in land are then applicable, and this branch of the subject should be sought for under the titles EASEMENT, DEED, GRANT, etc. The particular mode of creating a way with which we are here concerned, is that of:

V. DEDICATION.—Dedication is an appropriation of land to some public use made by the owner of the fee, and accepted for such use by or on behalf of the public. (See DEDICATION, vol. 5, p. 395.)

VI. LAYING OUT AND ALTERING.—(See EMINENT DOMAIN, vol. 6.) The laying out highways is peculiarly a subject of statutory regulation, the details of which do not belong in a work of this kind, but must be sought in local works, and in the statutes of the several States.

The duty and authority of laying out roads is generally committed to boards known as highway commissioners, or, in cities, as street commissioners.

1. Jurisdiction.—This board is a body of limited jurisdiction, and all grants of power to it are strictly construed; and its jurisdiction is dependent upon a strict compliance with the statutory requirements governing its proceedings.² But jurisdiction may

question, so as to justify a road commissioner in removing fences placed thereon. *Owens v. Crosselt*, 105 Ill. 354.

The court cannot say, as a matter of law, that a highway acquired by prescription is of any particular width, beyond such portion as is actually used by the public. The width to which the public is entitled is a question for the jury in each case, and is not necessarily the full width of sixty-six feet. *Davis v. Clinton*, 58 Iowa 399.

Evidence of wheel tracks is competent to show the limits of a highway established by use. *Blummer v. Ossipee*, 59 N. H. 55.

The public cannot acquire a prescriptive right to pass over land generally. Such right must be confined to a specific line or way. *Bryan v. East St. Louis*, 12 Ill. App. 390.

1. A highway cannot be established by user alone, although the owner of the land had knowledge of such use, unless the owner also had express notice that a highway was claimed, independent of the mere use. *State v. Mitchell*, 58 Iowa 567.

And it has been held, in interpreting the Michigan road law, that user for

ten years will not of itself make a road a public highway if proceedings have not been taken to lay it out or establish it as one. *Porter et. al. v. Safford*, 50 Mich. 46.

The county board ordered the location of a highway, and, over the defendant's objection, the same was opened through his field, and used by the public for about two months, when the defendant rebuilt his fences, which is the obstruction complained of. Whether there was a highway, depends on the validity of the order therefor, not on the user. *Miller v. Porter*, 71 Ind. 521.

Miscellaneous.—Where doubt exists as to the true location of a road, it may be determined by long public user. *State v. VanDerveer*, 47 N. J. L. 259.

Where a way has become public by user, the result of proceedings looking to its recognition as a highway are immaterial. *Brown v. Kansas City, etc., R. Co.*, 20 Mo. App. 427.

2. Jurisdiction.—*Sedgwick Stat. L.*, 351; *Blackwell, Tax Titles* 38; *Dougherty v. Hope*, 1 N. Y. 79; *Sharp v. Stein*, 4 Hill (N. Y.) 76; *Ex parte Ward*, 52 N. Y. 395; *Rathbun v. Acker*,

be obtained by consent, and a failure of jurisdiction may be waived.¹

2. Petition.—The proceedings begin by a petition, which must, in all respects, follow the statutory requirements. It must contain a description of the line of the proposed road or alteration, given with reasonable certainty.² It must generally bear the

18 Barb. (N. Y.) 393; Rensselaer, etc., R. Co. v. Davis, 43 N. Y. 137; Smith v. People, 47 N. Y. 330; People v. Utica Ins. Co., 15 Johns. 358; People v. Mattsell, 94 N. Y. 182; McCluskey v. Cromwell, 11 N. Y. 602; Ruhland *et al.* v. Supervisors, etc., 55 Wis. 664; Ruhland *et al.* v. Jones, 55 Wis. 673; St. Louis v. Gleason, 89 Mo. 67; Oran v. Highway Comr., 19 Ill. App. 259; Dyer v. Miller, 58 Cal. 585; State v. Hudson Co., etc., 45 N. J. L. 462; State v. Trenton, 47 N. J. L. 489.

Proceedings of a town board of supervisors laying out a highway, which are void because of failure to comply with statutory requirements, constitute no justification to such supervisors for a threatened occupation by them of lands for the purposes of such highway. Ruhland *et al.* v. Jones *et al.*, supervisors, 55 Wis. 673.

That which the legislature directs in proceedings for laying out village streets cannot be decided to be immaterial by the courts. If the village trustees, upon deciding to lay out a street, are required to cause a resolution to be entered on the minutes of their board, this must be done. So must the owners of land to be taken be named in the petition, as the statute requires. The trustees cannot change the route specified in the petition when the statute confers no authority upon them to make the change. People v. Whitney's Point, 32 Hun. (N. Y.) 508.

The law authorizing condemnation proceedings should be strictly construed and every prerequisite to the exercise of the jurisdiction observed. St. Louis v. Gleason, 89 Mo. 67; Oran v. Highway Comr., 19 Ill. App. 259.

The record of the proceedings of the township board of directors should show that every essential prerequisite of the statute had been complied with, such as that the petition for the road had been made by twelve legal voters and householders of the township living within three miles of the road, and that a copy of the petition had been posted in three of the most public places in the township before any steps

were taken by the board. A record which showed only that the signers of the petition were citizens of the township, and that the petition had been posted "in three places along the line of the road," was fatally defective. Whitely v. Platte County, 73 Mo. 30; Dyer v. Miller, 58 Cal. 585; *A fortiori* of laws for laying out a certain road; State v. Hudson County, etc., 45 N. J. L. 462. And an act authorizing a city council "to lay out any one street" does not authorize the laying out of more than one. Poorman v. Santa Barbara, 65 Cal. 313.

1. Jurisdiction by Consent.—Lack of jurisdiction is waived by the owner of land through which a road is laid out, by his presenting a claim for damages consequent upon the opening. Comr. of Woodson Co. v. Heed, 33 Kan. 34.

Contra, Ruhland v. Supervisors, etc., 55 Wis. 664.

2. Description.—Where in the petition the description of the proposed line of the highway is such that it may be located readily and with certainty, it is sufficient and will not be vitiated by an inaccurate use of technical terms. Jackson v. Rankin, 67 Wis. 285.

Notice that "application will be made to the mayor and city council of Baltimore, to open and condemn McKim and Valley streets from Eager to Hoffman street," etc., sufficiently describes McKim street as the same was ordered to be opened by ordinance No. 142, subsequently passed, which authorized and directed the commissioners for opening streets, "to condemn and open McKim street, from Eager street to Hoffman street, as laid down on Poppleton's map of Baltimore City;" and there is a substantial conformity between the notice and the ordinance. Mayor, etc., of Baltimore v. The Little Sisters of the Poor, 56 Md. 400; Stoddard v. Johnson, 75 Ind. 20.

There must be sufficient certainty about the description to enable a surveyor to run it, and, therefore, the description in such a petition, "thence

signatures of a certain number of property holders of the district.¹

Averments.—The petition must contain all the averments of matters of fact required by the statute, otherwise it will be fatal to the jurisdiction.²

northwest fourteen rods, with an angle of about ten degrees," is void. *Smith v. Weldon*, 73 Ind. 454. *In re Road in Sterrett Township*, 114 Pa. St. 627; *Hayford, et al. v. Comr. of Aroostook Co.*, 78 Me. 153.

If the petition duly describes the road, an incorrect subsequent description will not affect the proceedings. *Looby v. Austin*, 19 Ill. App. 325.

An application for a survey, etc., of a road need not state in what township its beginning and ending points are located; nor need the return state where the road laid out crosses the township line. *State v. Brandon*, 45 N. J. L. 332.

Nor need it show in express terms that the road will be in the county where the proceedings are had. If it defines the location by reference to government surveys, to the names of persons and farms to be touched, and intersections with other known highways in the county, it will be sufficient. *Sutherland v. Holmes*, 78 Mo. 399; *Conaway v. Ascherman*, 94 Ind. 187; *Clift v. Brown*, 95 Ind. 53.

1. **Signatures.**—Where any facts are made jurisdictional by statute, their existence must appear. Thus proceedings to establish a public road under the road law of 1868 (Laws of Missouri, 1868, p. 157), must show that the petition was signed by "twelve householders of the township or townships in which the road is desired, three of whom shall be of the immediate neighborhood," and that the notices of the intended application for the road had been posted for "twenty days prior thereto." These are jurisdictional facts and must appear on the record of the proceeding, otherwise the latter is void; certainly so as against landowners who did not relinquish their rights of way. *Zimmerman v. Snowden*, 88 Mo. 218; *Blize v. Castlio et al.*, 8 Mo. Ap. 290; *Shaffer v. Weech*, 34 Kan. 595. But a petition for laying out a road through two or more counties in a judicial district is sufficient if signed by the requisite number of legal voters, even though they all live in one of the counties. *State v. Macdonald*, 26 Minn. 445. *In re Grove street*, 61 Cal. 438. Under 1 Rev. Stat. of Indiana, 1876, p.

531, the petition for opening a highway is sufficient against collateral attack if it appears that either an owner, or an occupant, or an agent of the land through which the highway is to pass, was properly named therein. *Porter v. Stout*, 73 Ind. 3.

It is not essential to the validity of an order extending a street that the application therefor should be by a majority of the landowners who are also the owners of one-half the land taken for the extension; an application signed by a majority of owners of the lots fronting on the original street is sufficient. *People, ex rel. Buckley v. Pres., etc., of Pt. Jarvis*, 100 N. Y. 283.

2. **Averments.**—The petition should contain an averment of jurisdiction or the proceedings may be set aside on *certiorari*. *Randolph v. Ætna Highway Comr.*, 8 Ill. App. 128.

And an averment of the necessity of the use. *Helena v. Harvey*, 6 Mont. 114.

Contra, In re Road in Sterrett Township, 114 Pa. St. 627.

While the Iowa Code prescribes that a petition for the establishment of a highway shall run to the board of supervisors, yet a petition addressed to the county auditor, the clerk of the board, was sufficient to give the board jurisdiction to establish the road which the petition very clearly, though not expressly, asked for. *State v. Barlow*, 61 Iowa 572.

A petition for the establishment of a highway should cover not only that thne petitioners are freeholders, but that six of them reside in the immediate neighborhood of the highway, or it will be fatally defective. *Conaway v. Ascherman*, 94 Ind. 187. And it must be signed by them. *Minard v. Douglas County*, 9 Ore. 206; *King v. Burton County*, 10 Ore. 512.

A recital in a petition for the condemnation of land for a street that the city council "duly passed and adopted an ordinance in writing," directing the proceeding, and "that it is now necessary to condemn said land for public use agreeably to provisions of said ordinance," is a sufficient allegation of

Amendment.—The petition may be amended.¹

3. Notice.—In order to protect the rights of landholders, all the statutes require notice to be given of the pendency of the proceedings. A failure to comply with these regulations is generally fatal.²

the necessity of taking the land for public use. *Los Angeles v. Waldron*, 65 Cal. 283.

In proceedings to open a way under an ordinance conditioned to be void unless a piece of land be dedicated to the public by the owner, the petition is defective unless it alleges such dedication. *St. Louis v. Cruikshank*, 16 Mo. App. 495.

1. Amendment.—It is within the discretion of the circuit court to permit amendments to be made to the petition in highway cases, and the supreme court will not interfere unless there is an abuse of discretion. It is not an abuse of the discretionary power of the circuit court to permit an amendment to be made changing in a slight degree the line of a proposed highway, in a case where the change does not affect the interests of persons not in court. *Burns et al. v. Simmons et al.*, 101 Ind. 557.

The description may be amended even after the way is laid out. *Young v. Laconia*, 59 N. H. 534. And the petitioners may amend by withdrawing their names from the petition. *Webster v. Bridgewater*, 63 N. H. 206.

2. Notice.—Notice required by law is jurisdictional. *State v. Trenton*, 47 N. J. L. 489. A notice defective in not specifying the place where the hearing will be held is bad and invalidates the proceeding. *Oran v. Highway Comrs.*, 19 Ill. App. 259. So, too, if the time specified for the hearing in the notice be departed from. *Adams v. Clarksburg*, 23 W. Va. 203.

Where the statute provided that, "upon application made to the supervisors for the laying out, altering or discontinuing of any highway, they shall *make out a notice*, and fix therein a time and place at which they will meet," etc. *Held*, that this merely required the notice to be given by the direction and authority of the supervisors, and not that it shall be *signed* by them. *Williams v. Mitchell*, 49 Wis. 284; *Dougherty v. Brown*, 91 Mo. 26. In Oregon the notice to be given to interested persons must be signed by the petitioners. *Minard v. Douglas Co.*, 9 Ore. 206.

Personal Notice.—Personal notice is not required by law to be given to parties over whose land a proposed public road or highway is laid out. *In re Road in Sterrett Township*, 114 Pa. St. 627.

A town filed a petition seeking condemnation of a parcel of land. Notice that application for the appointment of commissioners would be made, was duly published, but never posted as required by law, nor was there any personal service, nor did the owners appear, nor waive their right to personal service. They filed exceptions. *Held*, that the said landowners, not having been served with personal service of said notice, that such application would be made, and not having appeared generally to said petition or in any manner waived their right to such personal notice, the said county court had no authority to docket a motion to appoint such commissioners, the advertisement of notice in a newspaper in the county for the period and in the manner prescribed by §6 of ch. 114 Acts of 1875, *without also posting said notice* in the manner prescribed by said sixth section of said act was insufficient to authorize the said court to hear the petition. That the petitioner having elected to proceed against the said landowners as non-residents, the said court had no authority to appoint such commissioners, even if said notice had been duly published and posted in the manner prescribed in said sixth section of said act. That in such a case, if the landowners had been properly proceeded against as non-residents, and the notice to them had been duly published and posted as required by said section 6 of ch. 114 Acts 1875, the court should have directed such compensation to be ascertained by a jury, and not by commissioners. *Trustees v. Clarksburg*, 23 W. Va. 203.

Where the notice by the supervisors of the time and place of meeting to decide upon the application for the laying out of a highway is served upon the occupants of the land through which such highway passer by reading such notice to them, the same is *served personally*, within the meaning of sec-

tion 1267, R. S. of Wisconsin. *Green v. State*, 56 Wis. 583.

Notice to Agent.—A, the owner of certain land through which it was proposed, in 1877, to lay out and establish a public highway, was not personally served with any notice of the time and place of the meeting of the viewers to view the road and give the parties interested a hearing. A notice, however, directed to "B, agent for A," was served upon B. There was no finding by the board of county commissioners that A was a non-resident of the county or State, or that B resided in the county or State, or was in the possession or control of the premises, or was in any way the agent of A concerning said premises, or to receive any notices. *Held*, the notice to B not a notice to A, and as it did not appear that the notice provided for in section 4, ch. 89, Comp. Laws of 1879, had been given, and as there was no reason set forth in the record for not giving such notice, and as the owner of the land did not appear at the time and place of the meeting of the viewers, or otherwise waive service of the notice of such meeting, the board of county commissioners of the county where the proceedings were pending had no authority to lay out and establish the public highway through the land of A. *Comrs. of Chase Co. v. Carter et. al.*, 30 Kan. 581.

To Occupant or Owner.—The legislature has the power to prescribe what shall be a reasonable notice of the pendency of a petition for the opening of a highway, and whether it may be given to the owner or to the occupant of land affected thereby; and in Indiana notice is sufficient if given to either the owner or occupant. *Porter v. Stout*, 73 Ind. 3.

The selectmen of a town issued a notice, addressed to J and H, heirs of the late P, stating that they proposed to lay out a road through certain land, including "the estate of the late P," and appointing a time and place to hear all parties interested. This notice was inclosed in an envelope addressed to L, who was the husband of H, and was left at his residence in another town by a messenger, and came to his knowledge on the same day. J was absent from the country at the time of these proceedings. P died seized of the land over which the proposed way was located, and devised the same to J, who conveyed it to L by a deed which was

not recorded at the time of the proceedings in question. The selectmen had no notice of the conveyance to L; and they did not post a notice of their intention to lay out the way. On the day before the proposed meeting of the selectmen, L had a conversation with their chairman in regard to the intended way and the meeting; and, by reason of a misunderstanding on his part as to the quantity of his land taken by the location, he made no objection to the laying out, and said that he should not be present at the meeting. *Held*, on a bill in equity by L to restrain the town from occupying his land, that the notice given by the selectmen was sufficient. *Lawrence v. Nahant*, 136 Mass. 477.

Notice to Non-Residents.—A foreign corporation affected by the opening of a highway, has sufficient notice by publication. *State v. Chicago, etc., R. Co.*, 68 Iowa 135.

No Presumption of Notice.—Where a public highway which has been used for twenty years without being recorded, to be ascertained, described, and entered of record, though no land not already in use by the public is to be taken, yet the proceeding involves an inquiry and decision affecting the rights of the owners of property; and these must, in some manner be notified of the pendency of the proceedings. No presumption of notice will be indulged. *Yelton v. Addison*, 101 Ind. 58.

Every requisite of the statute must be shown upon the proceedings to have been complied with. *Whitely v. Platte County*, 73 Mo. 30. Notice is jurisdictional. *Oran v. Highway Comr.*, 19 Ill. App. 259.

It is essential to the validity of proceedings by township trustees to establish a township road, that the record shall show either that the required notice of the presentation of the petition was duly given, or that the trustees were satisfied that it was. *Ferris v. Bramble*, 5 Ohio St. 109; *Forest v. Finck*, 43 Ohio St. 335; *Comr. of Woodson County v. Heed*, 33 Kan. 34. Any failure to comply with the statutory provisions as to the posting of notices invalidates the proceeding. *Adams v. Clarksburg*, 23 W. Va. 203.

It is essentially requisite to the validity of proceedings had in the Quarter Sessions for the laying out of a road, that the record should show that notice was duly served on the owners through whose land the road is laid out, and

VII. THE FEE.—1. In General.—The highway, at common law, is an easement merely, and the landowner has all the rights of property in the soil of the highway, but subject to this estate of the public. But a statutory dedication of a highway vests the fee of the land dedicated in the city or county to which the dedication is made.¹

that either releases had been obtained from them or the damages sustained, if any, ascertained. If a landowner in such case be a corporation it must appear of record that notice was served in the mode provided by statute. Appeal of the Central Railroad Co. of N. J., 102 Pa. St. 38.

Where the record fails to show more on the subject of notice than: "Petition presented to the township trustees on the 26th day of April, 1877, after having notice up in three public places in the township for thirty days," it is error for the trustees to proceed to order the establishment of the road, for the reason that there is no sufficient showing in the record, either that the proper notice was given or that the trustees were satisfied that it had been given. *Forest v. Finrock*, 43 Ohio St. 335.

Under the charter of St. Louis, no street can be extended nearer than five hundred feet to another street already opened, except on the unanimous recommendation of the board of public improvements. To sustain such a proceeding an affirmative proof of such recommendation is essential. *St. Louis v. Franks*, 78 Mo. 41.

1. **In General.**—*Washburn on Easements* (4th ed.) 253; *Gosselin v. Chicago*, 103 Ill. 623; *Franz v. Sioux City & Pembina R. Co.*, 55 Iowa 107.

Where land is dedicated to public use as a highway, such dedication is an exclusion of any subsequently acquired private right or easement in the highway, as contradistinguished from the right every citizen has to use it for the purpose which caused the dedication. *Bailey v. Culver*, 84 Mo. 531.

Where a proprietor laying off any city or town, or an addition to any city or town, under the provisions of chapter 78, Comp. Laws of 1879, makes out a map or plat thereof, and reserves for public uses streets and alleys, and acknowledges, certifies, files and records the same with the register of deeds of the county in which such city or town, or addition, is situate, the fee of the streets and alleys dedicated to public use vests absolutely in the county

wherein such real estate lies, and the county forever afterward holds the property in trust for such use; but the city has control over it, as another agent of the public; and such streets and alleys, under the direction and control of the public authorities, are subject to be appropriated to all the uses to which the streets of a city are usually devoted, as the wants or conveniences of the people may render necessary or important. One of these is the laying down of water-pipes, to supply the inhabitants with water. *Held, also*, that where a proprietor has thus made, acknowledged, certified, filed and recorded a map and plat of city lots, and thereby, within the terms of the statute, made a complete dedication of the streets and alleys, a note or reservation written upon the map or plat, and signed by him in the following terms: "It is hereby expressly understood that no right or privilege whatsoever is hereby granted, conveyed or dedicated to any purchaser, excepting the simple easement or right of travel over said streets, avenues or alleys, but that all other rights and privileges are hereby expressly reserved to the undersigned proprietors," is inoperative and void as against the public, and does not in any way deprive the public or the city of the usual and necessary control of the streets, avenues and alleys. *Wood v. Nat. Water Wks. Co.*, 33 Kan. 590; *Overman v. Beckwith*, 35 Iowa 89; *Comr., etc., v. Beckwith*, 10 Kan. 603.

The title of a municipal corporation to the soil of its streets is paramount and exclusive, and no private occupancy, for whatever time, whether adverse or permissive, can vest a title inconsistent with it. *Kopf v. Utter*, 101 Pa. St. 27. See, also, *Chatham v. Brainard*, 11 Conn. 60; *Kennedy v. Jones*, 11 Ala. 63; *Campbell et al. v. O'Brien*, 75 Ind. 222; *Harris v. Elliott*, 10 Pet. (U. S.) 25; *Hagaman v. Moore*, 84 Ind. 496; *Charleston Rice Mill Co. v. Bennett*, 18 S. Car. 254; *Atchison, Top., etc., R. Co. v. Batch*, 28 Kan. 470; *Bissell v. N. Y. C. R. Co.*, 23 N. Y. 61; *Wager v. Troy U. R. Co.*, 25 N.

2. Rights of Owner.—He has a right to sell the land subject to the easement.¹ He may mine under it,² carry pipes beneath it, or run a drain under it.³ He may also have an action of trespass against any one cutting trees or digging up the soil.⁴

3. Abandonment.—Upon the abandonment of the public easement the whole property reverts to the owner of the fee.⁵

4. Adjacent Owners.—Where the same person owns land bounding both sides of a highway he is presumed to own the fee of the road-bed. Owners on opposite sides own *ad medium filum viae*.⁶ A conveyance bounded by a highway carries with it the fee to the middle of the road.⁷

5. Abutting Owners.—Whether or not the soil passes with such a conveyance is a question of intention. A grant bounding "by," "on," or "along" a highway carries the fee to the middle if the grantor owned to the middle; but one bounding "by the side of," "by the margin of," or "by the line of," does not carry beyond the edge of the road.⁸

Y. 529; *Smith v. Slocomb*, 11 Gray (Mass.) 280; *Bliss v. Ball*, 99 Mass. 597.

The public easement in a street is not affected by a judgment against the land for taxes. *Sanborn v. Minneapolis*, 35 Minn. 314.

1. *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483; *Fairfield v. Williams*, 4 Mass. 427; *Leonard v. Adams*, 119 Mass. 359; *Taylor v. Pub. Hall Co.*, 35 Conn. 430.

2. *Goodtitle v. Alker*, 1 Burr. 133; *Davison v. Gill*, 1 East. 64.

3. *Perley v. Chandler*, 6 Mass. 454; *Chamberlain v. Enfield*, 43 N. H. 356; *Holden v. Shattuck*, 34 Vt. 536; *Palmer v. Silverthorne*, 32 Penn. 65; *Overman v. May*, 35 Iowa 89; *Comr. v. Beckwith*, 10 Kan. 603.

Woodring v. Forks Township, 28 Pa. St. 355; *Kellogg v. Thompson*, 66 N. Y. 88; *Brookfield v. Walker*, 100 Mass. 94.

4. *Washburn on Easements* (4th ed.) 10. *Coburn v. Ames*, 52 Cal. 385. "If, therefore, a stranger were to enter upon and enclose a portion of the highway and exercise exclusive acts of ownership upon it for twenty years or more, he would gain a title to the same." *Washburne on Easements* (4th ed.) 10. *Read v. Leeds*, 19 Conn. 183. *Gardiner v. Tisdale*, 2 Wis. 153; *Blake v. Rich*, 34 N. H. 284; *Barclay v. Howell*, 6 Pet. (U. S.) 498; *Cooper v. Smith*, 9 S. & R. (Pa.) 26; *Locks & Canals v. N. & L. R. Co.*, 104 Mass. 1; *Dubuque v. Malony*, 9 Iowa 450.

5. Upon the abandonment of a highway the original rights of the owner of the soil revert to him. This is so

though the way is abandoned in favor of a substituted way. *Benham v. Potter*, 52 Conn. 248.

So of a conditional vacating of a street, the title does not pass to the abutting owner but to the original owner. *West v. McEnrey*, 21 Fed. Rep. 233; *Jackson v. Hathaway*; 15 Johns. (N. Y.) 447; *Westbrook v. North*, 2 Me. 179; *Robbins v. Borman*, 1 Pick (Mass.) 122; *Adams v. Emerson*, 6 Pick (Mass.) 57; *Harris v. Elliott*, 10 Pet. (U. S.) 55; *Phifer v. Cox*, 21 Ohio St. 248; *Crawford v. Delaware*, 7 Ohio St. 469; *Street R. Co. v. Cummings*, 14 Ohio St. 524.

St. Mary, etc. v. Jacobs L. R., 7 Q. B. 47; *Perley v. Chandler*, 6 Mass. 454; *Leonard v. Adams*, 119 Mass. 366; *Atchison, Top, etc., R. Co. v. Batch*, 28 Kan. 470; *Hicks v. Ward*, 69 Me. 436; *Cooper v. Detroit*, 42 Mich. 584; *Stout v. Noblesville, etc. Co.*, 83 Ind. 466.

6. *Willoughby v. Jenks*, 20 Wend. (N. Y.) 90; *Mott v. New York*, 2 Hill. (N. Y.) 358; *Sadtler v. Peabody Heights Co.*, 63 Md. 632.

7. 3 Kent Com. (5th ed.) 433; *Parker v. Framingham*, 8 Met. (Mass.) 266; *U. S. v. Harris*, 1 Sumn. (U. S.) 21; *Webber v. Eastern R. Co.*, 2 Met (Mass.) 147; *Sadtler v. Peabody Heights Co.*, 63 Md. 632.

8. *Peck v. Denniston*, 121 Mass. 17; *White v. Godfrey*, 97 Mass. 472; *Dean v. Lowell*, 135 Mass. 55; *Paul v. Carver*, 26 Penn. 223; *Hunt v. Rich*, 38 Me. 195; *Reed v. Leeds*, 19 Conn. 182. *Morrow v. Willard*, 30 Vt. 118; *Williams v. Sparks*, 24 Ohio St. 141;

VIII. LIABILITY FOR DEFECTIVE HIGHWAY.—1. Existence of Liability.—With regard to their liability for defective highway there is a distinction made between municipal corporations proper and *quasi* corporations, such as counties, townships, districts, etc. Although there is much conflict, the weight of authority is in favor of the rule holding municipal corporations liable in private actions for injuries caused by unsafe and defective highways, in the absence of statute or special provision in their charters.¹

Hughes v. Prov. & Wor. R. Co., 2 R. I. 508; *De Peyster v. Marli*, 27 Hun (N. Y.) 439, 247; *Tag v. Keteltas*, 48 N. Y. Super. Ct. 241; *Hammond v. McLachlan*, 1 Sandf. Ch. (N. Y.) 323; *Jones v. Pettibone*, 2 Wis. 308; *Child v. Starr*, 4 Hill (N. Y.) 469; *Canal Trustees v. Haven*, 5 Ill. 548; *Braxton v. Bressler*, 64 Ill. 488; *Cox v. Louisville, etc. R. Co.*, 48 Ind 178.

Massachusetts Rule.—In Massachusetts a boundary generally by the highway conveys title to the middle, if the grantor owns so far. *Sanborne v. Rice*, 129 Mass. 387. The *New York* is nearly similar, the words showing a contrary intention having to be very definite. *Mott v. Mott*, 68 N. Y. 246; *Low v. Tibbetts*, 72 Me. 92; *Sadtler v. Peabody Heights Co.*, 63 Md. 632; *Gould v. B. & O. R. Co.*, 67 Md. 149.

If the owner of a strip of land conveys land separated thereby from the highway, his subsequent dedication of the strip as a highway confers on the grantee no title to the fee in the highway. *Valley Pulp & Paper Co. v. West*, 58 Wis. 599.

Where it is apparent that a grant of land bounding on a highway intended the line of the highway and not the middle line as a boundary, the grantee cannot maintain trespass for cutting down trees within the line of the highway. *Gaylor v. King*, 142 Mass. 495.

In 1829 a canal company, under power given by its charter, located and constructed its canal along the west side of a certain highway and within its limits, taking in land on the east side for a substitute highway, its charter authorizing it to make changes in highways where necessary. The substitute highway has ever since been used by the public and kept in repair by the town. In 1846 a company that had succeeded to all the rights of the canal company, was authorized to construct a railroad along the line of the canal. It did so, locating its track along the east bank of the canal at the place in question. In 1853 the canal

was wholly abandoned. In 1880, the company, for a consideration paid by the town, abandoned the use of the canal bank for its railroad track, released to the town all its rights and interest in the old highway, and located its track elsewhere. *Held*,—

1. That the adjoining owner had owned the fee of the land occupied by the ancient highway to its centre, subject to the right of the public to pass over it.

2. That on the legal establishment of the substitute highway the part left to the canal company ceased to be highway and the adjoining owner owned the fee subject only to the easement of the canal.

3. That when the canal was abandoned and the railroad track removed the land became freed from the easement held by the company, and the unincumbered property of the adjoining owner.

Benham et al. v. Potter, 52 Conn. 248.

1. Municipal Corporations Proper.—In *Barnes v. Dist. of Columbia*, 91 U. S. 540, it is said: "The authorities establishing the contrary doctrine that a city is responsible for its mere negligence are so numerous and so well considered that the law must be deemed to be settled in accordance with them." And the court cited among others the following cases: *Mayor, etc., v. Henley*, 2 Cl. & Fin. (Eng.) 331; *Mercy Docks v. Gibbs*, 11 H. L. Cas. 687; *Same v. Penhallow*, 1 H. Ld. Cas. N. S. (Eng.) 93; *Scott v. Mayor*, 37 Eng. Law & Eq. 465; *Robbins v. Chicago*, 4 Wall. (U. S.) 658; *Mayor v. Sheffield*, 4 Wall. (U. S.) 189; *Davenport v. Ruckman*, 37 N. Y. 568; *Requa v. Rochester*, 45 N. Y. 129; *Springfield v. Le Claire*, 49 Ill. 476; *Smoot v. Mayor*, 24 Ala. 112; *Jones v. New Haven*, 34 Conn. 1; *Co. Comrs. v. Duckett*, 20 Md. 468; *Pittsburg v. Grier*, 22 Pa. St. 54; *Cook v. Milwaukee*, 24 Wis. 270; *Richmond v. Long*, 17 Gratt. (Va.) 375; *McCombs v. Akron*, 15 Ohio 476; *Selma v. Per-*

In many States, however, notably the New England States, the liability of cities and towns in such actions at common law is denied. In almost all, if not all of those States, in which the implied liability of municipal corporations for neglect of public duty is denied, liability is imposed by statute. The difference is important, since the right of action exists in those States only in those cases provided for by statute, and the terms of the several statutes as to notice, etc., must be strictly complied with.¹

In order to create a liability, the duty of keeping the highways in repair must be imposed upon the municipal corporation *as such*, and not upon it as an agency of the State, or upon its officers as independent public officers, and the authority to levy a tax for this purpose must be given.²

Hence, in most States, counties, townships and districts, being considered merely political divisions of the State, and acting only as its agent, are held not liable for injuries resulting from their neglect to perform their public duties. But in a few States it is held otherwise.³

kins, 68 Ala. 145; *Galveston v. Barbour*, 62 Tex. 172; s. c., 8 Am. & Eng. Corp. Cas. 577.

1. In *Hill v. Boston*, 122 Mass. 344; s. c., 23 Am. Rep. 332, this question was discussed at perhaps greater length than ever before, and all the English and American cases of any importance were reviewed, and the conclusion arrived at was that in the absence of statutory liability, or some special provision in its charter no private action could be brought against a municipal corporation for the neglect of a public duty. The same conclusion has been reached in *Chidsey v. Canton*, 17 Conn. 475; *Burritt v. New Haven*, 42 Conn. 174; *Reed v. Belfast*, 20 Me. 248; *Sanford v. Augusta*, 32 Me. 536; *Eastman v. Meredith*, 36 N. H. 284; *Hyde v. Jamaica*, 27 Vt. 443; *Pray v. Jersey City*, 32 N. J. L. 304; *Detriot v. Blackeby*, 21 Mich. 84; *Young v. Charleston*, 20 S. Car. 116; s. c., 47 Am. Rep. 827; *Tranter v. Sacramento*, 61 Cal. 271; *Altnow v. Sibley*, 30 Minn. 186; s. c., 44 Am. Rep. 191; *Beardsley v. Hartford*, 50 Conn. 529; s. c., 4 Am. & Eng. Corp. Cas. 595.

The duty of repairing is not imposed by the acceptance of a charter which merely allows the village, as a volunteer, to take supervision of the highways. *Parker v. Rutland*, 56 Vt. 224.

The rule exempting municipal corporations from liability grows out of the principal that a State cannot be made liable to an action for neglect or misfeasance of its officers, through which a person is injured, unless some

statute creates the liability. *Galveston v. Ponainsky*, 62 Tex. 118; *Bigelow v. Inhabitants of Randolph*, 14 Gray (Mass.) 543; *Eastman v. Meredith*, 36 N. H. 295.

2. *Distinction as to State Agency.*—*Dillon Municipal Corp.* (1881), § 1017. *Fort Wayne v. Dewitt*, 47 Ind. 391; *Richmond v. Courtney*, 32 Gratt. (Va.) 792; *Centerville v. Woods*, 57 Ind. 192; *Staples v. Canton*, 69 Mo. 592; *Jansen v. Atchison*, 16 Kan. 358; *Albrittin v. Huntsville*, 60 Ala. 486.

It has been held that if the city has not the legal authority to procure the necessary funds for repairing the highways, it will not be liable for injuries happening from defects in them. *Hines v. Lockport*, 50 N. Y. 236; *Weed v. Ballston*, 76 N. Y. 329.

To determine whether there is municipal responsibility for misfeasance or nonfeasance the question is whether the department whose acts or omissions are complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of, or charged with, a duty primarily resting upon the municipality. *Ehrgott v. Mayor*, 66 N. Y. 264.

3. *Quasi Corporations.*—*Waltham v. Kemper*, 55 Ill. 346; *Granger v. Pulaski Co.*, 26 Ark. 37; *Askew v. Hale Co.*, 54 Ala. 639; *Brabham v. Supervisors*, 54 Miss. 363; *State v. Hudson Co.*, 30 N. J. L. 137; *Treadwell v. Comra.*, 11 Ohio St. 190; *Larkin v. Saginaw Co.*, 11 Mich. 88; *Russell v. Steuben*,

Where the highway has been rendered unsafe by the act or order of the municipal authorities, the corporation will be held liable, even in those States which do not hold municipalities impliedly liable for their negligence.¹

2. Duty of Corporation.—The duty imposed upon a municipal corporation is that of keeping the highway free from such defects as render it unsafe for ordinary travel. This duty has, in general, been performed when it has made the surface of the ground over which the traveller passes, sufficiently smooth, level and guarded by railings, to enable him to travel with safety and convenience, by the exercise of ordinary care on his part.² The duty of light-

57 Ill. 35; *People v. Auditors*, 74 N. Y. 310; *Huffman v. San Joaquin Co.*, 21 Cal. 426; *Yeager v. Tippecanoe Township*, 81 Ind. 46; *Watkins v. Preston Co.*, 30 W. Va. 657; s. c., 20 Am. & Eng. Corp. Cas. 305.

Counties are liable in Indiana for negligence respecting county bridges. *Vaught v. Board, etc.*, 101 Ind. 123.

But in a few States, counties are held to an implied liability. *Calvert Co. v. Gibson*, 36 Md. 229; *Brown v. Jefferson Co.*, 16 Iowa 339.

1. Liability for Act of Corporation.—*Hill v. Boston*, 122 Mass. 344; s. c., 23 Am. Rep. 332; *Chicago v. Hesing*, 83 Ill. 204; s. c., 25 Am. Rep. 378; *Weet v. Brockport*, 16 N. Y. 161; *Wendell v. Troy*, 36 Barb. (N. Y.) 329; *Baltimore v. Pendleton*, 15 Md. 12.

2. Duty of Corporation.—Instances.—*Opinion of Hoar, J.*, in *Hixon v. Lowell*, 13 Gray (Mass.) 59: A municipal corporation is not an insurer against accidents upon the streets and sidewalks; nor is every defect therein, though it may cause the injury sued for, actionable; it is sufficient if the streets are in a reasonably safe condition for travel in the ordinary modes. 2 Dill. Mun. Corp., § 1019; *Blake v. St. Louis*, 40 Mo. 571; *Richmond v. Courtney*, 32 Gratt. (Va.) 792; *Centerville v. Woods*, 57 Ind. 192; *Seward v. Milford*, 21 Wis. 485.

And while the corporation must exercise vigilance in keeping its streets and sidewalks in a reasonably safe condition for public travel by night as well as by day, yet it cannot be expected to maintain the surface of its sidewalks free from all inequalities, and from every possible obstruction to more convenient travel. *Gosport v. Evans*, 112 Ind. 133; s. c., 18 Am. & Eng. Corp. Cas. 275.

The limit of duty on the part of a town with regard to the condition of

its highways, falls far short of making them absolutely safe under all circumstances, even for those who use them properly. And where the use is one that reasonable care and prudence could never have anticipated, there is no duty on the town at all in reference to it. *Wilson v. Granby*, 47 Conn. 59; s. c., 36 Am. Rep. 51; *Emporia v. Schmidling*, 33 Kan. 485; s. c., 7 Am. & Eng. Corp. Cas. 86.

Actions against municipal corporations for injuries sustained by individuals while using or passing along its streets are founded upon the negligence of their officers in the performance of their official duties, and cannot be sustained without proof of such negligence. *Dubois v. Kingston*, 102 N. Y. 219; s. c., Am. & Eng. Corp. Cas. 630.

It is beyond human ingenuity to devise a plan which is not capable of danger to heedless persons or young children who cannot be expected to appreciate the danger; and reasonable safety is what the law requires, and no more. *Shippy v. Au Sable*, (Mich.) 18 Am. & Eng. Corp. Cas. 369.

The fact that a city has expended all the money at its disposal for repairing the highways, will not exempt it from liability. *Prideaux v. Mineral Point*, 43 Wis. 513.

But it is within the discretion of commissioners of highways of a town, where they have not sufficient funds in their hands to make all needed repairs, to apply the funds in making such repairs as in their judgment are most urgently needed, and they are not responsible for an error in judgment in doing so. *Monk v. New Utrecht*, 104 N. Y. 552; s. c., 18 Am. & Eng. Corp. Cas. 352.

Where the city assumes such duty it cannot be heard to say that it failed to

perform it because the time of its agents on whom it had devolved the work was so occupied with other duties as to prevent them from giving their attention to the street in question. *Tritz v. City of Kansas*, 84 Mo. 632.

Ordinary Care Required.—Township officers cannot ignore common sense and ordinary experience in discharging their duties, and neglect to keep in repair a bridge which is generally suspected to have become weakened from age, merely because they have had no actual notice of any defect. But they are only required to exercise ordinary care and prudence and reasonable intelligence in performing their duty of supervising the condition of roads and bridges and keeping them in repair; and in determining the standard of diligence required from them by law it is proper to consider the size of the township, the sparsity of the population, the number and remoteness of the roads and bridges and the improbability of finding road officers with exceptional qualifications. *Medina v. Perkins*, 48 Mich. 67.

They must be on the watch for hidden defects in township bridges; and their neglect of reasonable and ordinarily effective watchfulness will make the township liable for injuries resulting from such defects. *Stebbins v. Keene*, 55 Mich. 552.

If the city knew, or by the exercise of reasonable care and caution, could have ascertained the defective condition of its sidewalk, it is liable for injuries received by reason of such defective condition, although not one of a hundred persons passing over it would have noticed the defect. *Squires v. Chilli-cothe*, 89 Mo. 226; *Jansen v. Atchison*, 16 Kan. 358; *Eudora v. Miller*, 30 Kan. 494.

Duty to Keep Streets Unobstructed.—A municipal corporation is as much bound to keep a street or highway free from obstruction when the title has been acquired by user as when acquired by grant or condemnation. *Beaudeau v. Cape Girardeau*, 71 Mo. 393.

In an action against a town for personal injuries caused by a defect in S Street, it appeared that S Street, which had long been open to and used by the public, was laid out by the road commissioners of the town as a town way; that the report of the laying out was filed by them in the town clerk's office; that this report was accepted by the town at a town meeting, and the

way was built by the town; and that the notice of this meeting was not in accordance with a by-law of the town. The judge ruled "that S Street had not been laid out in accordance with law, and that, to prove it to be a dedicated way, the jury must be satisfied that it had been used by the public for twenty years before 1846; but that, if the public was not cautioned against travelling upon it, the town would be liable for an accident to persons coming out of such way, as well as those entering thereon." *Held*, that the defendant had no ground of exception. *Taylor v. Woburn*, 130 Mass. 494.

Under the 1339 § R. Stat. of Wisconsin a town is not liable for a defective condition of the highway where such way has been adopted as part of the county highway. *Stilling v. Thorp*, 54 Wis. 528; *Bishop v. Centralia*, 49 Wis. 669.

The city is not rendered liable by the mere fact that it had *permitted* the use of the sidewalk by the public for several years, the same not being within the limits of any recognized city highway. *Bishop v. Centralia*, 49 Wis. 669. *Compare Johnson v. Milwaukee*, 46 Wis. 568; *James v. Portage*, 48 Wis. 677. But the city may be liable for defects existing beyond the limits of the city. Thus, where the Mass. Statute of 1870, ch. 219, authorized county commissioners "to lay out a highway and construct a bridge and suitable draw across the M River in the towns of G and H;" and provided that the commissioners were "to determine and award what cities and towns receive particular and special benefit from the construction and maintenance of said road and bridge, and to apportion and assess upon said county and such cities and towns, and in such manner and amount as they shall deem equitable and just, the cost of construction and maintenance of such road, bridge and draw." The commissioners duly proceeded to locate the highway and bridge; ordered the same to be constructed, assessing the expense thereof on the county, the towns of W and G, and the city of H; and awarded "that the city of H and the town of G shall each maintain and keep in repair one-half of the bridge and one-half of the draw, each maintaining that part contiguous to the highway leading on to the bridge from their own city and town." *Held*, that the award was valid; and that an action might be

ing the streets depends upon statutory enactment.¹

3. Barriers.—A city must protect its streets with barriers when there is any defect in, or so near to the highway, that persons,

maintained against the town of G for personal injuries caused by a defect in that portion of the bridge which the town was by the award bound to keep in repair, although such portion was outside the limits of the town of G. The liability in the latter case is of course statutory. *Whitman v. Groveland*, 131 Mass. 553.

Where a municipal corporation omits to act with reasonable diligence after notice of an unlawful obstruction in a street which might occasion injury to persons lawfully thereon, it is no defense to an action for injuries so occasioned that it was not known to the corporation that the obstruction was in fact dangerous. *Rehberg v. Mayor*, etc., 91 N. Y. 137; s. c., 2 Am. & Eng. Corp. Cas. 529.

A municipality is bound to take notice of and guard against the perishable nature of materials employed in public places. *Indianapolis v. Scott*, 72 Ind. 196; *Aurora v. Hillman*, 90 Ill. 61; *Grove v. Kansas*, 75 Mo. 672; *Estelle v. Lake Crystal*, 27 Minn. 243. But see *Young v. Charleston*, 20 S. Car. 116; s. c., 6 Am. & Eng. Corp. Cas. 54.

Liability for Defect in Plan.—Municipal corporations are not liable for any defect or want of efficiency in the plan adopted for the construction of their streets. This is a legislative or judicial function, over which the courts have no authority. *Child v. Boston*, 4 Allen (Mass.) 41; *Mills v. Brooklyn*, 32 N. Y. 489.

In an action by a foot passenger against a municipality to recover damages for injuries resulting from an alleged defect in one of defendant's street crossings, it is error to leave the question to the jury whether there was any necessity for the construction of said crossing. That is a matter purely and solely within the discretion of the municipal authorities. *Easton v. Neff*, 102 Pa. St. 474; s. c., 48 Am. Rep. 213.

Where power is conferred upon a municipal corporation to make local improvements, its exercise is *quasi* judicial or discretionary, and for a failure to act or an erroneous estimate of the public needs, a civil action cannot be maintained against it. *Urquhart v. Ogdensburg*, 91 N. Y. 67.

A city is not liable for injuries that

may happen because crosswalks or side-walks are not laid at all, or because they are built upon a certain plan; that it is within the discretion of a city as to how many and in what places crosswalks shall be laid. *Williams v. Grand Rapids*, 59 Mich. 51; s. c., 13 Am. & Eng. Corp. Cas. 464.

A municipal corporation is not liable for mere errors of judgment as to the plan of a public improvement, but is responsible for negligence in devising the plan of an improvement as well as for negligence in executing the work. *North Vernon v. Voelger*, 103 Ind. 314.

1. Duty of Lighting Streets.—Where a city is required by law to light its streets, it is liable for neglect to do so; otherwise, not. *Gaskins v. Atlanta*, 73 Ga. 746; *Butler v. Bangor*, 67 Me. 385; *Randall v. Eastern R. Co.*, 106 Mass. 276; *Noble v. Richmond*, 31 Gratt. (Va.) 271.

In *Freeport v. Isbell*, 83 Ill. 440, the court said: "It might be a matter of great convenience to have all our cities or incorporated towns well lighted in the night-time with gas, and it might add to the security of pedestrians, whose business or tastes might require them to travel at late hours of the night; but to hold that a city or incorporated town was under a legal obligation to thus provide the streets with light, might well be regarded as an act of usurpation on the part of the courts, of the legislative power, which has been exclusively delegated to the legislative department of the municipality."

Lyon v. Cambridge, 136 Mass. 419. A city is under no obligation to light its streets, and its mere neglect to do so is not a ground of liability unless the charter expressly imposes the duty. But inasmuch as a street partially obstructed or out of repair may be reasonably safe if lighted, but dangerous if unlighted, the fact that it was or was not lighted may be material upon the question of negligence. *Miller v. St. Paul* (Minn.), 20 Am. & Eng. Cor. Cas. 349.

Where there is such a defect in a gutter-crossing of a city as be dangerous to persons passing at night, it is the duty of such city to guard the same in some way, and the absence of gas-light from street-lamps, or other lights, in such vicinity, may be considered in

using reasonable care, may be injured thereby.¹

But where the defect is so far from the highway that it can

determining the question of negligence. *Indianapolis v. Scott*, 72 Ind. 196.

1. *Railings and Barriers.*—In those cases where the erection of rails or barriers along the highway is a reasonable and necessary precaution to guard travellers against injury the municipality is bound to provide such safeguards, and will be *held* liable for a failure in this regard. *Haskell v. New Gloucester*, 70 Me. 305; *Stack v. Portsmouth*, 52 N. H. 221; *Davis v. Hill*, 41 N. H. 329; *Palmer v. Andover*, 2 Cush. (Mass.) 600; *Rowell v. Lowell*, 7 Gray (Mass.) 100; *Jones v. Waltham*, 4 Cush. (Mass.) 299; *Stevens v. Boxford*, 10 Allen (Mass.) 93; *Burnham v. Boston*, 10 Allen (Mass.) 290; *Babson v. Rockport*, 101 Mass. 93; *Button v. Cummington*, 107 Mass. 347; *Stinson v. Gardner*, 42 Me. 248; *Haskell v. New Gloucester*, 70 Me. 305; *Freeport v. Isbell*, 83 Ill. 440; *Bassett v. St. Joseph*, 53 Mo. 290; *Koester v. Ottumwa*, 34 Iowa 41; *Williams v. Clinton*, 28 Conn. 264; *Murphy v. Gloucester*, 105 Mass. 470; *Com. v. Wilmington*, 105 Mass. 599; *Pittston v. Hart*, 89 Pa. St. 389; *Kennedy v. Mayor, etc.*, 73 N. Y. 365; *Atlanta v. Wilson*, 59 Ga. 544; *Wilson v. Atlanta*, 60 Ga. 473; *O'Leary v. Mankato*, 21 Minn. 65; *Chicago v. Hislop*, 61 Ill. 86; *Pittston v. Hart*, 89 Pa. St. 389.

The city of Richmond lowered the grade of two streets, making a precipice of eight feet at their intersection where there was an old and constantly used pathway over an adjoining lot into those streets. The city had placed barriers at the end of the streets, but nothing to warn passers along the pathway. A traveller, ignorant of the precipice and without negligence on her part, at night, walked along that pathway down into the precipice, causing her great damage. In an action against the city, *held*, that the plaintiff was entitled to her action against the city for damages. *Orme v. Richmond*, 79 Va. 86; s. c., 5 Am. & Eng. Corp. Cas. 605.

Where a railroad company appropriates the entire width of a public road for its track, but actually uses only a portion thereof, leaving the remainder open for travel but in a dangerous condition, it is the duty of the township supervisors either to fence off the dangerous portion so that the public

cannot travel thereon, or else, to erect and maintain such guards as may render the said road safe for travel. *Aston v. McClure*, 102 Pa. St. 322.

When a city in grading a street leaves a high and steep embankment in the street, without railing, light or other guard or warning to prevent those passing on such street from falling off such embankment, it may be adjudged guilty of negligence, although the width of the cut and the height of the embankment were established by the council, and although the work of grading was done in a proper and careful manner. The negligence consists, not in the plan of the work or the manner in which it was done, but in the failure to provide suitable protection against accident after the work of grading had been finished. *Wyandotte v. Gibson*, 25 Kan. 236. In *Hart v. Red Cedar*, 63 Wis. 634.

The defendant was repairing one of its bridges. The plank had been taken up; and at the close of a day's work its surveyor made a barricade to prevent travelling on the bridge; the plaintiff, ignorant of its condition, at night drove upon it and was injured. The question being whether the barricade was sufficient, the court charged the jury that if the surveyor "fully discharged the duty of the town, at the close of the day's work, by way of precaution against accident to travellers in the night time, the town is not responsible for this accident, nor liable in this case, although the barricade was rendered insufficient by accident, or malicious interference afterwards." *Held*, no error. *Mullen v. Rutland*, 55 Vt. 77.

In case of injuries suffered in attempting to pass over streets while they are undergoing repair or improvement, a city is liable only for a want of ordinary care; and where a street, during the process of repair, has been made safe, so far as the public is concerned, by barriers or other proper precautions, but afterwards, suddenly and without warning to or fault of the city, becomes unsafe by the removal of such barriers or other precautions by some unknown person, the city is not liable for damage occasioned thereby, without actual or implied or presumptive notice to it of such removal, and the lapse of a reasonable time for guarding against the consequent

only be reached by one straying from the highway, no barriers need be erected.¹

danger. *Klatt v. Milwaukee*, 53 Wis. 196; s. c., 40 Am. Rep. 759.

It is not negligence *per se* in a municipal corporation to fail to construct or maintain a railing or barrier for the security of travellers on its streets. *Staples v. Canton*, 69 Mo. 592.

Where a city street has been opened for travel its entire width, the city must keep it in a reasonably safe condition from sidewalk to sidewalk, and cannot excuse itself for leaving an unguarded excavation in such street by showing that there was as a matter of fact no travel thereon. *Crystal v. Des Moines*, 65 Iowa 502.

In constructing a bridge over the Erie canal in the village of L F, the State built a wing or retaining wall north of and parallel with the canal; the boundary line of the State lands was about twenty-one inches north of the wall. The village subsequently laid out a street along the northerly side of the canal; the description in the ordinance included said retaining wall and the strip of State land north of it, and said strip was subsequently used as part of the street. There was no railing or guard along the wall, and plaintiff's intestate in driving along the street on a dark night drove so far south that he, with his team and wagon, was thrown over into the canal, and he was drowned. A railing on the wall would have prevented the accident. In an action to recover damages, *held*, that the attempt on the part of the village to appropriate a part of the State lands for the street was a nullity; that the village had no legal right to put a railing on the wall, and no legal negligence could be predicated of an omission so to do, or of a failure of the village to obtain permission of the State to erect such a barrier. *Veeder v. Little Falls*, 100 N. Y. 343. In *Carpenter v. City of Cohoes*, 81 N. Y. 21; s. c., 37 Am. Rep. 468, the same rule was laid down with regard to a bridge across the Erie canal.

1. Municipality not Bound to Erect Guards Against Excavations far Beyond Line of Highway.—A municipality is not bound to provide guards or railings where the excavation to be guarded against is not immediately adjacent to the highway, but such a distance from it that the municipality cannot reasonably be expected to guard against it.

Nebraska City v. Campbell, 2 Black (U. S.) 590; *Adams v. Natick*, 13 Allen (Mass.) 529; *Warren v. Holyoke*, 112 Mass. 362; *Sparhawk v. Salem*, 1 Allen (Mass.) 30; *Murphy v. Gloucester*, 105 Mass. 470; *Puffer v. Orange*, 122 Mass. 389; *Lansing v. Toolan*, 37 Mich. 152; *Chicago v. Gallagher*, 44 Ill. 295; *Young v. District of Columbia*, 3 McArthur (D. C.) 137; *Monmouth v. Sullivan*, 8 Ill. App. 50; *Daily v. Worcester*, 131 Mass. 452; *Goodin v. Des Moines*, 55 Iowa 67; *Duffy v. Dubuque*, 63 Iowa 171; s. c., 4 Am. & Eng. Corp. Cas. 635.

A city is not bound to erect barriers to prevent travellers from straying from a highway, although there is a dangerous place twenty-eight feet from the highway, which they may reach by so straying. *Daily v. Worcester*, 131 Mass. 452.

A town is bound to erect barriers or railings where a dangerous place is in such close proximity to a highway as to make travelling on the highway unsafe. *Harris v. Inhabitants*, 128 Mass. 321.

A traveller driving with a horse and wagon, was precipitated over an embankment which was but thirty-four feet from a travelled part of the highway, and which was not separated therefrom by a railing. It was *held* that he could not recover damages from the town. *Barnes v. Inhabitants*, 138 Mass. 67; s. c., 7 Am. & Eng. Corp. Cas. 40.

In *Chicago v. Hesing*, 83 Ill. 204, the city was *held* liable for the death of a child four years old caused by falling into an unguarded ditch filled with water five feet deep. The ditch bordered on a narrow side-walk. The court said it was gross negligence to permit anything so dangerous to be unguarded in a public street. But where a person strayed from the highway and fell into an unguarded dock twenty-five feet from the boundary of the highway, the city was not *held* liable, the court saying: "A dangerous place, twenty-five feet from the highway, clearly would not be in such dangerous proximity as to make travelling on it unsafe." *Murphy v. Gloucester*, 105 Mass. 470. In *Hubbell v. Yonkers*, 104 N. Y. 434, s. c., 58 Am. Rep. 522, the plaintiff was riding along one of defendant's streets, the road-bed of which

It is no defense that no barriers would have been necessary if the traveller's horse had been perfectly quiet.¹

Cities are not required to erect barriers at areas and basement steps, it being necessary to the business of a city that such places should be left open.²

was thirty feet wide, macadamized and in good condition. On one side, where the street was graded up about twelve feet, there was a side-walk ten feet wide, separated from the road-bed by a curbstone eight inches high. There was no fence, wall or other obstruction to guard the outer edge of the side-walk. The horse attached to the wagon in which plaintiff was riding became frightened and commenced to shy, and, spite the efforts of the driver, went over the curbstone and side-walk and down the embankment, carrying the wagon and plaintiff with him. In an action to recover damages for injuries received by plaintiff, it appeared that the street had been in the same condition since its opening over ten years before, and, so far as appeared, no similar accident had occurred. *Held*, that defendant was not liable; that the accident was one of a class so rare, unexpected and unforeseen, defendant could not be charged with negligence for a failure to guard against it.

A city, bridging a street, made an excavation in a shallow stream, in which children were accustomed to play, but failed to protect it in any way. A small child fell into the excavation and was drowned, and the city was *held* liable for his death. *Emmelman v. Indianapolis*, 108 Ind. 530; s. c., 58 Am. Rep. 65.

It is not the duty of a city to erect barriers at points where approach from private property would be dangerous; it is under no obligation to prevent persons from coming upon the street from private property, although such mode of access be dangerous. *Goodin v. Des Moines*, 55 Iowa 67.

1. In *Hey v. Philadelphia*, 81 Pa. St. 44, the city was *held* liable where the accident happened from want of a barrier, but would not have happened if the horse which was being driven had been perfectly quiet. It was said in that case that because steady teams with cool drivers would be safe, but drivers of only ordinary nerve with fractious teams would not, was no reason why a road should not be guarded. In *Lower Macungie Township v. Merkhoffer*, 71

Pa. St. 276, the court said: "A highway must be kept in such repair that even skittish animals may be employed without risk or danger on it." And this was *held* to be the rule where a horse became frightened and backed off a bridge. *Newlin Township v. Davis*, 77 Pa. St. 317. See, also, *Kennedy v. Mayor, etc.*, 73 N. Y. 365.

Where plaintiff securely tied his horse to a post on a city street, the continuity of which was broken by a precipitous and impassable ravine, along which the city had erected no barriers, and plaintiff's horse, becoming frightened, broke loose and ran along the street and plunged down the precipice and was killed; *held*, that the city was not liable to plaintiff for the damages by him sustained. *Moss v. Burlington*, 60 Iowa 438; s. c., 46 Am. Rep. 82.

2. **Railings at Areas.**—When an open area or hatchway is contiguous to a side-walk and is notoriously and evidently dangerous, it is *held* by some authorities that the municipality is liable for a failure to provide proper guards or to oblige the property-owner to supply them. *Fitzgerald v. Berlin*, 51 Wis. 81; *City Council of Augusta v. Hafers*, 59 Ga. 151; *Rowell v. Williams*, 29 Iowa 210; *Grove v. Kansas City*, 75 Mo. 672. But see, *contra*, *Witham v. Portland*, 72 Me. 539; *Temperance Hall Assn. v. Giles*, 33 N. J. L. 260.

A city is not bound to maintain a railing in front of the numerous basement offices and shops that line its business streets. Open basement descents being necessary to the business of a city, the failure of the city to erect a barrier in front of them is not of itself negligence, and the city is not liable to a passer-by who, without negligence on his part, falls down such descents. *Beardsley v. Hartford*, 50 Conn. 529; s. c., 4 Am. & Eng. Corp. Cas. 559.

Where a descending stairway was *parallel* to the sidewalk, and there was a sufficient barrier on the *side* thereof, the defendant city was not bound to cause a barrier or gate to be maintained at the *entrance*; and it was error to submit to the jury the question

4. Falling Substances Causing Injury.—In general, municipal corporations are liable for injuries caused by falling substances, such as signs, awnings, decayed trees, and the like, where the insecurity of the objects is or ought to be apparent to the authorities. But where the liability of municipal corporations is only that imposed by statute, such injuries have been held not to come within the statutory words "defective highways."¹

whether it was negligent in failing to do so. *Fitzgerald v. Berlin*, 51 Wis. 81; s. c., 37 Am. Rep. 814.

A brick wall surmounted by a stone coping, adjoining a public sidewalk, is not an enticing structure within the meaning of the rule which holds persons liable for damages if they neglect to erect suitable barriers around dangerous objects near the streets and sidewalks likely to allure children to their hurt. *Clarke v. Richmond*, (Va.) 20 Eng. & Am. Corp. Cas. 320.

Where an excavation is made in the sidewalk for a proper purpose by the owner of the premises abutting, the city is not liable for an injury occasioned by negligence on his part in temporarily failing to keep the same covered so as to be safe for passers-by. *Lafayette v. Blood*, 40 Ind. 62.

1. Liability of Municipality for Injury from Falling Substances.—Where a municipality permits a permanent wooden awning or roofing to be constructed over the sidewalk, it is liable for an injury occasioned by a defect therein, although it is not apparently in bad repair. *Norristown v. Moyer*, 67 Pa. St. 355; *Hutson v. New York*, 9 N. Y. 163; *Davenport v. Ruckman*, 37 N. Y. 568; *Requa v. Rochester*, 45 N. Y. 129; *Grove v. Fort Wayne*, 45 Ind. 429; *House v. Montgomery Co.*, 60 Ind. 580; *Drake v. Lowell*, 13 Metc. (Mass.) 292; *Day v. Milford*, 5 Allen (Mass.) 98; *Merrill v. Portland*, 4 Cliff. (U. S.) 438.

A city is liable for the fall of a wooden awning, if it had notice of its condition, or the defect had existed for a sufficient time for notice to be implied although the structure was unauthorized. *Hume v. Mayor*, etc., 74 N. Y. 639.

The city is not absolved from liability for negligently permitting a dangerous awning to overhang the street, by the fact that the council has failed to pass an appropriate ordinance for the removal and abatement of nuisances. *Bohen v. Waseca*, 32 Minn. 176; s. c., 50 Am. Rep. 564.

In *Jones v. New Haven*, 34 Conn.,

the city was held liable for an injury caused by the falling of a decayed limb from a tree in a public park. This was under a charter accepted by the city and which gave it the exclusive control of the public parks and imposed upon it the duty to keep them in safe condition for public use. See, also, as to fall of dead limbs from trees, *Salisbury v. Herchenroden*, 106 Mass. 458.

In a city where for a long time the municipality has, by charter, had authority to plant, rear, trim and preserve ornamental shade trees in the streets, proof that a defendant owns and occupies the lot in front of which such a tree stands on the street, is not sufficient evidence that he planted or maintains the tree for his own uses, so as to charge him with the duty of trimming the same, and with responsibility for injury received by the plaintiff upon whom a neglected rotten limb had fallen. *Weller v. McCormick*, 47 N. J. L. 397; s. c., 54 Am. Rep. 175.

Where a section of roof was allowed to stand on a sidewalk, and it blew down on one who was partly on the walk and partly on the adjoining premises, the city was held liable. *Duffy v. Dubuque*, 63 Iowa 171; s. c., 4 Am. & Eng. Corp. Cas. 634.

So of a showboard on private land, so near the street and defectively supported as to be obviously dangerous. *Langan v. Atchinson*, 35 Kan. 318.

But in *Hewison v. N. H.*, 37 Conn. 475, it was held that a nuisance upon a highway endangering public travel is a public nuisance, and the duty to remove it, whether imposed or assumed, is a public governmental duty, and that the city was not liable for an injury caused by the falling of a large piece of cloth suspended perpendicularly across the street with heavy iron weights fastened to it.

And in *Hixon v. Lowell*, 13 Gray (Mass.) 59, a city was held not liable for the fall of accumulated snow and ice from a roof overhanging the sidewalk, and the same was held to be the rule, where a weight attached to a flag

5. What Part of Highway must be Repaired.—The duty of repairing extends only to that part of the highway which is in actual use, provided it is sufficient for the needs of the public. In the built-up portions of cities and towns this extends to the entire width of the street, but in streets in the less closely built portions of the former, and in villages, and on country roads, only the travelled part need be kept in repair.¹

The corporation is liable for the defective condition of that portion of the highway which it permits to be used, although not

suspended across the street fell. *Hewison v. New Haven*, 34 Conn. 136.

A city is liable for injuries resulting from the walls of a house destroyed by fire having fallen, when their dangerous condition, by the exercise of ordinary care on its part, could have been discovered in time to have secured or taken them down. *Grogan v. Broadway Foundry Co.*, 87 Mo. 321.

1. Width to be kept in Repair.—In general, the duty to keep in repair only extends to the "travelled path," so much of the way as is actually used, provided it is wide enough, to be safe. *Fritz v. Kansas City*, 84 Mo. 632; *Sykes v. Pawlet*, 43 Vt. 446; *Fitzgerald v. Berlin*, 64 Wis. 203.

In closely built up portions of a city it is the duty of the authorities to keep the entire street in a safe condition, but this is not the rule as regards country roads within the territorial limits of a city. It is sufficient if a portion of the width of the road is kept in smooth condition and safe and convenient for travel. *Monongahela v. Fischer*, 111 Pa. St. 9; s. c., 56 Am. Rep. 241.

If the improvement of a city street is such as to prepare it for travel with teams throughout its entire width, it is the duty of the city to keep the whole width of it in safe condition for such travel; and it cannot be heard to say the purpose was that only a portion of it should be so used. *Stafford v. Oskaloosa*, 64 Iowa 251.

Public travel is not supposed to occupy all parts of a country highway leading out of a village, though within its limits, and the public authorities cannot be expected to put the road in condition as if it were. *Keyes v. Marcellus*, 50 Mich. 439; s. c., 45 Am. Rep. 52.

A town is not required to keep the entire surface of a road between the fences clear of snow drifts, but need only provide a reasonably safe path.

Seeley v. Litchfield, 49 Conn. 134; s. c., 44 Am. Rep. 213.

While, generally speaking, it is the duty of a city to keep its streets in reasonably safe condition for public travel, it is not thereby implied that every street and the whole width of every street must be placed and kept in good condition. The city may, without incurring liability, leave certain streets entirely unopened, and in others put only a portion of the width in condition for use. *Wellington v. Gregson*, 31 Kan. 99; s. c., 6 Am. & Eng. Corp. Cas. 215.

To render the town liable it is not necessary that the defect be in the way, if it is in such close proximity as to render travelling along the way dangerous. *Drew v. Sutton*, 55 Vt. 58; s. c., 45 Am. Rep. 644.

A city may be liable for a defect in the path between the sidewalk and the street, if used with the knowledge of the city. *Aston v. Newton*, 134 Mass. 507.

Municipal discretion as to how much of a street shall be set aside for the actual highway, and how much for the sidewalk, trees, gutters, etc., cannot be reviewed judicially or passed upon by a jury so long as no distinct legal duty has been violated. *McArthur v. Saginaw*, 58 Mich. 357; s. c., 55 Am. Rep. 687.

Where a woman fell into a hole within five feet of the highway in a thinly settled part of a village, the village was held not liable. *Keyes v. Marcellus*, 50 Mich. 439; s. c., 45 Am. Rep. 52.

A town is not liable for an injury occasioned to a traveller by a defect in a public common, which has been conveyed to the town upon the condition that it should "forever after be kept open as and for a common for the use of the inhabitants of the town," and across which the town has constructed footpaths. *Clark v. Waltham*, 128 Mass. 567; s. c., 35 Am. Rep. 159. And

authorized, or laid out as such.¹

If the corporation does anything to induce the public to travel on any part of the highway not laid out or dedicated, it is liable for its condition.²

6. Objects Calculated to Frighten Horses.—Cities are liable for licensing, or allowing to remain in the street, anything which is calculated to frighten horses that are ordinarily well behaved. But

in *Paine v. Brockton*, 138 Mass. 564, the town was *held* liable for a defect between the highway and the entrance to a private way.

1. Tacit Permission.—If the city tacitly permit a thoroughfare to be used as a public street, even though it does not authorize it, it is liable for its condition. *Gallagher v. St. Paul*, (Minn.) 28 Fed. R. 305. So, where the city has not authorized the construction of a sidewalk, if it allow it to remain in a defective or dangerous condition for a long time, it will be liable for not repairing or removing it. *Saulsbury v. Ithaca*, 94 N. Y. 27; s. c., 4 Am. & Eng. Corp. Cas. 591.

Where the margin of a road has by use become a part of the road, the town must keep it in repair. *Potter v. Castleton*, 53 Vt. 435.

But the city is not liable for permitting the use of a walk for several years, where it is not within the limits of any recognized city highway. *Bishop v. Centralia*, 49 Wis. 669.

Where there is no visible boundary to the line of a city street, and a portion of the road travelled on is so near the line, although really outside of the street, as to induce the belief in any one passing upon the street and exercising reasonable care that he is within the line thereof, if such portion is for any reason rendered dangerous for travel and the city has notice thereof, it will be liable. *Jewhurst v. Syracuse*, 108 N. Y. 303; s. c., 19 Am. & Eng. Corp. Cas. 372.

And where, owing to the obstructed condition of the sidewalk, foot passengers have become accustomed to use another pathway, the same duties devolve upon the municipality in connection with that pathway as originally existed with regard to the sidewalk. *Barton v. Montpelier*, 30 Vt. 650.

2. City's Acts to Induce Travel.—Where a city has graded or improved any portion of a street, for the purpose, and with the result, of inviting and inducing public travel thereon, there

arises the duty to keep such portion in repair, and the consequent liability for failing to do so. *Triese v. St. Paul*, (Minn.) 18 Am. & Eng. Corp. Cas. 301.

In *Mansfield v. Moore*, 21 Ill. App. 326, Magruder, J., said, "They (the city authorities) so acted in reference to the sidewalk as to hold it out to the people as a public thoroughfare. They invited the public to use it as belonging to the village. Having assumed to perform the same duty in regard to it as though it was a part of one of the streets, they were bound to use the same degree of vigilance as they exercised in reference to other sidewalks within the limits of the corporation."

The fact that a pavement was continuous from a sidewalk on a street over the adjacent lands to the place of danger, was not, of itself, an implied invitation to a person on the sidewalk to go upon the adjacent lands. *Kelly v. Columbus*, 41 Ohio 263; s. c., 7 Am. & Eng. Corp. Cas. 35.

The fact that the city after the accident appropriated and expended a sum of money in the repair of said street will not, in the absence of other acts of acceptance, be admissible in evidence as tending to show that the city had previously recognized and adopted said street. *Kennedy v. Cumberland*, 65 Md. 514.

To relieve itself from liability for the want of repair of a side-track which is equally as accessible and apparently as much travelled as the prepared track, the town should give some reasonable notice to the public travelling there that the use of such side-track is unauthorized. Such notice may be given by placing obstructions in the side-track, or by putting up notices, or in any other manner which will sufficiently notify travellers that the town desires them to use the graded track alone. *Cartwright v. Belmont*, 58 Wis. 370; s. c., 20 Am. & Eng. Corp. Cas. 603. Posting a conspicuous and legible notice is sufficient. *Smith v. Lowell*, 139 Mass. 336.

not every thing which frightens vicious or timid horses, is a defect.¹

When a horse, frightened at something for which the corporation is not liable, becomes uncontrollable, and the traveller is injured by a defect in the highway, there is no liability. But if the driver loses control only for a moment, the rule is otherwise,

1. **Frightening Horses.**—Towns and cities, in the absence of contributory negligence, are liable for injuries resulting from the fright of horses, of ordinary gentleness, at objects naturally calculated to frighten them, and which the corporation has negligently placed, or permitted to be placed, and to remain upon the street. *Morse v. Richmond*, 41 Vt. 435; *Dimock v. Suffolk*, 30 Conn. 129; *Hewison v. New Haven*, 7 Am. L. Reg. 783; *Littleton v. Richardson*, 32 N. H. 59; *Chamberlain v. Enfield*, 43 N. H. 358; *Winship v. Enfield*, 42 N. H. 197; *Card v. Ellsworth*, 65 Me. 547; *Bartlett v. Hooksett*, 48 N. H. 18; *Ayer v. Norwich*, 39 Conn. 376; *Foshay v. Glen Haven*, 25 Wis. 288; *Clinton v. Howard*, 42 Conn. 294; *Fritsch v. Allegheny*, 91 Pa. St. 226; *Bennett v. Fifield*, 13 R. I. 139; *Rushville v. Adams*, 107 Ind. 475; s. c., 57 Am. Rep. 124.

In *Township of North Manheim v. Arnold*, (Pa.) 13 Atlantic Rep. 444, the court said: "It is well settled by the decision of this court, and of the courts of other States, that where objects, ordinarily calculated to frighten road-worthy horses, are placed, and suffered to remain, in the public highway, they are regarded as defects in the road, and the public authorities, after due notice, are liable for injuries caused thereby." *Whart. Neg.*, § 983; *Ayer v. Norwich*, 39 Conn. 376; *Morse v. Richmond*, 41 Vt. 435; *Stone v. Hubbardston*, 100 Mass. 50; *Foshay v. Glen Haven*, 25 Wis. 288; *Bartlett v. Hooksett*, 48 N. H. 18; *Card v. City of Ellsworth*, 65 Me. 547.

While the plaintiff and her husband were driving along the streets of the defendant town, their horse was frightened at a fire used by a person licensed by the city to manufacture candy in one of the streets. The horse ran away, throwing them out of the buggy and injuring the plaintiff. In an action against the city for damages, *held*, that the city was liable; that it is the duty of municipal corporations to keep their streets free from such obstructions as, by their appearance, are calculated to

frighten horses of ordinary gentleness. *Rushville v. Adams*, 107 Ind. 475; s. c., 15 Am. & Eng. Corp. Cas. 259.

In *Piollet v. Simmers*, 106 Pa. St. 95, it was said that the liability would attach if the objects were "calculated to frighten ordinary gentle and well trained horses." "For, if persons are bound to guard against frightening skittish, vicious, timid and easily frightened horses, it will not be possible to state any limit of precaution which will be a protection against liability." And the court quoted the language of the court in *Pittsburg, etc., Ry. Co. v. Taylor*, 104 Pa. St. 306: "The frightening of a horse is a thing which cannot be anticipated, and is governed by no known rules. A leaf, a piece of paper, a lady's shawl fluttering in the wind, a stone or a stump by the wayside, will sometimes alarm even a quiet horse." See *Cushing v. Bedford*, 125 Mass. 526, where a horse frightened at a brilliantly painted watering trough.

It is not admissible to show that numerous horses were driven past the object at which the plaintiff's horse frightened without being frightened. *Bloor v. Delafield*, 69 Wis. 273; s. c., 18 Am. & Eng. Corp. Cas. 289.

Where the plaintiff's horse took fright at the carcass of a horse which had been lying in one of the streets of the city of Allegheny for about twenty-four hours, and, becoming unmanageable, ran away, inflicting severe injuries upon plaintiff, it was *held* that the question of negligence was for the jury. *Fritsch v. Allegheny*, 91 Pa. St. 226. In *Stanley v. Davenport*, 54 Iowa 463, s. c., 37 Am. Rep. 216, the city was *held* liable for injuries caused by the plaintiff's horse taking fright at a steam motor used on the street by permission of the city, which had no statutory authority to permit such use of the street. So a village was *held* liable for permitting an advertising banner to hang across the street, causing a horse to run away. *Champlin v. Penn Yan*, 34 Hun. (N. Y.) 33. And so for licensing an exhibition of bears in the

and horses are likely to swerve moment-ly, the highway must be kept in such condition as to prevent injury.¹

Ice and Snow.—The question of liability for accumulations of ice and snow depends upon the amount of snow-fall, the weather, and the length of time the snow is allowed to remain. If the streets are in an evidently dangerous condition for an un-

dering a team. *Wis. 643.* A horse was frightened at the boards on their wagon against a travelled part of the street was not held liable. *Me. 152.*

Driver Control.—Where a horse is frightened at some object for which the municipality is not responsible, or gets beyond control, and a vehicle is injured in consequence of a defect in the street, the municipality is not liable, as the defect was the producing cause of the injury. *Davis v. Dudley, 4 Allen*

Palmer v. Andover, 2 Me. 600; Fogg v. Nahant, 98 Mass. 278; Jackson v. N. H. 107; Perkins v. Me. 152; Winship v. N. H. 107; Aurora v. Pulfer, 4 Cliff. 108; Spaulding v. Winslow, 74 Conn. 238; Ring v. Cohoes, 77 N. Y. 81; Merrill v. Claremont, 58 N. H. 54; Agnew v. Corunna, 55 Mich. 54; Am. Rep. 383.

Whether the fright or misconduct of the horse is such as to be regarded as the true and proximate cause of the injury, in any given case, is to be governed by the extent of such misconduct. If a horse, well broken and adapted to the road, while being properly driven, suddenly swerves or shies from the direct course, he is not in any just sense to be considered as escaping from the control of the driver, or becoming unmanageable, if he is, in fact, only momentarily not controlled. If, while thus momentarily swerving or shying, he is brought in contact with a defect in the road and an injury is thereby sustained, such conduct of the horse will not be considered as the proximate cause of the accident. Al-

drich v. Gorham, 77 Me. 287; s. c., 13 Am. & Eng. Corp. Cas. 668.

In *Burrell Township v. Uncapher, 177 Pa. St. 353*, this principle was applied where a horse was frightened by a locomotive engine, and subsequently injured by a defect in the highway.

A municipality has been held answerable for damages where an injury is caused by a horse shying at a defect, thus causing the carriage at once to hit on the same or another defect. *Bigelow v. Weston, 3 Pick. 267; Bly v. Haverhill, 110 Mass. 520; Woods v. Groton, 111 Mass. 357; Clark v. Lebanon, 63 Me. 392; Cushing v. Bedford, 125 Mass. 526.*

Where a team, hitched to a post, was frightened by another runaway team and broke the post and ran away and injured the plaintiff, damage was held to be too remote. It was said that the city need not provide hitching posts, and, when it did, was only bound to use ordinary care in selecting them. *Rockford v. Tripp, 83 Ill. 247.*

In *Hinckley v. Somerset, 145 Mass. 326, s. c., 18 Am. & Eng. Corp. Cas. 294*, plaintiff's horse, which he was driving along a highway in the defendant town, became frightened and ran against, and partly over, a wall on the side of the way, which, plaintiff contended, was of insufficient height. In an action against the town for the injuries sustained, held, that if the injury was received because the wall was not high enough, and the want of height made it insufficient as a barrier or railing, the plaintiff could recover, if the horse was a reasonably safe horse to drive, and if the plaintiff was in the exercise of due care, and did not lose control of the horse, or lost control for a moment only, and either regained the control, or would have regained it, before the horse would have run against the wall, if it had been of sufficient height.

But in *Fulton Co. v. Rickel, 106 Ind. 501*, a county was held not liable for a team becoming frightened at the de-

reasonable time, the city will be liable. But there can be no recovery where the accident was caused by mere slipperiness, or where sufficient time has not elapsed, considering the fall of snow, for the streets to be cleaned. The question is one largely affected by local usage.¹

fective condition of a bridge, although it had been out of repair long enough to charge the county with notice.

1. **Unreasonable Accumulation of Ice and Snow.**—When a municipality has allowed snow and ice to accumulate upon its pavements for an unreasonable time and an accident occurs in consequence of the dangerous condition of the pavement thereby produced, the municipality will be *held* liable. *Todd v. Troy*, 61 N. Y. 506; *Collins v. Council Bluffs*, 32 Iowa 324; *Barton v. Montpelier*, 30 Vt. 650; *Luther v. Worcester*, 97 Mass. 268; *McLaughlin v. Corry*, 77 Pa. St. 109; *Providence v. Clapp*, 17 How. (U. S.) 161; *Savage v. Bangor*, 40 Me. 176; *Hall v. Manchester*, 39 N. H. 295; *Loker v. Inhabitants of Brookline*, 13 Pick. (Mass.) 343; *Stone v. Hubbardston*, 100 Mass. 49; *Whitman v. Groveland*, 131 Mass. 553.

But a municipality is not liable for accidents occasioned upon its streets by mere slipperiness caused by ice and snow, where it does not appear that there has been any negligence in allowing the ice and snow to collect or to remain so as to be notoriously dangerous to passers-by. *Stone v. Hubbardston*, 100 Mass. 50; *Smyth v. Bangor*, 72 Me. 249; *Landolt v. Norwich*, 37 Conn. 615; *Mauch Chunk v. Kline*, 100 Pa. St. 119; *Evans v. Utica*, 69 N. Y. 166; *Cook v. Milwaukee*, 24 Wis. 270; s. c., 27 Wis. 191; *Ward v. Jefferson*, 24 Wis. 342; *Chicago v. McGiven*, 78 Ill. 347; *McDougall v. Boston*, 134 Mass. 149; s. c., 2 Am. & Eng. Corp. Cas. 561; *Dickinson v. New York*, 92 N. Y. 584; s. c., 2 Am. & Eng. Corp. Cas. 572.

A municipality is not liable for an injury caused to a foot passenger by reason of the slippery condition of its streets alone. It is liable, however, where such injury is caused by the accumulation of ice or snow into hills and ridges so as to render passage dangerous. *Mauch Chunk v. Kline*, 100 Pa. St. 119; s. c., 45 Am. Rep. 364; *Grossenbach v. Milwaukee*, 65 Wis. 31.

It is only where ice and snow are allowed to remain upon a street in such an uneven and rounded condition that a person using due care cannot walk

over it without danger of falling, that the city seems to become liable for injuries caused thereby. *Broburg v. Des Moines*, 63 Iowa 523; s. c., 50 Am. Rep. 756.

Where a town allowed a road to remain blocked up by snow drifts for from four to six weeks, it was *held* liable for an injury occurring in consequence. *Green v. Danby*, 12 Vt. 338.

The existence of a defect in a frequented sidewalk, from an accumulation of ice, which caused a personal injury, for nine days, and the patrolling of that sidewalk during that time by a policeman, and the passage over it several times of a selectman, affords evidence of notice to the town of the defect, and of negligence in not remedying it. *Fortin v. East Hampton*, 145 Mass. 196; s. c., 18 Am. & Eng. Corp. Cas. 260.

So where snow had accumulated to the height of two or three feet, and had remained for about two weeks, the town was *held* liable. *Pomfrey v. Saratoga Springs*, 104 N. Y. 459.

But if a large territory is suddenly covered with ice, its removal or the protection of the public in travelling over it would be impracticable, and the same duty does not exist. *Cloughessey v. Waterbury*, 51 Conn. 405.

Where a fall of rain or the melting of snow on adjoining premises is suddenly followed by severe cold, and thus the sidewalks are covered with a layer of ice, making them slippery and dangerous, the municipality is not required to see to its removal, but may without liability or negligence, await a thaw to remedy the evil; and, while it should require householders, where the danger is great, to sprinkle upon the surface ashes or sand or the like, it is not responsible for their omission so to do. *Taylor v. Yonkers*, 105 N. Y. 203; s. c., 18 Am. & Eng. Corp. Cas. 226.

If the municipality has made all due diligence to remove the accumulation, it is not liable. *Hayes v. Cambridge*, 136 Mass. 402; s. c., 6 Am. & Eng. Corp. Cas. 18.

Where the snowfall has been so heavy that it is impossible to clear the whole street, the municipality is at any

~~Negligence of Contractors, etc.~~—The fact that a defect in a street is the negligence of a contractor, whether his work has been accepted by the municipality or not, does not relieve the municipality of its liability for injuries caused by the defect. It is sometimes held that the municipality is not liable where the defect is not in itself dangerous, but becomes so merely by the negligence of the contractor in failing to place proper guards or barriers. In these cases the remedy is against the contractor, and no action is also taken in the cases of contractors

who open a passage-way and leave it in a safe condition. *Cloughessey v. Waterbury*, 40 Me. 176.

A municipality is not bound to do for its streets when there is ice upon them what it is bound to do for its highways. *Cloughessey v. Waterbury*, 40 Me. 176.

An injury is occasioned by an original defect in the construction and partly by mere slipperiness of the municipality will be held against the municipality. *Atchinson v. King*, 9 Kans. 100.

The question, when an incline in a walk and ice combine to produce an accident, is not whether the accident would not have happened, but for the inclination, but whether such a walk, so inclined, will become unsafe in winter weather, with the usual snow and ice. *Hall v. Fond du Lac*, 56 Wis. 242.

Local usage goes far toward fixing public duties as to the care of highways in winter. *McKellar v. Detroit*, 57 Mich. 158.

The same rules applicable in other cases as to contributory negligence are of course applicable in cases of actions against municipalities, where an injury has been occasioned by snow or ice. Foot passengers are bound to take unusual care in slippery weather. *Chicago v. McGilven*, 78 Ill. 347. It is contributory negligence to go upon a sidewalk which the foot passenger perceives to be slippery. *Schaeffer v. Sandusky*, 31 Ohio St. 246; *Dunkin v. Troy*, 61 Harb. (N. Y.) 437; *Aurora v. Pulfer*, 56 Ill. 270; *Quincy v. Barker*, 81 Ill. 300; *Evans v. Utica*, 69 N. Y. 166; *Willson v. Charlestown*, 8 Allen (Mass.) 137; *Belton v. Baxter*, 54 N. Y. 245. *Penna. Co. v. Rathgeb*, 32 Ohio St. 66.

1. Negligence of Contractors, etc.—In *Turner v. Newburgh*, (N. Y.) 12 Cent. Rep. 215, the New York court of appeals holds, a municipal corporation cannot claim legal exemption from

liability for a defect in a street, by reason of its having contracted out the construction of a sewer, or of its not having accepted the work of the contractor, where the municipal officers have permitted the streets to be open for public travel, and the defect has existed long enough to charge the municipal officials with knowledge of it. Gray, J., writing the opinion of the court, says: "The duty of the city to keep its streets in safe condition for public travel is absolute, and it is bound to exercise reasonable diligence and care to accomplish that end; and in cases like the present, where it has employed a contractor to do work involving excavation of its streets, it is not absolved from its duty and responsibility." 2 Dill. Mun. Corp. §§ 791, 793, 1038; *Storrs v. Utica*, 17 N. Y. 104; *Brusso v. Buffalo*, 90 N. Y. 679; *Kunz v. Troy*, 104 N. Y. 344.

Workmen.—In *Lowell v. Boston*, etc., R. Co., 23 Pick. (Mass.) 24, where in consequence of the neglect of workmen a traveller sustained an injury, it was held that the corporation was responsible for the negligence of such workmen, although they were employed by an individual who had contracted to do the work for a stipulated sum, the work being done by the direction of the corporation.

Openings Uncovered.—Where a contractor agreed to grade a street under direction of the city officers, the city was held liable for his negligence in leaving the excavation uncovered. *Dressell v. Kingston*, 32 Hun. (N. Y.) 533.

If a wayfarer be injured by falling into an open sewer in a public street, the city will not be relieved of liability by reason of the fact that the opening was left unguarded by a contractor engaged in the construction of the sewer. *Welsh v. St. Louis*, 73 Mo. 71.

A city cannot escape its responsibility for injuries, upon the plea that it

who are held liable as independent principals, in which cases the municipality is free from liability for their negligence.¹

had entered into a contract with another party to repair the streets, alleys and bridges. *Jacksonville v. Drew*, 19 Fla. 106; s. c., 45 Am. Rep. 5.

A contractor, engaged in repaving a street under a city contract, stretched a rope across the street and suspended a lamp upon it, when leaving work at night. The lamp was soon broken by boys, and the person in charge of the work took it home to repair it, intending to replace it, but did not do so. The city was held liable to one injured by driving his hack along the street, and coming in contact with the rope. *Baltimore v. O'Donnell*, 53 Md. 110; s. c., 36 Am. Rep. 395.

Where work is contracted to be done which is not of itself dangerous, but becomes so by the negligence of the contractor, the employer is not liable for injuries resulting therefrom; but if the work is dangerous of itself, unless guarded, and the employer makes no provision in his contract for its being guarded, and does not make a proper effort to guard it himself, then he is negligent, and cannot escape liability on the ground that the work was done by a contractor. *Van Winter v. Henry County*, 61 Iowa 685.

Where the work contracted for necessarily constitutes an obstacle or defect in the street, both the city and the contractor will be liable to one injured; but the contractor alone will be liable where the obstacle or defect is caused by something not necessarily a part of the contract work, but wholly collateral to it. *Robbins v. Chicago*, 4 Wall. (U. S.) 657.

1. **Independent Contractors.**—But where contractors are not working under directions or control outside their contract, they are in no sense servants or agents, but are independent principals. *McQuire v. Grant*, 25 N. J. 356; *Hale v. Johnson*, 80 Ill. 185; *McCafferty v. Spuyten Duyvil, etc.*, R. Co., 61 N. Y. 178; s. c., 19 Am. Rep. 267; *Scammon v. Chicago*, 25 Ill. 361. Therefore a corporation is not liable for the injury to third parties from the negligence on the part of such contractors in the performance of their work. *Pack v. New York*, 8 N. Y. 222; *Kelley v. New York*, 11 N. Y. 432; *Eaton v. European, etc.*, R. Co., 59 Me. 520; *Allen v. Willard*, 57 Pa. St. 374; *Morgan v. Bowman*, 22 Mo. 538; *St. Paul v.*

Seitz, 3 Minn. 205; *Callahan v. Burlington, etc.*, R. Co., 23 Iowa 562; *Brown v. Werner*, 40 Md. 15.

A city is not liable for the negligence of a contractor, unless he does the work under its management, and a stipulation that the city engineer shall have power to direct changes in the manner of conducting the work, will not make the city liable. *Erie v. Caulkins*, 85 Pa. St. 247.

Where the work ordered to be done is intrinsically dangerous, and the contractor uses due care, an action will lie against the city. *Joliet v. Harwood*, 86 Ill. 110.

But in *Circleville v. Neuding*, 41 Ohio St. 465, the city was held liable for the loss of a horse falling into a cistern, which was being constructed by an independent contractor, although it had no control over the work, except to see that it was done according to contract.

So, where the city engineer prepared plans and specifications for water pipes, but the work was done by a contractor, the city was held liable for an explosion of the pipes. *Harrisburg v. Saylor*, 87 Pa. St. 216.

On the other hand in *Blumb v. City of Kansas*, 84 Mo. 112; s. c., 15 Am. & Eng. Corp. Cas. 263. A city was held not liable for injuries received by one resulting from blasting of rock done by a contractor in necessary performance of his contract for the improvement of street, notwithstanding the city had reserved the right to annul the contract or suspend work under it, whenever, in the judgment of the city engineer there was good reason for doing so, and, although the contract also made it obligatory upon the contractor to discharge any workmen, engaged upon the work, who should disobey any direction of the city engineer as to the workmanship, or material used.

And where the city employed a contractor for a gross sum to build a sewer, and the plaintiff's horse was frightened by his negligent blasting, the city was held not liable. *Herrington v. Lansingburg*, 36 Hun. (N. Y.) 598.

In *Condict v. Jersey City*, 46 N. J. L. 157, the city was not held responsible for the death of a man, killed by the negligence of a garbage cart driver while dumping his cart.

A contractor may be an independent

dangerous, or if the city has notice of the negligence in which it is done. In some cases it is held that the city is liable that its licensees do not misuse the privileges granted them, and in these cases it is liable without notice.¹

Macon, 83 Mo. 345, it was held that the act of a person making a crossing in the street by permission of the city, was the act of the city, and the city, with notice to the latter was liable. If a city issues a building permit and obstructs a street, it is the duty of the corporate authorities to see that the persons whom she authorizes to use her streets shall properly guard and protect such obstructions; and, if she negligently fails to perform this duty, she is responsible to one who is injured while properly using such streets. *Indianapolis v. Doherty, 71 Ind. 5*.

And in *Savannah v. Donnelly, 71 Ga. 258*, it was held, where a municipal corporation gave express permission to an individual to open a ditch across a street in the city, in order to connect the water-pipes of a private person with the water-works belonging to the city, this was in effect the opening of the ditch by the city itself; it was the act of the city, and the latter became liable for any damage which might accrue to any person by reason of the careless and negligent manner in which the work was done. It was the duty of the city to have superintended and overlooked the work which it permitted to be done on its streets, and to have seen that it was done in such manner that no injury should come to passers on the street from defects therein.

While a corporation may not be held liable for any defect in the original plan, and while it may adopt a sidewalk already constructed, or rebuild upon a new plan, and thus secure to itself immunity, this must be done by proper corporate action; and where a change in the grade or slope has been made by the owner of adjoining premises in rebuilding, making the sidewalk dangerous for travel, an omission on the part of the corporation, after notice, to take any action in reference to the matter is not a defense in an action brought against it to recover damages for injuries caused by the defect. *Urquhart v. Ogdensburg, 97 N. Y. 238; s. c., 7 Am. & Eng. Corp. Cas. 25*.

A city is bound to see that a plat-

form, which it allows a person to erect in a street, is safe, though it is not in the usually travelled part of the street. *Estelle v. Lake Crystal, 27 Minn. 243*.

Where the duty of keeping the sidewalks in repair is imposed upon the owner of the adjoining premises, a lessee, who has not contracted to keep the same in repair, may recover from the city for injuries caused by a defect. *Avery v. Syracuse, 29 Hun. (N. Y.) 537*.

1. For Acts of Licensees.—Municipal corporations are not liable for the acts of persons it licenses to use its streets, unless the thing authorized is intrinsically dangerous, or the municipal authorities have notice of the negligence of its licensees. *Ryan v. Curran, 64 Ind. 345*. Thus it is a question for the jury whether a city is liable to one struck by a bullet shot through the canvas tent of a shooting gallery, which was licensed by the city. *Hubbell v. Viroqua, 67 Wis. 343; s. c., 58 Am. Rep. 866*.

A city is not liable for injuries to a traveller, caused by the explosion of gas collected in a man-hole constructed in the street by a private corporation, having acquired the right, by charter and city ordinance, to lay steam-pipes beneath the street, subject to regulation by the city, where there is no positive proof of lack of care in conducting the work or of locating the pipes, or that such explosion could be anticipated. *Hunt v. New York, 109 N. Y. 134; s. c., 20 Am. & Eng. Corp. Cas. 380*.

A municipal corporation, granting to one a license for a purpose proper and lawful, in this case to lay a private water-pipe in the street, is not liable to one injured by reason of the misuse or abuse of that license, whether the same be by an independent contractor for the work from the licensee, or by the licensee himself. That the street commissioner, or other authorities of the municipality had knowledge, that the said license was being misused or abused by the independent contractor of the licensee or by the licensee himself, in that the excavations for water-pipes in the streets were left in an unguarded and dangerous condition, will not render the mun-

the streets is one of the police or public corporations, in which they act as agents, a failure in the proper exercise of such

resulting
of the li-
v. Sim-
56 Am.
Corp. Cas.

a municipal cor-
make an exca-
does not vary
of the parties in
of action where
wrongful and neg-
which the work was
unlawfulness. Port
Bank, 96 N. Y.
Am. & Eng. Corp. Cas.

a corporation may law-
streets to be temporarily
for purposes, and it will
be wrongful and neg-
ligent care and diligence in
keeping streets free from obstruc-
tion. *Washburn v. Dunlap*, 112 Ind.
Am. & Eng. Corp. Cas. 263.
If an excavation is made in the
street for a proper purpose by the
owner of the premises abutting, the
owner is liable for an injury occa-
sioned by negligence on his part in
neglecting to keep the same
reasonably safe for passers-by.
Washburn v. Blood, 40 Ind. 62.

A town is liable only for an injury
caused by a defect which might have
been removed, or that might have been
prevented by reasonable care and dili-
gence on the part of the town. A rail-
road bridge over a highway, which the
defendant town was obliged to keep in
repair, was destroyed by fire. The
railroad company built a temporary
bridge, which obstructed the highway.
Held, that the selectmen of the town
did all they were required to do when
they applied to the county commis-
sioners and railroad commissioners
filing a formal complaint against the
construction of the bridge, if they were
not authorized to remove the obstruc-
tion. *Planders v. Norwood*, 141 Mass.
171, 11 Am. & Eng. Corp. Cas.
166.

A city is not liable for an accident
caused by building materials left in the
street, where an ordinance requires a
light to be placed upon such obstruc-
tions, and the police department, whose

duty it is to enforce the ordinance, are
under the exclusive control of the State.
Sinclair v. Baltimore, 59 Md. 592.

In *McDermott v. Kingston*, 19 Hun.
(N. Y.) 108, the city was held not liable
to one falling into an excavation made
by a gas company, where an ordinance
required the company to keep a light
burning.

To a complaint alleging that the cor-
poration negligently caused an excava-
tion to be made in a sidewalk, and left
it unprotected in the night-time, the
defendant answered that the property
owner, by whom the excavation was
made, on leaving work on the night
when the accident occurred, placed a
danger-signal and other warnings about
the excavation. *Held*, that the answer
was good, as the degree of care re-
quired was ordinary care, and that, un-
less there were peculiar circumstances
making it a duty of the agents or con-
tractors of the corporation to keep a
watch during the night, it was sufficient
to place guards and signals about the
excavation. *Dooley v. Town of Sulli-
van*, 112 Ind. 451.

N was injured, while crossing a street
in a borough, by the firing of a cannon
by a crowd of citizens. In an action
against the borough to recover dam-
ages for the injury, the jury, in a special
verdict, found that the cannon had been
fired at short intervals, for several
hours, at various points in the borough;
that it was not fired at any public or
authorized celebration; that a police-
man was standing by and made no
effort to stop the firing. A special act
of assembly authorized the borough to
appoint policemen, remove nuisances,
etc.: *Held*, that the borough was not
liable. *Norristown v. Fitzpatrick*, 94
Pa. St. 121; s. c., 39 Am. Rep. 771.

In *Robinson v. Greenville*, 42 Ohio St.
625; s. c., 12 Am. & Eng. Corp. Cas.
640, the corporation was held not liable
upon the same state of facts, the rea-
son given being that with respect to
police powers, such as suppressing
riots and unlawful assemblages, such
corporation is, in the absence of statu-
tory provision to the contrary, the agent
of the State, and not liable for a fail-
ure to perform or negligence in per-
forming duties in that particular im-
posed by statute.

powers, the city is not liable.¹ This rule is applied in the case of coasting in the streets, where it is held, almost without exception, that there is no liability upon cities and towns for permitting those sports in the streets, even where the city provides facilities for indulgence in them.²

10. Abutting Owners.—The abutting landowner, in the absence of statute, is not liable to one injured by a defect in the street adjoining his premises, and where the duty of repairing its streets is imposed by charter on a city, it cannot shift it upon the citizen.³

1. Acts of Disorderly Persons.—Municipal corporations are not liable for the failure to exercise duties of a public or legislative nature, hence in the absence of statute, they are not *held* liable for the action of mobs or riotous assemblies. *Western College v. Cleveland*, 12 Ohio St. 375; *Prather v. Lexington*, 13 B. Mon. (Ky.) 452; *In re Penna. Hall*, 5 Pa. St. 204; *Baltimore v. Poultnery*, 25 Md. 107; *Ely v. Supervisors*, 36 N. Y. 297.

An instructive case as bearing on the liability of cities for the acts of mobs and disorderly persons on the streets as affected by statute is that of *Alleghany County v. Gibson*, 90 Pa. St. 397 (Pittsburgh riot case), in which it was *held* that the property owner is not in default for not giving notice, unless he has knowledge of the intention to destroy, that the assertion of a legal right in a legal manner is not such improper conduct as will prevent recovery, that the fact that the riot was widespread and beyond the control of local authorities is no defense, and that the property of a non-resident is within the statute.

A town is not liable for suspending the ordinance forbidding the use of fire crackers in the street. *Hill v. Charlotte*, 72 N. Car. 55.

2. Coasting.—A boy coasting upon a hand-sled is not a defect or want of repair in a highway, for which a city is liable to a person struck by the moving sled. *Pierce v. New Bedford*, 129 Mass. 534; s. c., 37 Am. Rep. 387.

And this is the rule, although the city has fitted the street for that purpose by turning water upon it and allowing it to freeze. 128 Mass. 583; s. c., 35 Am. Rep. 781, note; *Lafayette v. Timberlake*, 88 Ind. 330.

A city, after having adopted an ordinance prohibiting, upon its streets, sports tending to produce bodily injury, is not liable for a collision occurring

upon a street, whereby a traveller was injured, as the result of coasting for sport, though the sport was carried on by crowds, publicly, in the presence of its officers and police, to the obvious danger of persons using the street. *Faulkner v. Aurora*, 85 Ind. 130; s. c., 44 Am. Rep. 1.

The right of action is against the person inflicting the injury. *Burford v. Grand Rapids*, 53 Mich. 98; s. c., 8 Am. & Eng. Corp. Cas. 549.

In *Schultz v. City of Milwaukee*, 49 Wis. 254, the court observes: "The coasting or sliding down Poplar street, in the manner and to the extent charged in the complaint, was, while being indulged in, a grievous public nuisance, which the city authorities ought to have prevented or suppressed. But this duty is a public or police, rather than a corporate duty, in the performance of which the corporation, as such, has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community." *Compare Mayor, etc., v. Marriott*, 9 Md. 160.

Coasting in a public street, unaccompanied by boisterous conduct, is not necessarily a nuisance. *Jackson v. Castle*, 80 Me. 119.

In *Weller v. Burlington*, (Vt.) Alb. L. J. July 7, 1888, it was suggested that the reason why towns are *held* not liable for coasting accidents is because a majority of the citizens approve of the practice. But the court did not incline to that view.

3. Liability of Adjoining Landowner.—In the absence of legislation, an abutting landowner is not liable to an individual injured by a defect in the highway in front of his premises, unless the defect was caused by, or occurred in, some structure erected by or for

through the fault of the abutting landowner
city. if recovery is had against it; and the
against the city is conclusive upon him,
as to the measure of damages, and the

~~Negligence~~—(See CONTRIBUTORY NEGLIGENCE

Contributory negligence is applicable in dam-
municipalities for injuries received in the street.
operately and knowingly into a dangerous part
Contributory negligence as regards any consequent

over the street. Jan-
man. 358; Weller
N. J. L. 397; s. c.,
Corp. Cas. 537, and

the city and the abutting
to keep the sidewalk
city is joint and sev-
Simpson, 110 Ill. 294;
Sug. Corp. Cas. 616;
N. Car. 431; s.
Corp. Cas. 71.

city is charged by its
the duty of keeping its
repair, the owner of the
cannot be made liable for
by defects in the
of his lot. Keokuk v.
Iowa 352; s. c., 36 Am.

providing that "owners
for all damages, to whom-
resulting from their default or
neglect in not keeping such
in good repair, and in safe,
condition" so far as it assumes
the owners liable to others
the city, is unconstitutional.
Stillwater, 33 Minn. 198; s.
Am. & Eng. Corp. Cas. 11.

**Abutting Property Owner Liable
to Municipality.**—Where a munici-
is obliged to respond in dam-
for an injury occasioned by de-
sidewalk or an excavation there-
it may have recourse against the
property owner through whose
the injury has occurred. Robbins
Chicago, 4 Wall. (U. S.) 657; Mil-
Holbrook, 9 Allen (Mass.) 18;
City Railroad Co., 47 N.
Portland v. Richardson, 54 Me.

But this is the rule only when the
city itself is not in default. Papworth
Milwaukee, 64 Wis. 389.

When a person places an obstruction
in the street of a city, he is not in a

condition to demand of the city that it
shall remove the obstruction at its own
expense, if it has knowledge of it, and in
case of failure to remove it after such
knowledge, that it shall be precluded
from looking to him for indemnifica-
tion, if it is adjudged to pay, and does
pay, damages for an injury caused by
the obstruction. Sioux City v. Weare,
59 Iowa 95.

Where it is the duty of the lot owner
to repair, but if he fail to do so for a
specified time, it is the duty of the
board of public works to do so, and
charge the cost of the same to him, and
when both he and the board of public
works neglect to repair, and the city
has to pay damages for injury caused
by the sidewalk's defective condition
after such time had expired, the lot-
owner is liable to the city therefor.
City of Detroit v. Chaffee.

A city having paid a judgment ob-
tained against it for injury from snow
and ice on the sidewalk has no remedy
over against the lot owner, after having
paid the judgment. Hartford v. Tal-
cott, 48 Conn. 525; s. c., 40 Am. Rep.
189.

And it is said that where the property
owner has notice of the pendency of the
suit against the municipality and could
have defended therein, but fails to do
so, he is concluded as to the existence
of the defect, the liability of the munici-
pality and the measure of damages for
the injury sustained. Veazie v. Rail-
road Co., 49 Me. 119; Mayor v. Troy,
etc., Railroad Co., 49 N. Y. 657;
Brooklyn v. City Railroad Co., 47 N.
Y. 475; Milford v. Holbrook, 9 Allen
(Mass.) 17; Boston v. Worthington, 10
Gray (Mass.) 496; Westfield v. Mayo,
122 Mass. 100. But see, Chicago v.
Robbins, 4 Wall. (U. S.) 657; Littleton
v. Richardson, 54 Me. 46.

The towns in New York being by
statute liable for defects in high-

injury. But a reasonable choice between various known dangers is not negligence. Other illustrative instances will be found in the notes.¹

ways, the State is liable to a town for damages to a highway caused by a break in the Erie canal. *Bidelman v. State*, 110 N. Y. 230.

1. **Deliberately Incurred Risk.**—A foot passenger on the sidewalk of a city street, who, with full knowledge of the dangerous character of an obstruction on the pavement, deliberately attempts to walk over it when he could have avoided it by a slight detour into the street, and who falls and is injured in such attempt, is guilty of contributory negligence *per se*. *McKee v. Bidwell*, 74 Pa. St. 218; *Goshorn v. Smith*, 92 Pa. St. 435; *Baker v. Fehr*, 97 Pa. St. 70; see, also, *Schaeffer v. Sandusky*, 33 Ohio St. 246; *Dunkin v. Troy*, 61 Barb. (N. Y.) 437; *Aurora v. Pulfer*, 56 Ill. 270; *Quincy v. Barker*, 81 Ill. 300; *Evans v. Utica*, 69 N. Y. 166; *Wilson v. Charlestown*, 8 Allen (Mass.) 137; *Belton v. Baxter*, 54 N. Y. 245; *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 66; *Erie v. Magill*, 101 Pa. St. 616; s. c., 2 Am. & Eng. Corp. Cas. 579; *Coates v. Canaan*, 51 Vt. 131; *Chicago v. Bixby*, 84 Ill. 82; *Horton v. Ipswich*, 12 Cush. (Mass.) 488; *Durkin v. Troy*, 61 Barb. (N. Y.) 437.

Where a person might have taken the center of the street, which was muddy; but if he had, he would have run the risk of falling into chuck-holes; or he might have gone around the block, but then he would have been required to have passed off the sidewalk, and might have encountered obstacles. *Held*, in an action against the municipality for damages, that if he voluntarily took the direct route, even though he knew it was unsafe, instead of one indirect and unsafe, and if he acted with the care with which a prudent man would have acted under the circumstances, he was not guilty of contributory negligence. *Altoona v. Lotz*.

A person walking on icy streets must use more than ordinary care. *Rockford v. Wilderbrand*, 61 Ill. 155.

The fact that a woman, sixty years old and weighing about two hundred pounds, noticed, before attempting to ascend an accumulation of snow and ice upon a street crosswalk, that it was very rough and slippery, is not conclusive evidence that she was not in the exercise of due care in attempting to

cross. *Gilbert v. Boston*, 139 Mass. 313.

In order that liability may be avoided on the ground of contributory negligence, the defect must be so plain and obvious as to be necessarily observed by a person of ordinary faculties. *Cox v. Westchester Co.*, 33 Barb. (N. Y.) 414.

Instances of Contributory Negligence of Passenger.—A city is bound to keep its streets in a reasonably safe condition for persons to pass thereon by night as well as by day; but if a person could have avoided injury from the existence of an open sewer in the middle of a street by the use of ordinary diligence, the city would not be liable therefor. *Massey v. Columbus*, 75 Ga. 658.

In attempting to cross a stream in the evening by means of a swing-bridge, intestate fell into the stream, and was drowned; the bridge having been pushed from its position by a boat, so that it was connected with the path by four feet of its width. The evidence tended to show that there was a light on the bridge, and five or six others within from fifty feet to one hundred and fifty feet. The bridge was frequently opened in this manner, as well as for the passage of boats. Intestate had frequently crossed the bridge, and was familiar with the surroundings. *Held*, that the evidence tended to support the charge of contributory negligence. *Splittorf v. State*, 108 N. Y. 205.

It is not want of ordinary care for a woman to drive a horse. *Cobb v. Standish*, 14 Me. 198. Nor is it negligence to drive a horse over a smooth, level road at ten miles an hour. *Reed v. Deerfield*, 8 Allen (Mass.) 522. Nor to drive through the streets of a city, with which the driver is unacquainted in a violent storm. *Milwaukee v. Davis*, 6 Wis. 377. Nor to drive over a street when the defects are covered with snow. *Clark v. Lockport*, 49 Barb. (N. Y.) 580.

In *Dubois v. Kingston*, 102 N. Y. 219; s. c., 12 Am. & Eng. Corp. Cas. 630, it appeared that the stepping-stone, which was of ordinary size, lay in front of the city post-office, lengthwise of and just inside the curb of the sidewalk. At the north end of the stone was a lamp-

The city being bound to keep its streets in reasonably good order, it cannot debar persons from all use of them by putting or leaving them in bad order; and the knowledge of defects, while it lays passengers under the necessity of using greater care, does not absolutely prevent them from recovering for injuries received from defects of which they were aware.¹

post; at the south end a crosswalk. At the time of the accident plaintiff was running to a fire; gas-lights were burning in the post-office, and the street lamp was lighted. There was abundant room for plaintiff to pass on the sidewalk; he was well acquainted with the locality, and the stone had been there several years. It was *held* that plaintiff himself was chargeable with negligence. It is for the jury to say whether travelling at night without lights, when it is too dark to see the highway, is contributory negligence. *Daniels v. Lebanon*, 58 N. H. 284.

Greater care is required of persons of defective eyesight in walking over the streets than of persons of normal vision. *Winn v. Lowell*, 1 Allen (Mass.) 177. But a person is not required to have perfect vision. *Thompson v. Bridgewater*, 7 Pick. (Mass.) 188. In *Sleeper v. Landown*, 52 N. H. 244, the court would not say that it was negligence for a blind man to attempt to cross a bridge 16 feet wide, not guarded by railings.

If the state of a horse's vision is such as to make it liable, when exposed to ordinary objects upon and along the highway by a driver of ordinary care and skill, to become unmanageable through fear, and this condition of the horse's vision contributes to the accident, or if his vision is so defective as to render him unsafe and unsuitable to drive on the highway, the plaintiff cannot recover; nor can he, if his negligence or the unsafety of the horse in any way contributes to the injury. *Wright v. Templeton*, 132 Mass. 49.

It is not error for the court, in an action of tort for personal injuries, caused by an alleged defect in a highway, to refuse to charge the jury, as a matter of law, that the plaintiffs were guilty of contributory negligence, because they were driving a blind horse on a dark night; that is a question for the jury. *Brackenridge v. Fitchburg*, 145 Mass. 160; s. c., 18 Am. & Eng. Corp. Cas. 287.

The plaintiff was riding upon the public street in the private carriage of

another. The carriage was precipitated into a ditch in the street. The plaintiff was injured. *Held*, that, as the plaintiff was without fault, and had no authority over the driver, she may recover against the city notwithstanding the negligence of the owner of the carriage in driving it, may have contributed to produce the injury. *Follman v. Mankato*, 35 Minn. 522; s. c., 15 Am. & Eng. Corp. Cas. 238. And so in *Nisbet v. Garner*, (Iowa) Alb. L. J. Dec. 8, 1888, 459, it was *held* that where a person rides in another's vehicle, neither exercising nor assuming any control over the driver, the negligence of the driver cannot be imputed to him.

1. City Cannot Debar Public From Using Streets.—The act of a party in voluntarily attempting to pass over a street which he knows to be defective or obstructed will not necessarily debar him from recovering damages from the municipality in case of injury. A municipality cannot by failing to keep a street in repair deprive the public of the right to use it absolutely. The question of contributory negligence is for the jury. *Frost v. Waltham*, 12 Allen (Mass.) 85; *Rindge v. Colrain*, 11 Gray (Mass.) 157; *Whitaker v. West Boylston*, 97 Mass. 273; *Pollard v. Woburn*, 104 Mass. 84; *Humphreys v. County*, 56 Pa. St. 204; *Weed v. Ballston*, 76 N. Y. 329; *Wheeler v. Westport*, 30 Wis. 392; *Rice v. Des Moines*, 40 Iowa 638; *Maultby v. Leavenworth*, 28 Kan. 745; *Maw v. Townships of King and Albion*, 8 Ont. App. 248; s. c., 2 Am. & Eng. Corp. Cas. 676.

The fact that a person uses a street or sidewalk after he has noticed that it is out of repair is not necessarily negligence. Persons are not to be entirely debarred from the use of a street because it may be defective or somewhat dangerous, but where danger exists, and it is known, ordinary prudence would require of those using such street greater vigilance and care and caution, corresponding with the danger, to avoid injury. *Emporia v.*

Inasmuch as a town cannot be liable for errors of judgment of travellers, no damages can be recovered for injuries received when a traveller injudiciously leaves the line of the street and is injured beyond its margin. But a reasonable deviation, as to get a drink of water from a hydrant, is permitted.

Schmidling, 33 Kan. 485; s. c., 7 Am. & Eng. Corp. Cas. 86.

Persons have a right to use the sidewalks, although acquainted with their defective condition, and whether guilty of contributory negligence is a question for the jury. *Bullock v. New York*, 51 N. Y. Sup. Ct. 36; s. c., 8 Am. & Eng. Corp. Cas. 583.

In *Gosport v. Evans*, 112 Ind. 133; s. c., 18 Am. & Eng. Corp. Cas. 275, it was said that care must be exercised proportionate to the known risk, and plaintiff could not deliberately cast herself upon the obstruction, and then recover for the injury; she, being under no compulsion, might easily have avoided all danger by merely stepping around it.

Plaintiff, knowing that a certain plank in a bridge was defective, chanced to step upon it in crossing the bridge, and was injured by the plank giving way with him. *Held*, in an action for damages, that his previous knowledge of the defect in the plank in no wise compromised him, and that the bridge company could not avoid the responsibility arising from its own neglect by charging the plaintiff with knowledge of that negligence. *Monongahela Bridge Co. v. Bevard*, (Pa.) 11 Atl. Rep. 575.

Whether a passer-by can, in the exercise of proper care, pass over an obstruction upon a sidewalk, caused by earth deposited thereon by an adjoining owner, or is bound to go around such obstruction into a muddy street, is a question of fact; and attempting to pass over the obstruction, with knowledge of its existence, is not, as matter of law, culpable negligence. *Shook v. Cohoes*, 108 N. Y. 648.

Persons Using Highway Not Bound to Anticipate Danger.—A person using a public highway is not bound to anticipate danger without some notice of a condition of things suggesting a peril to travel. *Turner v. Newburgh*, 109 N. Y. 301.

A traveller upon a public highway, without knowledge of defects in bridges forming parts thereof, and himself exercising proper diligence, has a right to presume that such bridges are in a safe

condition, and to act upon that presumption. *Board of Comrs. of Howard Co. v. Legg*, 110 Ind. 479.

One, in passing along a sidewalk, has the right to assume that the city has performed its duty in keeping the walk in safe and proper condition, and he is required to exercise only ordinary care in passing over the place where the accident occurred, unless he knew of its dangerous condition, or might have seen it by the exercise of the care ordinarily observed by citizens in walking along the sidewalks of the city. He is not required to anticipate danger, nor to be on the lookout for its existence. *Gordon v. Richmond*, (Va.) 18 Am. & Eng. Corp. Cas. 251.

A city or town is bound to maintain the sidewalks in a reasonably safe condition, and cannot escape liability for an injury, caused by a defective sidewalk, upon the probability or expectation that no one acquainted with the defects would pass over it. *Thomas v. Brooklyn*, 58 Iowa 438.

The mere fact that plaintiff knew that the sidewalk was defective does not conclusively prove contributory negligence on his part in travelling upon it after dark. *Maultby v. Leavenworth*, 28 Kan. 745.

The husband's knowledge of a defect and of his wife's intention to pass over it, will not defeat an action by husband and wife. *Street v. Holyoke*, 105 Mass. 82; s. c., 7 Am. Rep. 500.

There are many cases, however, which *hold* that it is contributory negligence for a person passing along a street to go upon a part of it which he knows or perceives to be dangerous either from slippery ice or from the accumulation of ice and snow. *Evans v. Utica*, 69 N. Y. 166; *Belton v. Baxter*, 54 N. Y. 245; *Chicago v. McGiven*, 78 Ill. 347; *Schaeffer v. Sandusky*, 33 Ohio St. 246; *Dunkin v. Troy*, 61 Barb. (N. Y.) 437; *Aurora v. Pulfer*, 56 Ill. 270; *Quincy v. Barker*, 81 Ill. 300; *Erie v. Magill*, 101 Pa. St. 616; s. c., 2 Am. & Eng. Corp. Cas. 579; *Coates v. Canaan*, 51 Vt. 131; *Chicago v. Bixby*, 84 Ill. 82; *Horton v. Ipswich*, 12 Cush. (Mass.) 488.

Where a foot-passenger, at night, voluntarily, and without necessity for

so doing, steps from the sidewalk, without knowing that it could be done in safety, and is injured by stepping into a hole, he is guilty of such negligence as will prevent a recovery from the city. *Alline v. Le Mars*, (Iowa) 18 Am. & Eng. Corp. Cas. 262.

If a traveller goes upon the margin of the highway by his own fault, and there receives an injury, he cannot recover. If he goes upon the margin, made into road, by the town, or by long use, or by an individual, and adopted by the town, and receives an injury there, without his own fault, he can recover. *Potter v. Castleton*, 53 Vt. 435.

It is not enough that the plaintiff thought it safer and better to take the side-track, if the regular track was reasonably open and safe. A town cannot be liable for an error of judgment on the part of a traveller. *Burr v. Plymouth*, 48 Conn. 460.

It is no defense that there was another road in good condition which the plaintiff might have taken. *Erie v. Schwingler*, 22 Pa. St. 384.

Plaintiff sued the city for injuries sustained by reason of its negligence in leaving unprotected an opening in a bridge, through which he fell and was injured. The evidence disclosed that the accident occurred in the night-time, and that it was extremely dark; that the plaintiff was a stranger in the city, and knew nothing of the locality; that he had shortly before voluntarily left his companion, who had a lantern and was acquainted with the locality; that the plaintiff, with apparently no purpose, then started down the street alone; and being misled by the reflection of a light on the water, walked through the opening and was injured. *Held*, that the facts did not admit of any reasonable inference that the plaintiff was free from contributory negligence. *Cummins v. Syracuse*, 100 N. Y. 637.

Where one voluntarily leaves a safe, convenient and well-lighted sidewalk, and after proceeding several feet therefrom, falls into an excavation, the municipal corporation is not liable therefor. *Aliter*, if the excavation was so near the sidewalk that from the ordinary accidents of travel one would be liable to fall into it while pursuing the ordinarily travelled way. *Zettler v. Atlanta*, 66 Ga. 195.

If a person travelling in a sleigh along the center of the road, which is bare, leave it to take advantage of the snow on the side, or the horse leave it

from natural instinct, the town will not be liable. *Rice v. Montpelier*, 19 Vt. 470.

Where plaintiff was lawfully using one of defendant's streets, and he stepped to a hydrant, situated one or two feet from the street, upon an adjacent lot, to draw some water to drink, and, while so doing, with one foot upon the lot and the other upon the street, a section of roofing, which the city had negligently allowed to stand upon its edge on the sidewalk near by, fell upon and injured him, *held* that his stopping to draw water, as stated, was the exercise of a privilege which he might lawfully enjoy, and a mere incident to the general use which he was making of the street, and that it would not defeat his right to recover of the city for the damages sustained by him. *Duffy v. Dubuque*, 63 Iowa 171; s. c., 50 Am. Rep. 743.

Where a pedestrian on a public street at night intentionally left the highway in order to take a by-path, but missed the path and was injured by falling off the end of a culvert which projected beyond the street line on a level therewith, he cannot recover damages from the municipality on the ground of negligence by it in omitting to erect guards at the point of the highway where he turned off. *Hill v. Scranton*, 102 Pa. St. 378; s. c., 48 Am. Rep. 211.

Children Playing in Street.—Little children have a right to go upon the streets of a city for air and exercise; *Indianapolis v. Emmelman*, 108 Ind. 530; *Mulligan v. Curtis*, 100 Mass. 514; without regard to the occupation or pecuniary condition of their parents; *Mayhew v. Burns*, 103 Ind. 328; and a city's duty towards a child who is lawfully upon a street or bridge does not differ from its duty towards an adult, even though the child may be incidentally using the way for purposes of play, *e. g.*, rolling a hoop. *Chicago v. Keefe*, 114 Ill. 222; s. c., 11 Am. & Eng. Corp. Cas. 549; *McGarry v. Loomis*, 63 N. Y. 104. But children using a highway *merely* for play, are putting it to a use for which it was not intended, and cannot recover for injuries due to defects or obstructions. *Stinson v. Gardiner*, 42 Me. 248; *Blodgett v. Boston*, 8 Allen (Mass.) 237; *Tighe v. Lowell*, 119 Mass. 473. Among unlawful uses, any and every use of any kind of velocipede upon a sidewalk may be mentioned. *Purple v. Greenfield*, 138 Mass. 1.

12. Notice.—It may be stated in general terms that a town cannot be held liable for defects causing accident unless the corporation has due notice of the existence of the defect.¹

The fact that a very young child, two or three years old, is alone on the street, is *prima facie* evidence of negligence, and that this contributed to the accident. *Kreig v. Wells*, 1 E. D. Sm. (N. Y.) 74. But it is not conclusive. *Wright v. M. & M. R. Co.*, 4 Allen (Mass.) 283; *Gibbons v. Williams*, 135 Mass. 333; *Schmidt v. M. & St. P. R. Co.*, 23 Wis. 186.

Allowing a boy of six to go unattended through quiet streets, where few vehicles pass, is not negligence *per se*. *Cosgrove v. Ogden*, 49 N. Y. 255. Nor, it has even been *held*, permitting a boy of eight or ten to play on the street after dark. *Lovett v. Salem*, etc., R., 9 Allen (Mass.) 557.

The plaintiff can always meet the charge of contributory negligence, if he can prove that the child, though alone, did not in fact do or omit any thing which common prudence forbade or required. *O'Brien v. McGlinchy*, 68 Me. 552; *Lynch v. Smith*, 104 Mass. 52; *Ihl v. Forty-second St. R. Co.*, 47 N. Y. 317; *McGarry v. Loomis*, 63 N. Y. 104.

In *Donoho v. Vulcan Iron Works*, 75 Mo. 401, it was *held* that a boy, using the street for a play ground, could not recover.

It is competent for a jury to find that children using a street for air and exercise are travellers, and the fact that they stopped for a few minutes to watch other children at play will not divest them of their rights as travellers. *Bliss v. South Hadley*, 145 Mass. 91; s. c., 18 Am. & Eng. Corp. Cas. 338.

It is not, as a matter of law, negligence for a boy of seven years old to step to the side of the footwalk of a bridge for an instant, to clasp a post in sport, or for his parent, accompanying him, to permit him to do so. *Gulline v. Lowell*, 144 Mass. 491; s. c., 18 Am. & Eng. Corp. Cas. 333.

A sidewalk is for the passage of persons only, whether it be passed over for business or for pleasure, or merely to gratify idle curiosity; and this rule applies to a child as well as to an adult, and the city owes the same duty to have the sidewalk in a reasonably safe state of repair in respect to a child, as to others, passing and repassing thereon. *Chicago v. Keefe*, 114 Ill.

222; s. c., 11 Am. & Eng. Corp. Cas. 549. So standing in a street to see a procession pass, cannot be said not to be "travelling on the highway." *Varney v. Manchester*, 58 N. H. 430.

An elephant, properly driven, may be a traveller within the meaning of the statute. *Gregory v. Adams*, 14 Gray (Mass.) 242.

1. Necessity of Notice.—In general a municipality is not liable for an injury resulting from a defect in the sidewalk unless sufficient time has intervened for the authorities to repair the defect after they had knowledge thereof or ought by reasonable diligence to have acquired such knowledge. *Centraalia v. Krouse*, 64 Ill. 19; *Rapho v. Moore*, 68 Pa. St. 404; *Smith v. New York*, 66 N. Y. 295; *Cleveland v. St. Paul*, 18 Minn. 279; *Doulon v. Clinton City*, 33 Iowa 397; *Dewey v. Detroit*, 15 Mich. 307; *Mayor v. Sheffield*, 4 Wall. (U. S.) 189; *Portland v. Richardson*, 54 Me. 46; *Chicago v. Robbins*, 2 Black. (U. S.) 418; *Johnston v. Charleston*, 3 S. Car. 232; *McGinly v. New York*, 5 Duer (N. Y.) 674; *Griffin v. New York*, 9 N. Y. 456; *Durant v. Palmer*, 5 Dutch. (N. J.) 544; *Sterling v. Thomas*, 60 Ill. 264; *Severin v. Eddy*, 52 Ill. 189; *Estelle v. Lake Crystal*, 27 Minn. 243.

In order to make a city liable for personal injuries occasioned by a defect in a sidewalk, which it was the duty of the city to keep in repair, said defect not being caused by the city nor with its permission, the city must have actual or constructive notice of the defect in time to have repaired it, or protected passers-by against it, before the accident; and the existence of a defect in the sidewalk of a prominent thoroughfare of a city for some months previous to the accident is constructive notice of the defect to the city; and omission to repair, or afford protection, is negligence on its part. *Moore v. Minneapolis*, 19 Minn. 300.

In *Higert v. City of Greencastle*, 43 Ind. 574, it was *held*, where a city had improved one sidewalk and the roadway of a street, but not the opposite sidewalk, and a lot-owner on the side unimproved made a sidewalk in front of his property, under the direction of, as to the grade thereof, of a civil

By notice is meant either actual knowledge in the mind of a proper officer or such a notoriety and continuance of the defect that the proper officers, using reasonable care and diligence, might have obtained knowledge of the defect.¹ The former is called

engineer of the city, and which was a continuance of the sidewalk used by the public for several years and which was so constructed by him, that it terminated in an abrupt descent, over which a foot passenger at night fell and injured himself, the city was liable for the injury in the absence of negligence of the injured party, the city having notice of the dangerous character of the sidewalk, the attention of two councilmen having been called to it by the property owner, notwithstanding such sidewalk had been so constructed without authority from the city.

A city is liable for an accident caused by a defective sidewalk, although the walk may have been constructed by a private person without its order, if the defect were known to the proper officers of the city, or might have been known by the exercise of ordinary care in time to have repaired it before the accident. *Barnes v. Newton*, 46 Iowa 567.

When objects are left temporarily and rightfully outside of the travelled way, which may constitute a defect by remaining there an unreasonable time, the town, to be liable, must have knowledge that they are there under circumstances constituting these defects. *Farrell v. Oldtown*, 69 Me. 72.

Where an eight-ton boiler was left in the highway at six P. M., and allowed to remain there, with the knowledge of the inhabitants, till seven o'clock the next morning, when the plaintiff's horse took fright thereat, and in consequence ran away, and the plaintiff was hurt, to render the inhabitants liable, it was necessary that they have reasonable notice, not only that the boiler was there, but that it was unnecessarily there, or, in other words, knowledge of the illegal element which constitutes it a defect. *Bartlett v. Kittery*, 68 Me. 358.

A city will not be held liable for an injury from a defective sidewalk unless the authorities have notice of the defective walk, or unless they have notice of such facts and circumstances as would, by the exercise of reasonable diligence, lead a prudent person to such knowledge. *Chicago v. Sterna*,

105 Ill. 554; s. c., 2 Am. & Eng. Corp. Cas. 594.

See, also, on the necessity of notice, *Griffin v. New York*, 9 N. Y. 456; *Howe v. Lowell*, 101 Mass. 99; *Kenady v. Lawrence*, 128 Mass. 318; *Aston v. Newton*, 134 Mass. 507; s. c., 2 Am. & Eng. Corp. Cas. 600; *Manchester v. Hartford*, 30 Conn. 118; *Boucher v. New Haven*, 40 Conn. 456; *Colley v. Westbrook*, 57 Me. 181; *Farrell v. Oldtown*, 69 Me. 72; *Smyth v. Bangor*, 72 Me. 249; *Howe v. Plainfield*, 41 N. H. 485; *Hubbard v. Concord*, 35 N. H. 68; *Joliet v. Walker*, 7 Ill. App. 267; *Chicago v. McCarthy*, 75 Ill. 602; *Chatsworth v. Ward*, 10 Ill. App. 75; *Sterling v. Thomas*, 60 Ill. 264; *Weightman v. Washington*, 1 Black. (U. S.) 39; *Chicago v. Robbins*, 2 Black. (U. S.) 418; *Nichols v. Alberis*, 66 Mo. 413; *Perkins v. Fayette*, 68 Me. 152; *Market v. St. Louis*, 56 Mo. 189; *Dantzeiser v. Cook*, 40 Ind. 65; *Logansport v. Justice*, 74 Ind. 348; *Lafayette v. Larson*, 73 Ind. 367; *Evansville v. Wilter*, 86 Ind. 414; *Huntingdon v. Breen*, 77 Ind. 29; *Rice v. Des Moines*, 40 Iowa 638; *Van Pelt v. Davenport*, 42 Iowa 308; *Medina v. Perkins*, 48 Mich. 67; *Furnell v. St. Paul*, 20 Minn. 117; *Estelle v. Lake Crystal*, 27 Minn. 243; *Salina v. Trospier*, 27 Kan. 544; *Osborne v. Hamilton*, 29 Kan. 1; *Ward v. Jefferson*, 24 Wis. 342; *Shell v. Appleton*, 49 Wis. 125; *Benware v. Pine Valley*, 53 Wis. 527; *Albrittin v. Huntsville*, 60 Ala. 486; *Mayor, etc., of Atlanta v. Perdue*, 53 Ga. 607; *Atlanta v. Champe*, 66 Ga. 659; *Noble v. Richmond*, 31 Gratt. (Va.) 271.

1. *Reed v. Northfield*, 13 Pick. (Mass.) 94. In order to hold a city liable for an injury received by falling over an obstruction on its sidewalk, it must be shown, not only that there was such an obstruction, and that plaintiff was injured thereby, as alleged, without negligence on his part, but also that defendant had notice of such obstruction, or that it had existed for such a length of time as to import notice; and that defendant had not used reasonable diligence in removing such obstruction. *Boulder v. Niles*, 9 Colo.

express, or actual notice; the latter, implied,¹ or constructive notice.

Express notice may be given by a writing served upon a proper officer in compliance with a statutory regulation, or it may be by a knowledge of the defect coming to a proper officer in other ways.² Such officers are, in general, aldermen, policemen, or others whose duty it may be to take such notice.

1. What circumstances amount to notice of a defect in the highway as will render the municipality liable will be discovered by an examination of the following cases: *Howe v. Lowell*, 101 Mass. 99; *Kenady v. Lawrence*, 128 Mass. 318; *Smith v. New York*, 66 N. Y. 295; *Logansport v. Justice*, 74 Ind. 378; *Lafayette v. Larson*, 73 Ind. 367; *Dantzeiser v. Cook*, 40 Ind. 65; *Huntington v. Breen*, 77 Ind. 29; *Furnell v. St. Paul*, 20 Minn. 117; *Nichols v. Alberia*, 66 Mo. 413; *Market v. St. Louis*, 56 Mo. 189; *Perkins v. Fayette*, 68 Me. 152; *Ward v. Jefferson*, 24 Wis. 342; *Shell v. Appleton*, 49 Wis. 125; *Benware v. Pine Valley*, 53 Wis. 527; *Hubbard v. Concord*, 35 N. H. 68; *Howe v. Plainfield*, 41 N. H. 485; *Van Belt v. Davenport*, 42 Iowa 308; *Rice v. Des Moines*, 40 Iowa 638; *Boucher v. New Haven*, 40 Conn. 456; *Chicago v. McCarthy*, 75 Ill. 602; *Joliet v. Walker*, 7 Ill. App. 267; *Chatsworth v. Ward*, 10 Ill. App. 75; *Salina v. Trosper*, 27 Kan. 544; *Mayor, etc., of Atlanta v. Perdue*, 53 Ga. 607; *Atlanta v. Champe*, 66 Ga. 659; *Allbritt v. Huntsville*, 60 Ala. 486; *Colley v. Westbrook*, 57 Me. 181; *Farrell v. Oldtown*, 69 Me. 72; *Smyth v. Bangor*, 72 Me. 249; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 689.

2. Who are Proper Officers. — One Deane, while walking along the sidewalk on Curtis street, Denver, in daylight, stepped upon the cap covering a coal-hole, which tipped under his weight, allowing one leg to pass through, and causing an injury from which serious consequences followed. After suffering great pain for a considerable length of time, he lost almost completely the use of his leg for life. There was nothing in the appearance of the cap or cover to the coal-hole, or its surroundings, to indicate danger to a casual, or even careful, observer. The defect which produced the injury was the failure to properly bolt or fasten down the cover. There being an ordinance of the city which charged the chief of police with the care of coal-holes and caps existing on the city

sidewalks, his knowledge of a defect existing in a cap charges the city with actual notice of the defect; and if, owing to such defect, an accident happens, the city is liable, if such notice existed at a time before the accident happened reasonably sufficient to remove the defect. *Denver v. Deane*, 10 Colo. 375; s. c., 20 Am. & Eng. Corp. Cas. 336.

Notice to Member of Town Council.

—While a town will be bound by a notice of a defect in a sidewalk communicated to a member of the town council, such notice must relate to the defects which caused the injury sued for, and notice to the councilman of defects which had been repaired before the accident occurred will not charge the town with notice of those which caused the injury, although they occurred at the place where the repairs had been made. *Carter v. Monticello*, 68 Iowa 178.

In an action to recover damages for injuries sustained by plaintiff in consequence of the falling upon him of a pile of brick in one of defendant's streets, it appeared that the bricks were placed in the street without the permission of the city authorities by a contractor engaged in tearing down a building adjoining the street. The pile was constructed in a dangerous manner, without proper braces, and was built to an improper height. The pile was commenced a week before the accident, and had reached the safety limit as to height four or five days before. The charter of the city (§ 17, subd. 4, ch. 335, N. Y. Laws of 1873), authorizes the common council to enact laws preventing obstructions to streets, and prohibits obstructions except "the temporary occupation thereof during the erection or repair of a building on a lot opposite the same." The police force of the city are also charged by statute with the duty at all times to remove nuisances existing in the public streets. § 29, ch. 403, Laws of 1864. By a city ordinance the incumbering or obstructing a street without the consent of the mayor or street commissioners is prohibited. A

policeman assigned to duty in the precinct saw the pile from time to time as it was going up, but it did not appear that he interfered or sought to ascertain whether any permit had been granted, or that he notified any officer or department of the city government of its existence. Plaintiff offered to prove that regulations had been made prescribing the height to which brick might be piled in the streets, under the permission of the proper bureau; this was rejected and plaintiff was non-suited. *Held*, error; that it was to be assumed that regulations had been made, as plaintiff offered to prove, and that the policeman assigned to duty at the place knew of them; that while the policeman might have been justified in supposing that the contractors had a permit, he ought to have known, when the pile exceeded the height which safety permitted, they were not acting within the scope of any authority; that *notice to the policeman of the unlawful character of the obstruction was notice to the city* and it is chargeable with any neglect on his part. *Rehberg v. New York*, 91 N. Y. 137; s. c., 2 Am. & Eng. Corp. Cas. 529.

In an action to recover damages for injuries alleged to have been caused by defendant's negligence in omitting to repair a crosswalk on one of defendant's streets, plaintiff's testimony tended to show that a stone in the walk had been out of place for over a year; the stone was five feet long and two feet wide; the grade of the crosswalk was about half an inch to the foot; the northwest corner of the stone was on the level; at the southeast corner it was eight inches, and at the southwest five inches, below the level. The city had passed an ordinance requiring the policemen on duty to inspect crosswalks; this walk had been inspected, and the policemen testified that they observed nothing dangerous and did not report. *Held*, that the facts were sufficient to charge the city with notice of the defect; that the passage of the ordinance and the failure of the policemen to report did not shield the city; that the irregularity in the crosswalk was not so slight as to make the question of negligence in omitting to repair one of law; but that it was one of fact for the jury, and, therefore, that a nonsuit was error. *Goodfellow v. New York*, 100 New York 15.

See, also, *Hume v. The Mayor*, 47 N. Y. 639; *Reinhard v. New York*, 2 Daly

(N. Y.) 243; *Weed v. Ballston Spa*, 76 N. Y. 329; *Todd v. Troy*, 61 N. Y. 506; *Howe v. Lowell*, 101 Mass. 199; *Donaldson v. Boston*, 16 Gray (Mass.) 508.

In Iowa, notice of a defect in a sidewalk communicated to a city marshal is not such notice to the city as will render it liable for an injury resulting therefrom. *Cook v. Anamosa*, 66 Iowa 427; s. c., 8 Am. & Eng. Corp. Cas. 568.

Notice to Citizen.—Notice to a citizen is not notice to a corporation. *Donaldson v. Boston*, 16 Gray (Mass.) 508. *Contra*, *Springer v. Bowdoinham*, 7 Greenl. (Me.) 442; *Mason v. Ellsworth*, 32 Me. 271.

The Notice Expressly Required by Statute.—*Gregg v. Weatherfield*, 55 Vt. 385; *Spearbracker v. Larrabee*, 64 Wis. 573; *Holmes v. Paris*, 75 Me. 559; s. c., 6 Am. & Eng. Corp. Cas. 1, decides that a town is not entitled to the statutory notice (of twenty-four hours) of a defective road, before liability for an injury caused by it, in a case where the incumbrance causing the defect, is created by a surveyor while acting as a servant of the town. In such case the town is estopped from claiming the statutory notice.

The provisions of a city charter "that the city shall not be liable to or for any damages arising or growing out of any sidewalks, streets, drains, sewers, gutters, ditches, or bridges in said city being in a defective or damaged condition or out of repair, unless it be shown that previous to the happening of the same one of the aldermen of the ward in which the same is located had knowledge thereof," etc., does not apply to obstructions placed in the street by an employe of the city while in its employ, owing to which a horse is injured. *Adams v. Oshkosh*, 71 Wis. 49; s. c., 20 Am. & Eng. Cas. 329; *Studley v. Oshkosh*, 45 Wis. 380.

The notice to the town officers within fourteen days after an injury is received because of a defect in a way must be in writing, and its sufficiency is a matter of law for the court. *Chapman v. Nobleboro*, 76 Me. 427; s. c., 5 Am. & Eng. Corp. Cas. 636.

The plaintiff's father, who was injured through a want of repair of a highway, lived more than ten days, in a condition in which it was possible for him to have given the notice required by statute, as preliminary to an action against the town for the injury sustained

Notice may be presumed or implied from the lapse of such a time since the original occurrence of the defect that the proper officers should have become informed of its existence.¹ This time varies with the nature of the case. Several months is time enough for city officials to become acquainted with the existence of a defective sidewalk.² Yet in another case a lapse of forty

by him. The plaintiff gave notice *within* thirty days after the decease of his father, he being the executor named in the will of the deceased, and having been, subsequently to the giving of such notice, appointed executor upon the probate of the will. *Held*, that under Mass. Pub. Stat. ch. 52, § 21, the notice is insufficient. *Nash v. Hadley*, 145 Mass. 105; s. c., 18 Am. & Eng. Corp. Cas. 359.

1. **Where Notice will be Presumed.**—In *Reed v. Northfield*, 13 Pick. (Mass.) 94, the court remarks: "Notice may be inferred from the notoriety of the defect and from its continuance for such a length of time as to lead to the presumption that the proper officers of the municipality did in fact know, or with proper vigilance and care might have known, the fact. This latter is sufficient, because this degree of care and vigilance they are bound to exercise; and therefore, if in point of fact they do not know of such defect, when by ordinary and due vigilance and care they would have known it, they must be responsible as if they had actual notice." Actual notice to the proper municipal authorities of a defect is not necessary in order to charge it with negligence. They owe to the public the duty of active vigilance; and where a street or sidewalk has been out of repair for any considerable length of time, so that by reasonable diligence they could have notice of the defect, such notice may be imputed to them. *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459. *Cook v. Anamosa*, 66 Iowa 427; s. c., 8 Am. & Eng. Corp. Cas. 568.

A clear and unmistakable omission on the part of the city estops it from pleading lack of notice. *Boucher v. New Haven*, 40 Conn. 456.

Where a sidewalk when built was dangerous, and had no appearance of having been changed since the building of it, the city was guilty of gross negligence, and an instruction that the city must have notice was refused. *Chicago v. Langlass*, 66 Ill. 361; *Manchester v. Hartford*, 30 Conn. 118; *Goodnough v. Oshkosh*, 24 Wis. 549; *Weisenberg v.*

Appleton, 26 Wis. 56; *Lindholm v. St. Paul*, 19 Minn. 245; *Gude v. Mankato*, 30 Minn. 256; *Dotton v. Albion*, 50 Mich. 129; *Furnell v. St. Paul*, 20 Minn. 117; *Medina v. Perkins*, 48 Mich. 67; *Rosenberg v. Des Moines*, 41 Iowa 415; *Salina v. Trosper*, 27 Kan. 544; *Albertine v. Huntsville*, 60 Ala. 486. *Compare*, *Joliet v. Walker*, 7 Ill. App. 267; *Cf. Gilman v. Haley*, 7 Ill. App. 349; see, *Sheel v. Appleton*, 49 Wis. 125; *Chatsworth v. Ward*, 10 Ill. App. 75; *Chicago v. McCulloch*, 10 Ill. App. 459; *Bonine v. Richmond*, 75 Mo. 437; *Sullivan v. Oshkosh*, 55 Wis. 508; *Mayor v. Sheffield*, 4 Wall. (U. S.) 189; *Hart v. Brooklyn*, 36 Barb. (N. Y.) 226; *Yale v. Hampden*, etc., *Turnpike Co.*, 18 Pick. (Mass.) 357; *Donaldson v. Boston*, 16 Gray (Mass.) 508; *Howe v. Lowell*, 101 Mass. 99; *Cooley v. Westbrook*, 57 Me. 181; *Prindle v. Fletcher*, 39 Vt. 257; *Logansport v. Justice*, 74 Ind. 378; *Delphi v. Lowery*, 74 Ind. 520; *Evansville v. Wilter*, 86 Ind. 414; *Washington v. Small*, 86 Ind. 462; *Bloomington v. Bay*, 42 Ill. 503.

2. **Time Within Which Notice is Presumed.**—City officers must exercise reasonably active vigilance to keep streets in a safe condition, and where a dangerous obstruction has existed for months notice of it will be presumed. *Evansville v. Wilter*, 86 Ind. 414 & 462. In an action to recover for a fall upon a sidewalk which had been properly constructed only seven days before the fall, and appeared to be in a safe condition, the city will not be liable for the injury, without proof that it, or some of its officers, agents, or servants, having charge of such matters, had actual knowledge of the defect causing the fall, or proof that the defect had existed for such length of time before the injury, that the city authorities, if exercising ordinary diligence, would or should have known of its existence. *Chicago v. McCarthy*, 75 Ill. 602.

Where the evidence shows that the defect in the sidewalk existed for a number of months, it must be presumed to have been known to the proper

years was not *held* sufficient.¹ If a defect is palpable, dangerous and in a public place, it is a question for the jury how long a time must elapse before it becomes the duty of the corporation to have knowledge.²

officers and employes of the city. *Chicago v. Crooker*, 2 Ill. App. 279.

1. A passage-way from a city sidewalk into a basement was protected by a movable iron grating covered with boards. The iron-work was so fitted to the opening that it could be left insecure only by gross carelessness. After being in this condition forty years, and never, so far as known, getting displaced, a stranger used the passage and failed to secure the grating. In a few minutes the plaintiff, passing by, stepped upon it, and was precipitated into the basement. The city was *held* not liable. *Littlefield v. Norwich*, 40 Conn. 406; *Howe v. Plainfield*, 41 N. H. 485; *Mayor v. Stufflefield*, 4 Wall. (U. S.) 189; *Dewey v. Detroit*, 15 Mich. 307; *Townsend v. Des Moines*, 42 Iowa 657; *Market v. St. Louis*, 56 Mo. 189.

If the injury resulted from a defect occasioned by the recent sudden action of natural causes, the town was not liable, unless, under the circumstances of the case, they ought to have repaired the defect before the accident happened, and had reasonable opportunity so to do; and if they could have had no notice of it, either express or implied, or reasonable opportunity to repair it, the defect was not an obstruction, insufficiency or want of repairs, within the meaning of those terms as used in the statute giving to travellers a remedy against the town. *Hubbard v. Concord*, 35 N. H. 68. See, also, *Barton v. Syracuse*, 36 N. Y. 54; *Springfield v. Le Claire*, 49 Ill. 476.

An opening about a foot and a half deep, a little more than a foot in width, and two feet and a half long, was made six inches from the line of the sidewalk in a town, for the purpose of furnishing light and air to the cellar of a building. There was nothing to indicate where the line of the sidewalk ended. The opening had existed for some months, and was covered by a loose board, and was known to be so covered by the chairman of the selectmen of the town. While the board was off, a person travelling on the highway stepped into the opening. *Held*, in an action against the town for an injury thereby occasioned, that the jury were authorized to find that the town had reasonable no-

tice of a hole, insecurely guarded, near the limit of the highway. *Purple v. Inhabitants of Greenfield*, 138 Mass. 1.

Three weeks was *held* sufficient time to charge the city with notice in *Studley v. Oshkosh*, 45 Wis. 380.

Notice of a defect in a street may sometimes be inferred from lapse of time; but where it is made to appear that the defect complained of had not existed even for a day before the accident, as regards the city's alleged knowledge that the street was out of repair, there is a total failure of proof. *City of Madison v. Baker*, 103 Ind. 41; see, also, *Carrington v. St. Louis*, and note; 14 Am. & Eng. Corp. Cas. 471; s. c., 89 Mo. 208.

2. *Question for Jury.*—In *Klein v. City of Dallas*, 8 S. W. Rep. (Tex.) 90, the court said: "The question of notice must be left to the jury in all cases, whether it be actual or constructive. What facts would be sufficient to put the corporation upon inquiry, would depend upon a variety of conditions,—the length of time the defect had existed, its notoriety, the frequency of travel over it, and the character or the defect itself. Such facts would be admissible in evidence to be considered and weighed by the jury. The existence of a dangerous sidewalk or street would not in any case of itself justify a legal presumption that it was known to the city authorities except where it is visible, and where the city had itself constructed the sidewalk, and made the excavation or obstruction. The act of a wrong-doer rendering usual travel dangerous, without knowledge, actual or constructive, on the part of corporate officers, would not create a liability on the part of the city. *Cooly v. Westbrook*, 57 Me. 181; s. c., 2 Am. Rep. 30; *Hall v. Lowell*, 10 Cush. (Mass.) 260; *Mosey v. Troy*, 61 Barb. (N. Y.) 580; *Donaldson v. Boston*, 16 Gray (Mass.) 508; *Howe v. Lowell*, 101 Mass. 99; *Bloomington v. Bay*, 42 Ill. 503; *Manchester v. Hartford*, 30 Conn. 118.

What is Evidence of Notice.—It is error to instruct the jury, in an action against a city to recover damages for personal injuries resulting from a defect in a street-crossing, that, if the defect in the crossing was the result of defective con-

struction originally, the city would be chargeable without any notice whatever of its existence, there being no evidence either as to the manner of the construction of the crossing, or the quality of the material used, or the length of time since its construction. *Stein v. Council Bluffs*, 72 Iowa 180; s. c., 18 Am. & Eng. Corp. Cas. 362; *contra*, *Rockwell v. Railroad Co.*, 64 Barb. (N. Y.) 438.

In a suit against a city for injuries sustained by failing to keep in repair a highway or street, it is competent to put in evidence the records of the common council, to show that the street or highway is under the control of said city. *Huntington v. Mendenhall*, 73 Ind. 460.

Evidence that a bridge was out of repair, and the planks old and decayed at other points than the one where an accident occurred, is admissible to show such a general defective condition of the bridge as would charge the town authorities with notice of its condition. *Spearbracker v. Larrabee*, 64 Wis. 573.

In an action against a city for an injury occasioned by falling into an open cesspool, the cover of which had floated off during a heavy rain, evidence that the cover had been off several times, during the year before the accident, under similar circumstances, is admissible on the issue whether the defect might have been remedied, or the injury prevented, by the exercise of reasonable care and diligence on the part of the city. *Post v. Boston*, 141 Mass. 189.

Testimony tending to show a greater distance of the defect from a given point than that mentioned in the notice is not competent to change the notice or to prove its insufficiency; but it is competent and material as bearing upon the identity of the locality of the defect, described in the notice, with that where the injury was received. *Chapman v. Nobleboro*, 76 Me. 427; s. c., 5 Am. & Eng. Corp. Cas. 636.

In a suit against a city to recover for a personal injury from a fall, on June 12, 1878, caused by a defective sidewalk, a witness was asked if he knew the condition of the sidewalk in the month of June, 1878, to which the defendant made a general objection, which the court overruled: *Held*, that there was no error in the ruling. It was proper to prove the condition of the walk in the month of June prior to the injury; and if the defendant desired to object to

evidence in regard to its condition after the accident, the objection should have been more definite, and confined to that particular time. *Chicago v. Stearns*, 105 Ill. 554; s. c., 2 Am. & Eng. Corp. Cas. 594.

Evidence of Notice.—Act 240 of 1879 makes townships liable for injuries caused for defects in highways and bridges. Within forty days after the act took effect a man crossing a bridge with some heavy machinery drawn by horses, was injured in consequence of the interior rottenness of a beam. *Held*, that in an action against the township, the fact that the highway commissioner knew of repairs made the previous year and of the results of inspections then had should be taken into account, together with the age and appearance of the bridge, as bearing on the question of his duty to inspect after the act took effect. *Medina v. Perkins*, 48 Mich. 67.

In an action for personal injuries caused by a defect in a highway, the burden is on the plaintiff to prove express notice to the officers of the town where the accident occurred, of such defect, if he relies on express notice, and where there is no proof any such express notice the jury should be instructed that none was proved; and where the question of constructive notice is also submitted to them as a separate question, and the failure to so instruct may mislead them on that point the judgment will be reversed. *Bailey v. Spring Lake*, 61 Wis. 227; s. c., 5 Am. & Eng. Corp. Cas. 651.

In *Corcoran v. Village of Peekskill*, 108 N. Y. 151, it was *held* that evidence that after plaintiff had fallen into a certain excavation, within the limits of the village, against which the action for damages caused by the fall was brought, a person living near the excavation had placed a fence about it sufficient to protect the public, is improper and inadmissible. *Earl, J.*, said: "This evidence, we think, was incompetent. Such evidence has sometimes been received by courts in cases where the party sued for an accident has soon thereafter made repairs or improvements for the purpose of making the machine or structure which caused the accident more secure, convenient or safe, and its admissibility has been defended on the ground that the act of making the repairs or improvements was an admission that the machine or structure was, therefore, imperfect, out

IX. RAILROADS IN STREETS.—1. Earlier Decisions.—In the earlier cases the decisions were to the effect that railroads might use the streets, under the authority of their charters, without making additional compensation to the adjoining landowners. The dam-

of repair or unsafe. We think, however, that such evidence does not tend to prove that the party sued knew, or was bound to know, that the machine or structure was imperfect, unsafe or out of repair. After an accident has happened, it is ordinarily easy to see how it could have been avoided; and then, for the first time, it frequently happens that the owner receives his first intimation of the defective or dangerous condition of the machine or structure which caused or led to the accident. Such evidence has no tendency whatever, we think, to show that the machine or structure was not previously in a reasonably safe and perfect condition, or that the defendant ought, in the exercise of reasonable care and diligence, to have made it more perfect, safe and secure. While such evidence has no legitimate bearing upon the defendant's negligence or knowledge, its natural tendency is undoubtedly to prejudice and influence the minds of the jury. Hence in this court, and generally in the supreme court, it has been *held* erroneous to receive such evidence.

In *Salters v. Canal Co.*, 3 Hun. (N. Y.) 238; s. c., 5 Sup. Ct. (T. & C.) 559, it was *held* erroneous to admit evidence to show that after the accident the railroad company changed the character of its switch. Landon, J., writing the opinion, says: "The plaintiff was permitted to give evidence to the effect that after the accident the defendant substituted a target switch for the common one. Within the ruling in *Dougan v. Transportation Co.*, 56 N. Y. 1, this seems to be error. Whether the defendants were negligent was a question to be decided upon the facts as they existed at the time of the injury. What the defendants did afterwards was immaterial, unless their acts could be construed as equivalent to their declaration that they were negligent at the time of the injury. But the question appears to be settled by authority, and not open for discussion in this court."

In *Payne v. Troy & Boston R. Co.*, 9 Hun. (N. Y.) 526; s. c., 83 N. Y. 572, the action was to recover damages for an injury to the plaintiff's horse, received

while passing over a crossing upon defendant's track. The plaintiff was allowed, against defendant's objection and exception, to show that shortly after the accident the defendant took up the planks at the crossing and replaced them by new ones. This was *held* to be error. Learned, P. J., writing the opinion, said; "The only way in which such subsequent acts could bear upon the question would be as an admission that they had been negligent. So a jury would be likely to understand such proof. Yet it would plainly be unjust to the defendants that they should not take additional precautions against accidents, without the risk that these precautions should be construed into an admission of prior negligence. To put down a new plank was an act which the defendants might do for various reasons. Yet it would be easy to argue from that act to a jury that the defendants themselves knew that the crossing had been badly constructed or was out of repair. It seems to me that this evidence was improperly admitted, and that a new trial is therefore necessary."

In *Dale v. Delaware, etc., R. Co.*, 73 N. Y. 468, the plaintiff was a passenger in one of defendant's cars, and was seated near an open window, with his elbow on the window sill, and while passing over a bridge his elbow was struck by some substance, and his arm broken. It appeared that some months after the accident the bridge was removed, and replaced by an iron one, with trusses that did not rise as high as the window-sill. Testimony was received, under objection, to the effect that on the new bridge the distance between the rails and the sides of the trusses was greater than the old one. The court charged the jury that they might take that fact into consideration in determining whether the defendants were not guilty of negligence in allowing the old bridge to remain. This charge was *held* to be erroneous.

Where a portion of a sidewalk is generally defective and in disrepair, evidence that it had remained so for a considerable length of time previous to an accident caused by a defect therein may be received as bearing upon the

ages which they suffered in common with the general public from the obstruction of the streets, were held to be *damnum absque injuria*.¹

2. Fee in Public.—A distinction was made, and in many States is still retained, between those cases in which the fee of the street was in the city or in the public, and those in which it was in the adjoining owner. Most of the earlier cases held that in the former case the use of the streets might be authorized by the legislature, without additional compensation to the adjoining owners.²

3. Fee in Adjoining Owner.—But, in the latter case, where an easement only was granted to the public, and the fee was retained by the adjoining owner, that he was entitled to compensation for a use, which was not contemplated, when the street was condemned or dedicated.³

question of the negligence of the corporation in failing to ascertain and repair the particular defect complained of. *Kellogg v. City of Janesville*, 34 Minn 132.

1. *Cleveland R. Co. v. Speer*, 56 Pa. St. 325; *Tate v. Ohio R. Co.*, 7 Ind. 479; *Slatten v. Des Moines R. Co.*, 29 Ia. 148; *Parrot v. Cincinnati R. Co.*, 10 Ohio St. 623.

Railroads were not considered a different or new use of the highway, which had not been contemplated when it was laid out or dedicated, but only a new method of using the easement, which had been granted. *Milburn v. Cedar Rapids*, 12 Ia. 246.

2. When the Fee is in the Public or City.—The general rule was, before the introduction of the words "damaged for public use," or words of like import, into so many of the State constitutions, that no compensation could be given when the adjoining owner had not the fee. This rule is retained in many States. *Barney v. Keokuk*, 94 U. S. 324; *Houston, etc., R. Co. v. Odum*, 53 Tex. 343; *Lackland v. North Missouri R. R. Co.*, 34 Mo. 259; *Chicago, N. & S. R. Co. v. Mayor, etc., of Newton*, 36 Iowa 299; *Barr v. City of Oskaloosa*, 45 Iowa 275; *Moses v. Pittsburgh, Ft. Wayne & Chicago R. Co.*, 21 Ill. 516; *Chicago, B. & Q. R. Co. v. McGinnis*, 79 Ill. 279; *Chicago v. Rumsey*, 87 Ill. 348; *Brainerd v. Missisquoi R. R. Co.*, 48 Vt. 107; *Elliott v. Fair Haven & Westville R. Co.*, 32 Conn. 579; *Grand Rapids & Indiana R. R. Co. v. Heisel*, 38 Mich. 62; *Atchison & Nebraska R. R. Co. v. Garside*, 10 Kan. 522; *Colorado Central R. R. Co. v. Molandin*, 4 Col. 145; *New Albany & Salem R. R. Co.*

v. O'Daily, 12 Ind. 551; *Carson v. Central R. Co.*, 35 Cal. 325; *Market St. R. Co. v. Central R. Co.*, 51 Cal. 583; *Brown v. Duplessis*, 14 La. Ann. 842; *Whittier v. Portland & K. R. Co.*, 38 Me. 26; *McLoughlin v. Charlotte & S. C. R. Co.*, 5 Rich. (S. C.) 583; *Attorney-General v. Metropolitan R. Co.*, 125 Mass. 515; *Louisville & Frankford R. Co. v. Brown*, 17 B. Monroe (Ky.) 763; *Cincinnati & Spring I. Ave. R. Co. v. Cumminsville*, 14 Ohio St. 523; *People et al. v. Kerr et al.*, 27 N. Y. 188; *Kellinger v. Forty-second St. & Grand St. R. R. Co.*, 50 N. Y. 206; *Patterson v. Chicago, D. & V. R. Co.*, 75 Ill. 588. See *Story v. N. Y. El. R. Co.*, 90 N. Y. 122; s. c., 7 Am. & Eng. R. R. Cas. 596 and note.

3. Where the Fee is in the Adjoining Owner.—*Mahon v. New York C. R. R. Co.*, 24 N. Y. 658; *Kucheman v. C. C. & D. Ry. Co.*, 46 Iowa 366; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439; *Stetson v. Chicago & E. R. Co.*, 75 Ill. 74; *Imlay et al. v. Union Branch R. Co.*, 26 Conn. 249; *Grand Rapids & Ind. R. R. Co. v. Heisel*, 38 Mich. 62; *State v. Laverack*, 5 Vroom. (N. J.) 201; *Morris & Essex R. Co. v. Hudson T. R. Co.*, 10 C. E. Green (N. J.) 385; *Harrington v. St. Paul & Sioux City R. Co.*, 17 Minn. 215; *Adams v. Hastings & Dakota R. Co.*, 18 Minn. 260; *Kaiser v. St. Paul, Stillwater & T. F. R. Co.*, 22 Minn. 149; *Cox v. Louisville, N. A. & Chicago R. Co.*, 48 Ind. 178; *Carson v. Central R. Co.*, 35 Cal. 325; *Southern Pacific R. Co. v. Reed*, 41 Cal. 256; *Sherman v. Milwaukee, Lake S. & W. R. Co.*, 40 Wis. 645; *Blerch v. Chicago & N. W. R. Co.*, 43 Wis. 183; *Lawrence R. Co. v. Williams*, 35

4. Recent Constitutional Provisions.—But the whole subject has, in the past few years, undergone a change. With the introduction of the constitutional provisions allowing compensation where private property is "damaged for public use," or "taken and damaged for public use," or their equivalents, which have been inserted into the constitutions of all the States, which have changed their organic law in late years, has come a more liberal rule, and the tendency of the recent decisions has been to hold that compensation should be given in all cases, and many courts, which formerly held to the rule of no compensation, when the fee was in the public or city, now hold otherwise.¹

Ohio St. 168; *Terre Haute & Indianapolis R. Co. v. Scott*, 74 Ind. 29; *Henderson v. N. Y. Cent. R. Co.*, 78 N. Y. 423; *Phipps v. Western, etc., R. Co.*, 66 Ind. 319; *Chamberlain v. Elizabethport, etc., Co.*, 41 N. J. Eq. 43.

It makes no difference that the exclusive use of the street is in the public. *Jeffersonville R. Co. v. Estirle*, 13 Bush (Ky.) 667. Nor does the authority from the city to make such use of the street affect the rights of the adjoining owner to compensation. *Pomeroy v. Milwaukee*, 16 Wis. 640.

1. Recent Decisions Under Constitutional Provisions.—The tendency of the courts towards the rule allowing compensation in all cases has been marked. The grounds upon which many of them base their decisions are the changes in the constitution. But in many States the older decisions have been overruled without change in the constitutional provisions. The course of the decisions has been such as to lead to the conclusion that in the near future the rule will be compensation in all cases in almost all the States, abolishing the distinction formerly made as to whether the public or the landowner had the fee, which has very slight foundation in reason. Among the recent cases are: *Story v. N. Y. El. R. Co.*, 90 N. Y. 122; *Mahady v. Brunswick*, 91 N. Y. 148; *Lohr v. Met. El. R. Co.*, 104 N. Y. 268; *Railroad Co. v. Hambleton*, 40 Ohio St. 496; *Hogan v. Cent. Pac. R. Co.*, 71 Cal. 83; *So. Ca. R. Co. v. Steiner*, 44 Ga. 546; *Grand Rapids v. Heisel*, 47 Mich. 393; *Cash v. Union, etc., Co.*, 32 Minn. 101; *Va., etc., R. Co. v. Lynch*, 13 Nev. 92; *Hot Springs R. Co. v. Williamson*, 45 Ark. 429; *Rigney v. Chicago*, 102 Ill. 64; *Union Pac. R. Co. v. Andrews*, 30 Kan. 590; *Dweyer v. Chicago R. Co.*, 98 Ind. 153. Iowa still retains the rule of no compensation when the fee is in

the public. *Davis v. Chicago, etc., R. Co.*, 46 Iowa 389. In Kentucky a recovery can only be had for an unreasonable use of the street. *Elizabethtown, etc., R. Co. v. Thompson*, 79 Ky. 52.

In Missouri no damages can be had when the railroad is built and operated in a proper manner. *Cross v. St. L., etc., Ry.*, 77 Mo. 318.

The development of the new doctrine in New York is an interesting history apparently of a reluctant concession to what must soon become the prevailing view. For the steps in the process reference may be had to the following cases: *Canal Appraisers v. People*, 17 Wend. 571; *People v. Kerr*, 27 N. Y. 188; *Coster v. Mayor*, 43 N. Y. 399; *Hentz v. Long Island R. Co.*, 13 Barb. 646; *Plant v. Long Island R. Co.*, 10 Barb. 26; *Addams v. Saratoga & W. R. Co.*, 11 Barb. 44; *Kellinger v. Forty-second St., etc., R. Co.*, 50 N. Y. 206; *Fearing v. Irwin*, 55 N. Y. 486; *In re Elevated Road*, 70 N. Y. 327; *Caro v. Metropolitan R. Co.*, 40 N. Y. Sup'r Ct. 138; *Story v. New York El. R. Co.*, 90 N. Y. 122; s. c., 7 Am. & Eng. R. R. Cas. 596 and note. This complete change of view—for, to all appearances, the cases are irreconcilable (but see *Story v. New York El. R. Co.*, 90 N. Y. 122; s. c., 7 Am. & Eng. R. R. Cas. 596)—is the more remarkable in that it is not the courts following in the wake of the legislature, but the courts themselves assuming the initiative. The constitution of New York contains no provision regarding the payment of damages for property "damaged" or "injuriously affected," etc. The decision has for a basis the doctrine that while the property-owners have not the fee of the street, they have an easement, a right, or a privilege which demands that the street shall be used solely for the purposes of a street.

Where the landowner can prove special damages, not suffered by him in common with others, he has in all cases been allowed to recover.¹

5. Power to Grant Franchise.—The power to grant to a railway company the right of way in the highway is in the legislature.²

6. Duty at Crossing.—The duty of a railway company at the point where the highway crosses its line is to put and keep the highway in such a condition that the safety and convenience of the public shall not be materially interfered with.³

Pennsylvania holds to the doctrine of no compensation in any case. *Danville, H. & W. R. Co. v. Com.*, 73 Pa. St. 29; *Struthers v. Dunkirk, W. & P. R. Co.*, 87 Pa. St. 282. But see *Pusey v. City of Allegheny*, 98 Pa. St. 522.

And so in Alabama. *Perry v. N. O.*, etc., R. Co., 55 Ala. 413.

And in Denver *v. Bayer*, 7 Colo. 113; s. c., 2 Am. & Eng. Corp. Cas. 465, the rule is laid down that where injuries result from a change in or use of the street, wholly foreign to the ordinary purposes of a highway, as where the same is devoted to the purposes of a steam railroad, such owner is entitled to compensation, although such use was authorized by the authorities having charge of the streets. And this result follows whether the fee in the street is in such owner or not.

1. For direct damage, such as damage from construction, from sparks or cinders, etc., or from obstructing the means of access to the premises, the owner may always recover. *Stone v. Fairbury*, etc., R. Co., 68 Ill. 394; *Chicago, etc., R. Co. v. Ayres*, 106 Ill. 511.

So for obstructing the street by train, *Grand Rapids, etc., R. Co. v. Heisel*, 38 Mich. 62; *Brewer v. Boston, etc., R. Co.*, 113 Mass. 52; *Cadle v. Muscatine, etc., R. Co.*, 44 Iowa 11. And for injury from embankment, *Burritt v. New Haven, etc., R. Co.*, 42 Conn. 174; *Tate v. Missouri, etc., R. Co.*, 64 Mo. 149.

2. The power to grant to a railroad company the right to use the highway is in the legislature. A municipality has no authority over the streets within its territorial limits, except as delegated to it. If towns and cities were allowed to impose conditions upon, or restrict the use of their streets by railways, the public good might be sacrificed to every small town through which railway lines ran. *Ingraham v. Chicago, etc., R. Co.*, 34 Iowa 249; *Met. City Ry. Co. v. Chicago, etc., R.*

Co., 88 Ill. 317; *Branson v. Philadelphia*, 47 Pa. St. 349; *Atlantic, etc., R. Co. v. St. Louis*, 66 Mo. 228.

Municipalities have no right to impose upon railway companies any conditions upon their use of the streets where they are authorized by the legislature to use them for their tracks. *Council Bluffs v. Kansas City, etc., R. Co.*, 45 Iowa 338.

Although the city have the fee in the streets, they have no such private property therein, as to bring them within the provision which prohibits the taking of private property without compensation. *Clinton v. Cedar Rapids, etc., R. Co.* 24 Iowa 455.

A city will be liable to an abutting owner, if it grant to a railway company the right to use its streets, without authority from the legislature. *Stanley v. Davenport*, 54 Iowa 463.

3. Duty of Railway Company at Crossing.—In general it is the duty of a railway company to provide as safe a crossing for the highway as possible. *People v. Chicago, etc., R. Co.*, 67 Ill. 118. The duty of the company does not depend upon the question of the legality of the highway. It must provide a safe crossing for a way, openly and notoriously used as such, although not legally opened or dedicated. *Kelly v. Southern Minn. Ry. Co.*, 28 Minn. 98. But see, *contra*, *Central R. Co. v. State*, 32 N. J. L. 220. And it must see that its crossing does not become inadequate to meet the needs of an increasing population. *Cooke v. Boston, etc., R. Co.*, 133 Mass. 185; s. c., 10 Am. & Eng. Railroad Cas. 328.

Where the statute requires that the crossing shall be restored to its former usefulness, it must be so restored that the convenience of the public shall not be materially interfered with, except so far as it is necessarily interfered with by any railroad crossing. *Roberts v. Chicago, etc., R. Co.*, 35 Wis. 679.

Where the statute requires that the highway shall be restored to its former

X. RIGHTS OF THE PUBLIC.—1. Obstructions.—No rule can be laid down as to what constitutes an obstruction of the highway, it being a question to be determined upon the facts of each particular case. It may be said in general that every unauthorized use of the highway, which renders it less safe and convenient for travellers, is an obstruction. Temporary obstructions, which are necessary for business, are not unlawful; but the fact that the obstruction is necessary for business is no defense, if it be permanent.¹

usefulness, the company must restore it to its former breadth, although less breadth would accommodate the public. *Little Miami R. Co. v. Comrs.*, 31 Ohio St. 338. But a bridge over the railway need not be the full width of the highway, nor is it a nuisance because it is of lower grade than the highway. *People v. New York, etc., R. Co.*, 89 N. Y. 266.

Where the company has acquired the right to lay its tracks across the highway, it may maintain as many tracks as are necessary for the conduct of its business. *Comr. v. Hartford, etc., R. Co.*, 14 Gray (Mass.) 379.

Power to change the grade of a highway at a crossing does not give the company the right to alter the route of the highway. *Warren R. Co. v. State*, 5 Dutch (N. J.) 353.

A highway may be laid out over the track of a railway, whenever, in the opinion of the proper authorities, there is a necessity for it. *Hannibal v. Hannibal, etc., R. Co.*, 49 Mo. 480; *Little Miami, etc., R. Co. v. Dayton*, 23 Ohio St. 510; *Old Colony, etc., R. Co. v. Plymouth Co.*, 14 Gray (Mass.) 155; *Philadelphia, etc., R. Co. v. Philadelphia*, 47 Pa. St. 325; *Chicago, etc., R. Co. v. Lake*, 71 Ill. 333. But not when the location of the highway would make it very difficult or impossible to carry on the business of the company. *Northern Central R. Co. v. Baltimore*, 46 Md. 425.

1. The leading case on the obstruction of the highway by the use of it for business purposes is that of *The People v. Cunningham*, 1 Denio (N. Y.) 524. In this case the defendants owned a brewery, from which extended a pipe about two feet over the curb-stone, through which the swill was emptied into the carts and wagons of their customers. The number of teams collected there was so great that the street was frequently blocked from morning to night, so that others were prevented from passing. There was no evidence

that the arrangements were not as good as could be made at that place, or that the business was not conducted in such a manner as to give the least possible inconvenience to the public. The court held it to be a nuisance and said: "The fact that the defendants' business was lawful does not afford them a justification in annoying the public in transacting it; it gives them no right to occupy the public highway so as to impede the free passage of it by citizens generally. The obstruction complained of is not of the temporary character, which may be excused, within the necessary qualifications referred to in the cases cited, but results from a systematic course of carrying on the defendants' business. It is said that this business cannot be carried on in any other manner at this place so advantageously either to individuals or to the public. The answer to this is to be found in the observation of the court in Russell's case: 'They must either enlarge their premises or remove their business to some more convenient spot.' Private interest must be made subservient to the general interest of the community."

In Russell's Case, 6 East (Eng.) 427, referred to by the court, several wagons, used in business, was allowed to stand for two or three hours on a thirty-seven foot street; and although there was a passage way left on the other side of the street, this was said to be an obstruction.

But this cannot be said of the carriage of a visitor to the house of a friend, left standing before the door. *Norristown v. Moyer*, 67 Pa. St. 355.

A man has no right to eke out the inconvenience of his own premises by taking the public highway into his timber-yard. *King v. Jones*, 3 Campb. (Eng.) 331; *Thorpe v. Brumfitt, L. R.*, 8 Ch. App. (Eng.) 650; *Cushing v. Adams*, 18 Pick. (Mass.) 110; *Com. v. King*, 13 Metc. (Mass.) 115.

A sleigh standing ten or fifteen minutes in a village street for the purpose

2. Remedies.—(See NUISANCE.)

a. Abatement.—Since a private person has no right to abate a purely public nuisance, in order to justify the abatement of a

of unloading goods, ought not to be regarded as an obstruction; and it is not clear that, under any circumstances, a village street would in law be regarded as obstructed by the fact that one-third or one-half of it was occupied during the greater portion of the day by the vehicles of farmers, while their teams were feeding at an adjacent stable. *Sikes v. Town of Manchester*, 59 Iowa 65.

In *Fairbanks v. Kerr*, 70 Pa. St. 86, the court said: "A street may not be used in strictness of law, for public speaking, even preaching or public worship, or a pavement before another's house may not be occupied to annoy him; but it does not follow that every one who speaks or preaches in the street, or who happens to collect a crowd therein by other means, is, therefore, guilty of the indictable offence of nuisance."

Any noise, whether of musical instruments, the human voice, or however produced, that draws together noisy and disorderly people, is a nuisance. *Attorney-General v. Sheffield Gas Co.*, 19 Eng. L. & Eq. 649; *Walker v. Brewster*, L. R. (Eng.) 5 Eq. Cas. 31; *Inchfield v. Barrington*, L. R. (Eng.) 4 Ch. App. 388.

In *State v. White*, 64 N. H. 48; s. c., 15 Am. & Eng. Corp. Cas. 9, a person was indicted for violating a statute prohibiting the beating of a drum in the compact part of town without the command of a military officer. He offered to prove that he beat the drum with a sense of religious duty, and was worshipping God according to the dictates of his own conscience. It was *held* that it was no defense to show that the act was done in the performance of religious worship in accordance with a sense of religious duty, and that no actual disturbance of the public peace or the religious worship of others resulted from it.

Whether one who temporarily places articles used in his business upon the outer edge of the sidewalk in a city, leaving ample room for passage, is guilty of such negligence as will make him liable to a person injured by falling over such articles, is, in the absence of any law or ordinance prohibiting such obstructions, a question of fact. *Denby*

v. Willer, 59 Wisconsin Reports 240; s. c., 6 Am. & Eng. Corp. Cas. 226.

A city cannot grant to owners of coaches the right so to obstruct the street as to render access to private property impossible. *Branahan v. Cincinnati Hotel Co.*, 2 Am. & Eng. Corp. Cas. 1.

A wooden awning over a side-walk in front of a store is not *per se* a public nuisance. *Hawkins v. Sanders*, 45 Mich. 491.

In general it may be said that any unauthorized use of the street other than for purposes of travel, is a nuisance, if it hinders or delays others. *Smith v. State*, 23 N. J. L. 712; *Commonwealth v. Blaisdell*, 107 Mass. 234; *Northern Central R. Co. v. Commonwealth*, 90 Pa. St. 300; *State v. Berdette*, 73 Ind. 185.

Necessary Obstruction.—Temporary obstructions necessary for the conduct of business, or the use of the adjoining premises are allowable. Thus it is no nuisance to place building material in the street, provided it is not left in such a condition as to entirely obstruct the way, or endanger the passers-by. *Cushing v. Adams*, 18 Pick. (Mass.) 110; *Haight v. Keokuk*, 4 Iowa 199; *Vanderpool v. Hudson*, 28 Barb. (N. Y.) 186.

The subject of goods exposed on the sidewalk for sale is one largely regulated by local legislation. Placing goods upon the sidewalk, not for sale, but for the purpose of having them removed into the store within a reasonable time, is not obstructing the street. *Wood v. Mears*, 12 Ind. 515; *Congreve v. Smith*, 18 N. Y. 79; *Passmore v. Williams*, 1 S. & R. (Pa.) 219.

Obstructions not in Travelled Path.—It is no defense that the obstruction is not in the travelled part of the highway. The public have the right to use the entire width of the highway. *Harrower v. Ritson*, 36 Barb. (N. Y.) 303; *Rex v. Russell*, 6 East (Eng.) 427; *Dickey v. Tel. Co.*, 46 Me. 483. So where a person fell into a post hole dug in the extreme limit of the highway, the defendant was *held* liable, the court holding that a person has the right to go on any part of the road. *Wright v. Saunders*, 65 Barb. (N. Y.) 214.

And in *Reg. v. Tel. Co.*, 31 L. J.

nuisance in the highway by a private person, there must be such special damage to him as would support an action for damages.¹

b. Indictment and Injunction.—There is no law upon the subject of indictment for obstructing the highway, and injunction to prevent the same, not common to the general subject. (See NUISANCE, INDICTMENT, INJUNCTION.)

c. Action for Damages.—(See DAMAGES.) To sustain an action for special damage, from an obstruction of the highway, the plaintiff must prove some damage peculiar to himself, not suffered in common with the general public. A few instances of what has been held to be sufficient damage to support such an action will be found in the notes.²

(Eng.) 167, the defendants were held guilty of nuisance for placing their posts on the outer edge of the highway, the court saying that it was sufficient that they were in the way of those who might choose to go there. *Davis v. Mayor, etc.*, 14 N. Y. 524.

1. The damage must be different both in kind and degree from that suffered by the public in general. *Fort Plains Bridge Co. v. Smith*, 30 N. Y. 44; *Rogers v. Rogers*, 14 Wend. (N. Y.) 131; *State v. Parrott*, 71 N. C. 311.

The question of removing fences was elaborately discussed in *Griffith v. McCullum*, 46 Barb. (N. Y.) 561 and it was held that to justify the tearing down of a fence it must so encroach upon the highway as to be a private nuisance. The court said: "It would be an alarming doctrine that all persons who are by their fences encroaching upon the highway are liable to have their fences thrown down at any time by commissioners of the highway or other persons."

But in *Van Wyck v. Lent*, 33 Hun. (N. Y.) 301, it was held that highway commissioners may remove a building which encroaches upon the highway although there is room to pass without inconvenience or danger. But where a fence is built across a highway, so that passage is barred, any one desiring to pass may remove it, although it would seem to be otherwise if the fence merely encroaches, but does not prevent passage along the highway. *Pierce v. Dant*, 7 Cow. (N. Y.) 609; *Brown v. Watsons*, 47 Me. 161; *Powers v. Irish*, 27 Mich. 429.

2. For any damage different from that suffered by the general public, as damage from interference with his mode of ingress and egress, or from smoke and cinders, the adjoining owner may

recover. *Stone v. Fairbury, etc.*, R. Co., 68 Ill. 394. And so for obstructing the street in front of his premises. *Grand Rapids, etc., R. Co. v. Heisel*, 38 Mich. 62; *Seuery v. Central Pacific R. Co.*, 51 Cal. 104; *Chicago, etc., R. Co. v. Ayres*, 106 Ill. 511; *Brewer v. Boston, etc., R. Co.*, 113 Mass. 52.

But in Pennsylvania, the rule would seem to be that there can be no recovery for incidental damage, when the company is in the exercise of a right duly granted by the legislature. *Struthers v. Dunkirk, etc., Co.*, 87 Pa. St. 282, and see *Grear v. Railroad Co.*, 43 Iowa 83.

The special damage which the plaintiff must prove need only be slight damage. It is sufficient if he prove that he has lost trade by the obstruction. *Callanan v. Gilman*, 52 N. Y. Sup. Ct. 112.

The deprivation of light and air by a projecting awning is sufficient to enable him to have an injunction. *Lavery v. Hannigan*, 52 N. Y. Sup. Ct. 463. If the damage be the same in kind, but greater in degree than that suffered by the public, a private action will not lie. *Pittsburg, etc., R. Co. v. Jones*, 111 Pa. St. 204; s. c., 56 Am. Rep. 260.

Where, by the closing of a street, an abutting landowner is compelled to take a circuitous way to reach his premises, he may have an action against the wrong-doer. *Sheedy v. Union, etc., Works*, 25 Mo. App. 527.

But the averments that the plaintiff was compelled to travel by longer and worse roads, and could only reach certain places by his passing on private lands, was held insufficient as averments of special damage. *Shero v. Carey*, 35 Minn. 423. But it is held that if the obstructions cut off all means of public access to his lot, the abutter may have an action for damages, although the obstruction is not immediately in front

HIGHWAY COMMISSIONERS—HIRE—HIS.

HIGHWAY COMMISSIONERS.—See HIGHWAY; OFFICERS OF MUNICIPAL CORPORATIONS.

HIGHWAY ROBBERY.—See ROBBERY.

HIRE.—(See BAILMENT.) A bailment in which compensation is to be given for the use of a thing, or for labor and services about it.¹

HIS.—The use of the pronouns “he” and “his” in a written instrument is not conclusive that the person referred to is a male;² and, in a statute, includes both sexes.³ An individual may properly regard property as “his,” and so denominate it, when he has a right to it, and the power by law to enforce that right. Indeed, both in common parlance and the legal acceptance, property is *his* who, in case of its destruction, must maintain the loss of it.⁴ The words “his” or “their,” used in a policy as descriptive of the property of the assured, do not render the policy void, if the insured has an insurable interest, although the interest may be qualified or defeasible, or even an equitable interest.⁵

of his lot. *Wilder v. DeCon*, 26 Minn. 10.

In *Crook v. Pitcher*, 61 Md. 515, the court *held* that having to use a longer and more circuitous route, was not sufficient special damage to support an action. *Powell v. Bunker*, 91 Ind. 64; *Matlock v. Hawkins*, 92 Ind. 225.

1. Bouv. L. Dict.

Hire—Employ.—“‘Hiring’ and ‘employing’ are words of different meaning. To hire is to engage in service for a stipulated reward; as to hire a servant for a year, or laborers by the day or month; to engage a man to temporary service for wages. To employ is a word of more enlarged signification. A man hired to labor is employed, but a man may be employed in a work who is not hired. Materials are employed for building locks, but they are not hired; and a man who does his own work or the work of another is employed in it, although he receives no wages. To employ is to use as an instrument or means of affecting an object.” *McCluskey v. Cromwell*, 11 N. Y. 605 (diss. op.).

“**Hired and to Freight Taken.**”—“The words are, on the part of the shipowner, ‘granted and to freight let,’ and of the charterer, ‘hired and to freight taken,’ than which, of themselves, I know no words more apt to let pass the possession of a ship as well as of a house, although, I agree, the subjects are different; they are words of grant and demise, and pass possession in the

particular case.” *Christie v. Lewis*, 2 Brod. & B. 428.

“‘Hired to the defendant’ implies a contract, and is equivalent to saying ‘let to hire to the defendant.’” *Brown v. Garnier*, 6 Taunt. 389.

A contract that one shall provide a shop, loom and tackle, the other perform the labor of weaving, and each shall receive one-half the profits, constitutes a partnership, but not a “hiring” within the meaning of the statute, charging the township with the maintenance of the laborer as a pauper when he becomes chargeable. *Gregg Tp. v. Half-moon Tp.*, 2 Watts (Pa.) 342.

2. *Berniaud v. Beecher*, 71 Cal. 38.

3. *Rex v. Smith*, Russ. & Ry. 267, where a penal statute the words “receive or take into *his* possession any money,” etc., were *held* to apply likewise to a female servant.

4. *Hough v. City Fire Ins. Co.*, 29 Conn. 19-20.

5. *Fowle v. Springfield Ins. Co.*, 122 Mass. 194, and cases there cited.

“It is also a fact of public notoriety that in common parlance the person who is in possession of real property as owner, under a valid and subsisting contract for the purchase thereof, whether he has paid the whole of the purchase money and gotten the legal title or not, is called the owner thereof, and the property is usually called *his* by others. In equity it is, in fact, *his*; and the vendor has only a lien thereon

So with reference to a taxpayer.¹ For miscellaneous cases see note 2.

for the security of his unpaid purchase money." *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 396.

The purchaser at an execution sale of real estate gave the defendant in the execution a written promise to reconvey, upon the payment of a specified sum by a day named, but the defendant did not bind himself to make such payment, and the promise was founded on no consideration. On the same day the defendant accepted from the purchaser a lease of the same premises, went into possession, but never paid anything in redemption of the property. He took out a policy of insurance upon the house, containing an express condition that, if the interest in the property to be insured be a leasehold or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance should be void; the policy containing no statement of the interest of the insured, but describing the property as "his." *Held*, that if the insured represented his interest, the failure on the company's part to incorporate his statement in the policy, did not avoid it, otherwise it was void. "The acceptance of a policy containing the condition under consideration, without any representation as to title, amounts to a declaration on the part of the assured, that his interest is an absolute one." *Mers v. Franklin Ins. Co.*, 68 Mo. 127.

1. "The term *his estate* does not import that he must have a fee, or even a freehold, but any legal interest for which he is taxed, excluding such estate as he may hold in trust, either as guardian, administrator or otherwise, in which he has no property." *Inhab. of Sudbury v. Inhab. of Stow*, 13 Mass. 462.

2. A devised to the children of his sons and daughters his real estate and added, "It is my will, that each of my sons and sons-in-law shall yearly pay for his house £5 unto my executors, with which they shall pay off ground rents, etc. In such manner each of my sons and sons-in-law will get about £500." *Held*, that the devise vested an estate of inheritance in the testator's sons. "... Each of his sons, and sons-in-law, should pay five pounds to the executors for *his* house to pay quit rents, and keep the premises in repair. ... This shows an intention ...

to give Charles an estate for life, which by the addition of words of further limitation, must be enlarged to an estate of inheritance." *Sholfield v. Zehmer*, 6 Watts (Pa.) 101.

"A house" *held*, equivalent to "*his* house" in an indictment for keeping a gaming-house. *State v. Hubbard*, 3 Ind. 530. "We think that during the time the defendant kept a house, said house was, in contemplation of the enactment in question, his house, and that the indictment is, therefore, sufficiently certain."

So in an indictment for selling spirituous liquor "to be used in or about his house or other buildings," the defendant need not be owner or lessee of the building but may be merely a hired agent or bar-tender. *Com. v. Hadley*, 11 Metc. (Mass.) 66.

"The words 'his house,' construed with reference to the subject-matter, seem to designate the place where he sells or carries on the business of selling liquor. The act of selling and the control and possession of the article sold, at the place of sale, indicate the extent of the premises in which he has or claims to have possession, for any purpose connected with the use of spirituous liquors.

If, therefore, a man should get possession of premises wrongfully, as by forcible entry and detainer, or by trespass or disseizin, and should there sell spirituous liquors to be used on the premises thus obtained, they would be sold, we think, to be used in *his* house, within the meaning of the statute, and he would incur the penalty."

An accommodation indorser of negotiable paper, whose indorsement is in no way connected with the business of the indorser, cannot be forced into bankruptcy for suspending and failing to resume payment of such paper. Such paper is not "his commercial paper," within the meaning of the bankrupt act. *In re Clemens*, 2 Dill. (U. S.) 533.

To show the meaning of the words "his crop of flax," in a contract for the sale of flax between dealers, it was *held* admissible to introduce evidence of the circumstances under which the contract was made, of the relations of the parties and the usage of the trade. *Goodrich v. Stevens*, 5 Lans. (N. Y.) 230. "A crop is, primarily, some product of

HITHERTO—HOARDING—HOCUSSED—HOG.

HITHERTO.—See note 1.

HOARDING.—A fence enclosing a house and materials while builders are at work. It does not, however, necessarily mean something of a mere temporary character, but may be of so permanent a character that the right of the reversioner may be thereby injured.²

HOCUSSED.—See note 3.

HOG.—The term *hog* in a penal statute or indictment includes *pig*⁴ and *sow*,⁵ and is included in and synonymous with the term *swine*.⁶ In an act making the stealing of a *hog* grand larceny, the hog must be a *live* one;⁷ but a contract for the delivery of "hogs" has been *held*, in the absence of explanatory evidence, to mean *dead* ones.⁸

the soil gathered during a single year, and when a man speaks of '*his* crop,' he will ordinarily be understood to mean a 'crop raised by himself,' and yet the words do not, of themselves, import this meaning, but may be taken to mean a crop, that is, the portion of the present year's growth of the article in question, which had become his by purchase as well as by production. I do not think the words in question in the case at bar are so inflexible in meaning as to exclude proof of extrinsic circumstances to aid in their construction.

Where A demises to B for the term of *his* natural life, the demise is *prima facie* for the life of B. But where A demises to B, his executors and administrators, for the term of *his* natural life, and the lease contained a covenant by A for quiet enjoyment by B, his executors, etc., during the natural life of A, it was *held* that the word "*his*" in the demising clause must be referred to A, the grantor, and not to B, though his name was the last antecedent. *Doe dem. Pritchard v. Dodd*, 5 B. & Ad. 689; 2 N. & M. 838.

In an act rendering incompetent the testimony of any "negro or mulatto slave, free negro, or mulatto born of a white woman, during his time of servitude at law," etc., it was *held* that the word *his* had the same force and effect as the word *their*, and applied to "free negro" as well as to "mulatto born," etc. *U. S. v. Mullany*, 1 Cranch C. C. (U. S.) 517.

1. Where trustees alleged that "they have *hitherto* increased the annuities," the court (diss. op.), in commenting on this word said: "This term '*hitherto*' qualifies and limits what otherwise might appear either general or uncertain, and restrains the increase to that

period of time then elapsed, and prevents its reaching the future. When it occurs in that sublime passage from Job, '*Hitherto* shalt thou come, but no further, and here shall thy proud waves be stayed,' at first, is the command to reach the limited line, and then in amplification of the same idea, according to the usage in Hebrew poetry, it is added, 'and no further, and here shall thy proud waves be stayed.' But if, instead of the first being a command, it was a permission merely, or, as in this case, a *power* only, and it was '*hitherto mayest thou come*,' then the addition '*but no further*,' would be not an amplification of the former idea, but only a repetition of the same idea. Thus, '*hitherto we have paid*,' so far from implying that we will hereafter pay, is a reservation as to what we will hereafter do."

2. *Met. Assn. for Impvg. Dwellings, etc. v. Petch*, 5 C. B. N. S. 504.

3. A libel alleged that a gentleman was, on a certain night, "hocused and robbed of £40," in the plaintiff's public house. An innuendo "meaning thereby that the said public house was the resort of, and frequented by felons, thieves, and depraved and bad characters," after verdict for the defendant, was *held* too wide, "turning that which may have been an accidental occurrence, into habitual misconduct and negligence on the part of the keeper of the house." *Broome v. Gosden*, 1 C. B. 728; *Odgers on Libel* 101.

4. *Lavender v. State*, 60 Ala. 60; *Washington v. State*, 58 Ala. 355.

5. *Shubrick v. State*, 2 So. Car. 21.

6. *Rivers v. State*, 10 Tex. App. 177.

7. *Hunt v. State*, 55 Ala. 138.

8. *Whitson v. Culbertson*, 7 Ind. 195; *Alexander v. Dunn*, 5 Ind. 122.

HOLD.—To have as tenant. To announce a legal opinion; to adjudge or decree. To bind, confine, oblige or restrain.¹

HOLDER.—(See **BILLS AND NOTES.**) The term "holder" is properly applied to the person having possession of the paper and making the demand, whether in his own right or as agent for another.² It is a word of the same import as *bearer*, and both may acquire a title by lawful delivery, according to the terms of

1. Rap. & Lawr. L. Dict.; Abb. L. Dict.

Where land was conveyed by an owner in fee simple and in the deed he said: "And it is further understood that I, S. H., hold a life interest in the above described tract of land," it was *held* that the word "hold" here had the effect of a reservation in behalf of the grantor for his life. *Hurst v. Hurst*, 7 W. Va. 289, 297.

Words in an agreement that "A shall hold and enjoy," if not accompanied by restraining words, were *held* to operate as words of present demise. *Doe v. Ashburner*, 5 T. R. 163. And see *Pinero v. Judson*, 6 Bing. 206.

A covenant in a lease that the lessee shall "hold and occupy" the demised premises during the term was *held* to amount to a general covenant for quiet enjoyment during the term. *Ellis v. Welch*, 6 Mass. 246.

Power given to a corporation to "hold and manage" a fund *held* to imply a power to me for it, and to give it a right to leave the fund in the hands of an executor and demand only the annual interest. *Proprs. of White School House v. Post*, 31 Conn. 240.

A restriction on a corporation from "purchasing and holding" lands, does not prohibit *purchasing* alone, subject to the statutes of *mortmain*. "*Purchasing and holding* are very different things, and the consequences of each are very different. If the words had been that the bank should neither purchase nor hold, then it could have done neither one nor the other." *Leazure v. Hillegas*, 7 S. & R. (Pa.) 313, 320. And see *Runyan v. Lessee of Coster*, 14 Pet. (U. S.) 131, where this distinction is sustained.

A bequest of "250 shares which I hold in the U. Bank" is a specific legacy. "The 'which I hold' certainly individuate the stock as a *corpus* with as much precision as would the words 'standing in my name' . . . or 'all the stock which I have in the three per cents.'" *Blackstone v. Blackstone*, 3 Watts (Pa.) 335.

Where an article of association made

provision for a poll being demanded by "shareholders qualified to vote and holding in the aggregate 2,000 shares or more," it was *held* that a person holding the proxies of others did not come within the description of a person "holding" shares. *Queen v. Govt. Stock Invt. Co.*, 3 Q. B. D. 442.

In an act abolishing the sessions for Westminster, and directing that the county sessions for Middlesex shall be holden in Westminster, and that the persons *holding* the offices of bailiff of Westminster, etc., should execute the duties of sheriff, etc., of Middlesex, the word "holding" was construed to mean "now holding," *i. e.*, at the time of the passing of the act. *Nicholson v. Ellis*, El., Bl. & El. 267, 283.

Where a tax is payable by "all persons having or holding lands," "these words apply to persons receiving the rents and profits; and where a party receives the whole of the profits, he is to be charged with the whole. But where one person receives the profits to a limited extent only, and another receives the residue, the words *having and holding* embrace both." *Ward v. Coust*, 10 B. & C. 647.

The word "holding" in a statute providing that "all persons holding lands, etc.," may have partition does not require actual occupancy, but is equivalent to "owning," or "having title to," lands. *Godfrey v. Godfrey*, 17 Ind. 6.

In an act providing that the managers of a lottery "shall be holden to account for all the tickets in every class in said lottery," the expression "holden to account for," means not merely to 'render an account of' but 'to be responsible for;' it stands in opposition to the right of appropriation to one's own use and benefit." *Thomas v. Mahan*, 4 Me. 513.

A power of "holding to bail" *held* not to comprehend a power to take a recognizance to the injured party for his treble damages. *Vose v. Deane*, 7 Mass. 283.

2. *Bowling v. Harrison*, 6 How. (U. S.) 258.

the contract.¹

HOLDING.—A holding, in English law, is a piece of land held under a lease or similar tenancy for agricultural, pastoral or similar purposes.²

Under the Agricultural Holdings Act, 1875, "holding" includes all land held by the same tenant of the same landlord, for the same term, under the same contract of tenancy. Under the Land Law (Ireland) Act, 1881, "holding" during the continuance of a tenancy means a parcel of land held by a tenant of a landlord for the same term and under the same contract of tenancy, and upon the determination of such tenancy means the same parcel of land discharged from the tenancy. This means not only the land comprised in the contract of tenancy, and actually let to the tenant, but includes such profits *a prendre* or easements, as are appurtenant to the land so let.³

HOLIDAY.—(See **BILLS AND NOTES, DAY,**⁴ **DEMAND,**⁵ **SUNDAY.**)

A holiday is a secular day upon which the usual obligations of labor, attendance upon courts and attention to notices and service, and service in legal proceedings are, by law, remitted. In a sense Sunday is a holiday, but, as the word is usually employed, it does not include Sundays; thus, "Sundays and Holidays" is a common and correct expression.⁶

The matter of holidays is usually neglected by statutes or local usage. Sunday and the Fourth of July⁷ are universally observed in

1. Putnam v. Crymes, 1 McMul. L. (S. Car.) 9 (36 Am. Dec. 250).

The Iowa code provides that notice to redeem from tax sales shall be given by "the lawful holder of the certificate." A person purchased real estate at a tax sale, in partnership with another, and took the certificates in his own name. In dividing the certificates with his partner, he wrote his name on one and delivered it to his partner with the object of transferring it. *Held*, that such partner was the "lawful holder," notwithstanding the informality of the assignment. "By 'the lawful holder' is meant the one who in law is the owner of the certificate, and entitled to the rights and benefits which may accrue under it." Swan v. Whaley, 35 N. W. Rep. 440 (Iowa.)

2. Rap. & Lawr. L. Dict.

3. *In re Hutchinson*, 12 L. R., Ir. 79. But where, under the contract of tenancy, the turbary was excepted to the landlord, the "holding" was *held* not to include the right of cutting turf. Knox v. Baxter, 19 L. R. Ir. 460.

4. *Dies Non.*—For a full treatment of this subject, including what acts may

be performed on a *dies non juridicus*, see vol. 5, p. 85.

The term holiday imports *dies non juridicus*. Lampe v. Manning, 38 Wis. 673.

5. **Demand—Effect of Holidays.**—See vol. 5, page 528⁴⁴.

6. Abb. Dict.

7. Cuyler v. Stevens, 4 Wend. (N. Y.) 556.

Lewis v. Burr, 2 Caine's Cas. (N. Y.) 194.

Swinney v. Johnson, 18 Ark. 534.

In Ruge v. the State, 67 Ind. 388, an indictment for a violation of a liquor law charged the defendant with having sold intoxicating liquor, for a specific price, on the 4th day of July, 1876, "the said 4th day of July being then and there a legal holiday." The statute upon which the indictment was brought prohibited the sale of liquor upon Sunday "or any legal holiday." The court *held* that the indictment could not be sustained, as, at the time it was formed, there was no act making the 4th day of July a legal holiday. The act of March 6, 1875, made it a holiday "for all purposes of presenting for payment or ac-

this country. In addition to these the following are commonly observed: Thanksgiving day (appointed by the President and governors;) Christmas day;¹ New Year's day, Washington's birthday, Decoration day and general election days.

HOMAGE.—The most honorable service of reverence that a free tenant might do his lord; openly and humbly kneeling, being ungirt, uncovered and holding up his hands both together between those of the lord who sate before him; and there professing that "he did become his *man*, from that day forth, of limb and earthly honor," and then receiving a kiss from his lord.² It was abolished by Act of 12 Car. II, c. 24.

HOME.—(See, also, DOMICILE, DWELL.) The word "home" means some permanent abode or residence, with intention to remain.³

ceptance for the maturity and protest, and giving notice for the dishonor of bills of exchange," etc. But this did not make it a legal holiday within the meaning of the section upon which the indictment was founded.

1. Reithmiller v. People, 44 Mich. 280.

Tassel v. Lewis, 1 Ld. Raymond 743.

Commencement Day.—It has been held in *Massachusetts* that the day of commencement at Harvard College is not a holiday; but a usage of any bank in respect to notes falling due on that day, to make a demand on the maker and give notice to the indorser on the day preceding, will be binding on an indorser of a note discounted for him at the bank, who is consonant of such usage. City Bank v. Cutter, 3 Pick. (Mass.) 414.

Jewish Sabbath—Seventh Day Baptists.—See Lindo v. Unsworth, 2 Camp. 602; Isaacs v. Beth Hamedash Soc., 1 Hilt. (N. Y.) 469; Stansbury v. Marks, 2 Dall. (Pa.) 213; Simon v. Gratz, 2 P. & W. (Pa.) 412; Society v. Com., 52 Pa. St. 125; Marks v. Wilson, 11 Abb. Pr. (N. Y.) 87.

Fast Day is a holiday in *Massachusetts*, but by custom; not like Sunday, by positive law. The Bark Tangier, 3 Ware (U. S.) 120.

In the absence of any statute or usage it is regarded as a working day. The proclamation of the governor is only a recommendation and has not the force of law. Pierson v. Richardson, 1 Cliff. (U. S.) 386.

A common carrier may give notice to consignee and discharge cargo on "fast" or "thanksgiving" day, appointed by governor as holiday. Richardson v. Goddard, 23 How. (U. S.) 40. And

when the master has commenced the delivery of the cargo, he may continue and complete it on a fast day. Pierson v. Richardson, 1 Cliff. (U. S.) 385.

Contracts Subject to Holidays.—Teaching contracts for stated periods are subject to the observance of recognized holidays, and there should be no deductions for such occasions from the teacher's wages. School District No. 4 v. Gage, 39 Mich. 484; s. c., 33 Am. Rep. 421; and see Hosley v. Black, 28 N. Y. 438.

Where a contract specifies *working lay days* Sundays and holidays are excluded in the computation. Brooks v. Minturn, 1 Cal. 481.

See SUNDAY.

2. Whart. Law Lex.; 2 Bl. Com. 53-54.

3. Inhab. of Jefferson v. Inhab. of Washington, 19 Me. 301. Whereas *domicile* "though in familiar language used very properly to signify a man's dwelling-house has, in cases arising under international law, and in kindred cases thereto, a sort of technical meaning. . . . It fixes the character of the individual in reference to certain rights, duties and obligations; but dwelling-place and home have a more limited, precise and local application. . . . A home and dwelling-place do not, necessarily, continue until another is acquired. A man may break up his establishment, and divest himself of property, and become a wanderer, and there will be an end of his dwelling-place and home, as effectually as if he were to gain a home in another place." *Ibid*.

In the same case it is said: "The words dwelling-place and home and the term settlement therefore may have

very different signification. A person may have his settlement different from his dwelling-place and home. Indeed, he may have a settlement in a place in which he never had either a dwelling-place or home; as in the case of children born whilst their parents live in one town, having their settlement in another."

And in *Phillips v. Kingfield*, 19 Me. 381, it is said: "In our pauper laws there is a marked distinction between the place of residence or home, and the place of legal settlement. The latter cannot be changed without acquiring a new one. The former may be abandoned, without evidence that another residence has been secured."

" * * * The legislature intended, by the use of the expression 'dwells and has his home' to designate some permanent abode, a residence with an intention to remain, or at least without an intention of removal,—something more than the habits and life of a wanderer, who has no place where he has a right to continue, and call it and claim it as his rightful home." *Tuner v. Buckfield*, 3 Greenl. (Me.) 231.

"When . . . a person voluntarily takes up his abode in a given place, with intention to remain permanently, or for an indefinite period of time; or, to speak more accurately, when a person takes up his abode in a given place, without any present intention to remove therefrom, such place of abode becomes his residence or home, and will continue to be his residence or home, notwithstanding temporary personal absences, until he shall depart with intention to abandon such home." *Inhab. of Warren v. Inhab. of Thomaston*, 43 Me. 418.

So, conversely, "the principal place of abode of a man and his family, when it is only a temporary abode, is not his home in the sense here required." *Thayer v. Boston*, 124 Mass. 147.

A pauper, while supported as such, was *held* to have no "home or dwelling-place" within the meaning of a statute regulating settlements. "The dwelling-place or home here referred to is evidently one that the pauper has obtained, procured or occupied, of his own will, or through some voluntary agency of his own, or that of connections or friends, a place of abode that can properly be called his, in the selection or enjoyment of which he may be supposed to have been a free agent, or at least one that he was allowed to occupy and

enjoy as his home, independent of the compulsory charity of the town." *Wilmington v. Somerset*, 35 Vt. 232.

In *Exeter v. Brighton*, 15 Me. 60, it is said: "It is not then at all times true, that a party has his home where his domicile is, although it may be true that he can have no home where it is not. If he abandons his former residence, with an intention not to return, but to fix his home elsewhere, while in the transit to his new, and, it may be, distant destination, we are of opinion that whatever may be said of his domicile, his home has ceased at his former residence, within the meaning of the statute for the support and relief of the poor. . . . Home and domicile may, and generally do, mean the same thing; but a home may be relinquished and abandoned, while the domicile of the party, upon which many civil rights and duties depend, may in legal contemplation remain."

In a Will.—A testator directed his property to be kept together and his family supported out of it, under the government of his wife, and that no expenses should be charged to his children while they remained at home, etc. *Held*, that a daughter who left the family after she attained full age, was not entitled to maintenance. "It is plain, we think, that the 'house' mentioned in the will is that household of which the testator was the head while living, and the government whereof he committed to his wife upon his death." *Manning v. Woff*, 3 Dev. & B. Eq. (N. C.) 11.

Where a testator left to his unmarried daughter "a home and maintenance during the time she remains unmarried," this was *held* to mean "a home and maintenance on the premises where he lived at the time of his death," and she was not entitled to be supported elsewhere. *Parker v. Parker*, 126 Mass. 433.

Where the issue was whether a certain tract of land in dispute was intended by a testator to pass under a devise of his "home place," evidence that he had given parcels of land to certain of his sons, before his death, is irrelevant. *Waggoner v. Ball*, 95 N. C. 323.

Home Farm.—A home farm is "one used in connection with the landlord's residence, principally for the convenience or supply of the residence, and not for the purposes of profit, though of course, surplus produce may be sold, or otherwise disposed of in the usual way." *Hamilton v. Sharpe*, 20 L. R.

HOMESTALL.—Is used in the ancient law to designate the mansion house.¹

Ir. 234. Another definition approved of, though not taken as exhaustive, in the above case is that given in *Gamble v. Simpson*, 17 Ir. L. T. 44, viz.: as meaning, in England, "a farm occupied for the convenience, appurtenant to, and in connection with, and for the advantage of, a place of residence." The following remarks on the subject, may be quoted from the opinions of the justices of the court of appeal in the former case. (20 L. R. Ir. 236-9).

FITZGIBBON, L. J.: "Another difficulty that seems to have pressed upon the land commission and which I cannot appreciate, was that no one can have a 'home farm' who is not the possessor of a large estate. It may be that a farmer who has but one ordinary farm, has not a 'home farm,' but where a man having, as his home, a suitable country residence, farms neighboring land, for the advantage of, and in connection with, his home, why is such land not to constitute a 'home farm' because he has not tenants elsewhere? The question whether any given farm is a 'home farm' depends, I think, very much upon similar considerations to those which determine the difference between an agricultural and a residential holding; upon which side of line any particular case falls may be doubtful; but each case must be determined upon its own circumstances, and I object to laying down general principles on the subject."

BARRY, L. J., said: "I concur, and I own, that I, in great degree, share the doubt of Mr. Commissioner Vernon, that a farm is a 'home farm' merely because it happens to be farmed by the owner or landlord, and adjoins his residence. I think the word 'home' is there used in contra-distinction to something else, and I find great difficulty in ascertaining what that 'something else' is, unless it refers to farms belonging to the same landlord, which he does not occupy himself, but lets to other tenants. I think it difficult to hold a farm to be a 'home farm' which has nothing to distinguish it from other farms. At the same time, giving the case the best consideration I can, it would seem to me that the decision below limits the use of the word 'home' in a manner that may duly defeat the language of the act of parliament, and accordingly I adopt, for present pur-

poses, the definition given by Chief Justice Morris in *Gamble v. Simpson*, [quoted *supra*], and to be embodied in our order as now read out by Lord Chief Justice Fitzgibbon."

Home Port.—The *home port* of the vessel is the port in the office of whose collector the bill of sale, mortgage, etc., should be recorded; not the port of last registry or enrollment when not such home port. *White's Bk. v. Smith*, 7 Wall. (U. S.) 646.

In "The Favorite," 3 Sawy. (U. S.) 411, Judge Deady says: "Under the ruling of *Lottawana*, lately decided by the supreme court (21 Wall. 558), what constitutes a home port, is yet an open question. But I think upon reason and convenience, the home port ought to be the one where the vessel is enrolled; away from that place, whether in or out of the State in which her owner resides, she is supposed to be *in itinere*, and therefore relying upon her credit for the purchase of the necessary supplies to complete her voyage."

Whereas, in *The Albany*, 4 Dill. (U. S.) 448, Judge Dillon says: "As respects the rights and remedies of material-men, the home port or State of a vessel is the State wherein the owner resides, and not the State or district in which she is enrolled, where the two are different. To hold in such a case that the *enrollment* controlled would destroy the only foundation upon which a distinction between the rights of domestic and foreign material-men has been made, viz.: that the former are presumed to extend credit to the owner, whom they are supposed to know, or whom, at all events, they may pursue in the courts of their own State."

This view was adopted in *Rees v. Steamboat Gen. Terry*, 3 Dak. 166, where the court conclude: "After an examination of all the cases upon this subject within our reach, we are satisfied the clear weight of authority, as well as the effect of the decisions of the supreme court of the United States is with the doctrine that the home port of a vessel is any port of the State or territory where the owner, or if more than one, where the managing owner resides, so far as the question of home port affects the rights and remedies of the material-men."

1. *Dickinson v. Mayer*, 11 Heisk. (Tenn.) 521.

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I. DEFINITION.—Homestead is the house and land constituting a family residence. In law it is such family residence exempt from forced sale. In this sense the word is very frequently used by legal writers, and almost always when it is employed as a law term, as in the title of this article. This use of it is of comparatively recent origin, and the word still is employed often by courts and legal writers according to its meaning in common parlance. The signification is always apparent from the context. The extent of the exemption from forced sale varies in different States under their statutory authorizations, but the legal term *homestead*, implies some degree of exemption in all. Under this definition the law of real estate respecting homesteads is confined to exempt residences and lands throughout this article.¹

1. Definitions—Homestead.—"A person's dwelling-place with that part of his landed property which is about and contiguous to it." Webster. "A mansion house with the adjoining land." Worcester. "The home place . . . the house and the adjoining land, where

the head of the family dwells—the home farm." Bouvier's Law Dict.

Similar definitions: *Tumlinson v. Swinney*, 22 Ark. 400; *Ackley v. Chamberlain*, 16 Cal. 181; *Walters v. People*, 18 Ill. 194; *Philleo v. Smalley*, 23 Tex. 394.

II. DEDICATION: HOW HOMESTEADS ARE SELECTED, DECLARED AND OCCUPIED.—1. In General.—Formality in the dedication of homesteads is not universally required. While some States prescribe that the property set apart as exempt must be particularly described and its selection stated in a written instrument to be acknowledged and recorded with all the particularity of a deed of sale, others confer the exemption right, with respect to family residences, without exacting any declaration on the part of the beneficiaries.

The right is granted regardless of the character of the title under which the householder possesses his home. The homestead may be carved out of an estate in fee simple, a life estate, an equitable estate, a leasehold, and, under some of the statutes, in estates in common. The essential is that there must be some interest to be protected from execution. For homestead laws are distinctly for the purpose of preventing the disturbance of family homes by forced sales for debt. If the estate of the debtor in his home is such that it would be liable to execution in the absence of exemption laws, it is within the contemplation of the legislator when extending protection from execution to the amount in value specified, whatever the character of his title. If he has some interest, coupled with his possession, which his creditor could sell ordinarily, he has that upon which exemption law can operate. A mere naked possession may support the homestead claim against every one except the rightful owner entitled to regain possession. The homestead right is confined to the interest of the beneficiary in the real estate he occupies, whether he has title to the land itself or not. His possession is good against all who have no better right to possess, and the law protects him in it against his creditors. A creditor, attempting to levy upon a homestead, cannot meet the debtor's claim of exemption by the plea that the latter is not the owner of the land in which his interest as a tenant lies.¹

Liberal as the law of homestead exemption is towards the debtor, it yet confers upon him no right of property. It could not do so constitutionally. It affects and abridges the creditor's remedy against such right and interest as the debtor already has in the family residence which he occupies. A plaintiff in eject-

The word is used, in the sense given in the text, as a legal term, in the captions of digests and court reports, and generally in judicial opinions and law treatises on the subject of this article.

1. What the Debtor's Interest must be, upon which to base Homestead Rights.—That which, in the absence of an exemption law, "could be sold on execution." *Deere v. Chapman*, 25 Ill. 612. Any estate liable to forced sale. *Conklin v. Foster*, 57 Ill. 107. Exemp-

tion law designed to protect the debtor's family, "as against his creditor in the enjoyment of an actual homestead, irrespective of the title or tenure by which it is held." *Sears v. Hanks*, 14 Ohio St. 301. No question of title involved. *Vogler v. Montgomery*, 54 Mo. 584. *Thompson on Homestead and Exemption*, §§ 165-7. And many comparatively recent decisions cited in this division, showing the rule in the different States alphabetically arranged.

ment, with a superior title coupled with the right of immediate possession, finds no impediment to his action in a homestead law and wrongful occupancy thereunder. Homestead laws, notwithstanding their protection of the debtor's home to the very verge of propriety, never take one man's property and give it to another. The legal dedication of a homestead, therefore, must be preceded by the right to dedicate. Declaration, recordation and occupancy pre-suppose the existence of this right. This is true, and is necessarily so, in every State. The methods of dedication, however, vary greatly under different statutes, as it will appear in the following presentation of the rules of the several States on this branch of the general subject.¹

2. Title to Homestead.—Whether the title be legal or equitable, in fee simple, for life, or for years, a homestead may be carved out of real estate under either the constitutional or the statutory authorizations in *Alabama*. It may consist of two lots held under titles of a totally different character.²

One who owned two tracts disconnected, one of fifty-seven acres and the other of eighty-seven, both worth less than the legal limitation, and both cultivated for family support—the dwelling being on one, and out-buildings and a tenant house on the other—was sustained in his dedication of both as his homestead.³

The constitutional and statutory provisions of that State are intended to preserve the home or dwelling-place of the debtor and his family, rather than any particular estate or interest in the land.⁴

3. Selection.—The debtor must select the property in which he would enjoy the benefit of exemption, when the fact of its occupancy as a home does not indicate from what estate the homestead is to be carved. Under some circumstances the debtor has been allowed to select property which was under lease to another as that in which he was to enjoy the protection of exemption, and property used as a place of business has been successfully selected; but, since exemption is for the benefit of the family, the general

1. Cases cited in the following notes.

2. **Title.**—*Tyler v. Jewett*, 82 Ala. 93. Land held for a term of years by a husband, in which a homestead right is enjoyed is not continued as a homestead to his widow. *Pizzalar v. Campbell*, 46 Ala. 40.

3. **Two Tracts.**—*Dicus v. Halls*, (Ala.) 3 So. Rep. 239.

4. **Object not the Preservation of Estate or Interest.**—*Watts v. Gordon*, 65 Ala. 546.

A purchaser of land, with full covenants of warranty, afterwards evicted by a paramount title, is a creditor of the vendor from the time the deed was executed—not from eviction; and the purchaser's widow cannot have her

homestead carved out of it. *Corr. v. Shackelford*, 68 Ala. 241.

An insolvent decedent without homestead but living in a rented house up to the time of his death, left, as his only real estate, a lot with a store house thereon, and his widow and children had it assigned as their homestead, though it had never been occupied as a dwelling. The estate being insolvent, the exemption vested absolutely in the widow and minor children. *Hartsfield v. Harvoley*, 71 Ala. 231. Ala. Code of 1876, §§ 2827, 2840. But when a decedent left no widow, but a minor child, and the child became of age before the estate had been reported insolvent, the right of

rule is that the selection must be of the dwelling and appurtenances occupied by them. Land leased to another may yield revenue for the support of the family, yet the law has reference to the home of the family rather than their support.¹

4. Right of Widows and Minors.—In Arkansas, homestead exemption is for the benefit of the widow and orphan children under age.² If a childless widow has no home in her own right, she becomes entitled for life to that of her late husband, unless he left issue—one or more children. If he did, they share in the homestead and its rents and profits, with the widow during their minority respectively. Occupancy of the premises is not made necessary to the exemption. If the widow dies during the minority of any of the children the homestead goes to the minor or minors till of age.³

During the husband's life his wife has no interest in the homestead, present or future; hence, he may convey it without her assent.⁴

Though a widow is entitled to homestead against both heirs and creditors, she cannot *create* a homestead right in the land of her deceased husband. It must have become his right during his life, so that she can succeed to it.⁵

5. Claiming the Right.—When a resident dies, his widow or children, to avail themselves of the benefit of the law, must file a description of the land in the probate clerk's office of the county, and pray for its reservation from sale. Thereupon, the clerk shall enter it upon the records of the court.⁶

Orphaned minors, both parents being deceased, are *held* incapable of claiming the right of homestead, or of declining or abandoning it. They cannot make and file the required declaration.

homestead terminated on his reaching his majority, and it was not revived and enlarged into an absolute estate by the subsequent insolvency. *Baker v. Keith*, 72 Ala. 121.

1. Selection by the Owner.—The owner is authorized to select the real estate designed for a homestead, in Alabama, but if his creditors object to the selection as exceeding the amount to which he is entitled, the matter is determined by three free-holders. The selection need not be confined to a single piece of real estate. *Melton v. Andrews*, 45 Ala. 454. In estimating the value, the appraisers are not held to fractional nicety with reference to the amount named in the statute. *Pomeroy v. Buntings*, 46 Ala. 254.

Exemption is for the use of the family, and the exempt homestead is to be used by the family. *Kaster v. McWilliams*, 41 Ala. 302, in exposition of statute. Rev. Code of Ala.

(1867), § 2886. *Allman v. Gann*, 29 Ala. 240.

2. *Gainus v. Cannon*, 42 Ark. 503; Digest of Stat. of Ark. §§ 3590, 3591. Const. of Ark. Art. ix, §§ 6, 10.

3. *Johnston v. Turner*, 29 Ark. 280; *Klenk v. Knoble*, 37 Ark. 298; *Lindsay v. Morrill*, 36 Ark. 545; *Turner v. Vaughan*, 33 Ark. 454.

4. *Trotter v. Trotter*, 31 Ark. 145; *Hoback v. Hoback*, 33 Ark. 399; *Ward v. Mayfield*, 41 Ark. 94.

5. *Brown v. Watson*, 41 Ark. 309; *Harbison v. Vaughn*, 42 Ark. 539; *Patrick v. Baxter*, 42 Ark. 175. *Held*, in *Harbison v. Vaughn*, *supra*, that a debtor has no family such as would entitle him to homestead exemption, though his father lives with him occasionally, and his nephews reside with him, none of these being dependent upon him.

6. Claiming the Right.—Dig. Ark., §§ 3590-3.

Their guardian may rent the homestead to which they are entitled, and apply the revenue to their benefit; and that was *held* to answer the requirement of the law as to occupancy in such case.¹ Occupancy, however, is the general rule before exemption can be claimed.²

6. Declaration.—A declaration in California need not set forth facts to show the declarant is the head of a family; a simple statement to that effect is all that the law requires.³ Formerly, the declarant was required to be in the exclusive possession of the land selected for a homestead; his holding an undivided interest in it was insufficient.⁴ The declaration must contain an estimate of the value of the property claimed, though an estimate which exceeds the monetary limit fixed by law will not invalidate the declaration.⁵ But exemption would not apply to the excess.⁶ It is necessary for a married woman when declaring to state that her husband has not done so, and that she declares for the joint benefit of both.⁷

It was *held* that a declaration was valid for the protection of the homestead, made after attachment but before the recording of the attachment lien.⁸

(a) Residence Before Declaration.—A declaration, when the property was not used as a residence simply or mainly, was ineffective; used, for instance, as a hotel,⁹ or half of a double tene-

1. Rights of Orphan Minors.—Booth v. Goodwin, 29 Ark. 633, exposition of Gould's Dig., ch. 68, § 30. The rights of the minor children, under the statute and decisions thereon, were independent of those of the widow, a relative position unusual in the other States. The widow could not impair the rights of the children in any way. She had the priority, and there was no claiming by the children required while she retained her exemption. Johnston v. Turner, 29 Ark. 280.

2. Williams v. Dorris, 31 Ark. 466.

3. Jones v. Waddy, 66 Cal. 457.

4. Selection of Homestead.—Prior to the act of March 9th, 1868, a homestead could not be selected from an undivided interest in land; and under that act a homestead could only be selected, or a homestead previously selected be validated, where the party claiming the same was in the exclusive possession of a particular tract, and had the same inclosed. Rousset v. Green, 54 Cal. 136.

5. Under section 1263, Civil Code, a declaration *must* contain an estimate of the actual cash value. So *held*, with reference to a declaration of homestead that stated that the actual cash value was \$5,000 and over. Ames v. Eldred, 55 Cal. 136.

6. Declaration of Homestead.—A

declaration of homestead was filed, in which the value of the homestead premises was estimated at eight thousand dollars. *Held*: The declaration was not invalid because the estimate of value was in excess of the value of the homestead interest exempted by law from forced sale. Ham v. Santa Rosa Bank, 62 Cal. 125; 8 c., 45 Am. Rep. 654.

7. Sufficiency of Declaration.—A declaration of homestead by a married woman (made May 19th, 1875) failed to state that her husband had not made such declaration, and that she therefore made the declaration for their joint benefit, *held* invalid. Booth v. Galt, 58 Cal. 254.

8. Declaration after Attachment.—A homestead was declared after an attachment on the land and a judgment in a justice's court, but no abstract had been filed or recorded in the recorder's office. *Held*, that at the time of the declaration of homestead, the judgment did not constitute a lien upon the premises within section 1241 of the Civil Code, and a sale under the judgment conveyed no title. Wilson v. Madison, 58 Cal. 1.

9. Property used as a Hotel.—The mere filing of a declaration of homestead is not enough to make the property a homestead within the meaning of the

ment house rented.¹

If there is ownership and residency the declarant may cover large tracts of land in this State, for there is no quantitative limit. An insolvent was allowed to declare successfully upon eleven hundred acres.²

Actual residence by a family, and value within the statutory limitation, are the tests in this State, not quantity.³ The husband, however, need not reside on the premises declared upon as exempt, if his wife does, and she has made the declaration and he has made none; but the estimate of "actual cash value" cannot be omitted from the declaration.⁴

(b) *Declaration After Brief Residence.*—There is no period legally fixed within which the resident may acquire the right of making his declaration of homestead. It suffices if he has made the property the site of his actual home, though he may have re-

statute. The use of the property is an important element to be considered. Where the property is primarily and chiefly used as a hotel for the accommodation of the public, it would be doing violence to the statute to regard it as a homestead, although the owner may reside there with his family for the purpose of carrying on the business. *Laughlin v. Wright*, 63 Cal. 113.

1. **Double Tenement House as a Homestead.**—The premises consisted of a lot of land in San Francisco, thirty-five feet in width and one hundred and twenty-two and one-half feet in depth, which with the improvements were of the value of eight thousand dollars. Upon the land was a double house intended for two families. The insolvent never occupied more than the southerly half of the same—the other half has always been and is occupied by his tenants. The double house has two distinct entrances, and there is no connection between the two tenements by which a person can go, within, from one house to the other. *Held*, the court erred in setting apart as a homestead that portion of the premises not occupied by the insolvent. *Fiernan v. His Creditors*, 62 Cal. 286.

2. **Homestead of Insolvent.**—**Possession of Homestead.**—Plaintiff, in A. D. 1867, filed a declaration of homestead upon one thousand one hundred acres of Government land. He at that time, and ever since, has resided on the land. He inclosed about three hundred acres of the land with a fence, and used the remaining portion for grazing. His neighbors also grazed the uninclosed portion, but at the same time recognized the land as plaintiff's. Some time

about the year 1875, other parties entered, by permission of the plaintiff, as preemptors upon portions of the lands embraced in the declaration of homestead, and obtained titles to their respective claims from the United States, the plaintiff being a witness at the land office for each of said preemptors, all of whom afterwards conveyed their lands to the plaintiff. *Held*, his residence within the inclosure, upon the facts found, was sufficient to make good his homestead claim to all the land described in the declaration. *Ornbaum v. His Creditors*, 61 Cal. 455.

3. **Residence.**—Actual family residence is essential. *Babcock v. Gibbs*, 52 Cal. 629; *Lowell v. Lowell*, 55 Cal. 316; *Aucker v. McCoy*, 56 Cal. 524; *Ham v. Santa Rosa Bank*, 62 Cal. 125; *Tiernan v. His Creditors*, 62 Cal. 286. Use and value are the only tests. *Estate of Delaney*, 37 Cal. 176. It does not create a homestead, unless the property is occupied as such at the time the declarant files it. *Prescott v. Prescott*, 45 Cal. 58; *Babcock v. Gibbs*, 52 Cal. 629; *Lowell v. Lowell*, 55 Cal. 316; *Aucker v. McCoy*, 56 Cal. 524; *Tiernan v. His Creditors*, 62 Cal. 286.

4. **Declaration—Rights of Husband and Wife.**—The declaration may be made by a married woman without her husband joining in the act. *Gambette v. Brock*, 41 Cal. 78; *Clements v. Stanton*, 47 Cal. 60. In such case, the husband need not reside on the premises, if no other homestead is claimed. *Gambette v. Brock*, 41 Cal. 78.

The declaration must contain an estimate of the actual cash value. *Read v. Rahm*, 65 Cal. 343; *Jones v. Waddy*, 66 Cal. 457.

sided there but a single day while his family may be living at some other place. And it may be only partially occupied by himself, and used in part by others, even for purposes of business.¹

The applicant himself, however, must actually reside on the premises when he files his declaration. This is essential to the establishment of a valid homestead. The fact of actual occupancy at the time is not one of public interest susceptible of being proved by evidence of common report or general understanding.²

A simple declaration that the declarant is the head of a family is sufficient without any statement of other facts.³

7. Selection from Community Property.—When homestead for the widow is to be assigned from her husband's estate, it should be set aside from the community property, if there is any, and not from the separate estate of the deceased husband. If worth more than \$5,000, the property out of which her homestead is to be carved, may be sold, and that sum paid to the widow in lieu of homestead.⁴

Where separate property is set apart as a homestead for the surviving wife, it is for a limited period only. The title vests at once in the heirs of the husband, subject to the order setting apart the homestead.⁵

In setting apart land for a homestead, the cash value must be stated in the declaration, whether it be greater or less than the amount allowed. A substantial averment, without details, is all that is required in this respect.⁶

8. Selection from Separate Property.—The owner and occupant selects, states the value, and causes the recording of his homestead, though creditors may have an estimate corrected after appraisal; or, if the homestead is both excessive in value and indivisible, they may have the property sold, reserving the amount of exemption for the debtor.⁷

9. Rights of Husband and Wife—Children.—The wife and children succeed the deceased homestead holder in his right of exemption, and the judge of probate assigns it to them, or carves out one from the estate for them, if the husband has made no declaration.⁸ When the homestead is selected by husband and

1. Cal. Civil Code, §§ 1237, 1263; *Skinner v. Hall*, 69 Cal. 195; *Aucker v. McCoy*, 56 Cal. 524; *Ackley v. Chamberlain*, 16 Cal. 181.

2. *Pfister v. Dascey*, 68 Cal. 572.

3. Civil Code of Cal., § 1263, as amended in 1874. *Jones v. Waddy*, 66 Cal. 457.

4. *Estate of Lord v. Lord*, 65 Cal. 84; Cal. Code of Civil Procedure, § 1465, as amended in 1880.

5. Cal. Code Civil Procedure, § 1468, as amended in 1861.

6. *Read v. Rahm*, 65 Cal. 343; Civ. Code, § 1263, p. 3.

7. **Selection and Estimate.**—The

owner, in California, makes his own selection and has it recorded. Appraisers fix the value if creditors complain that it is excessive. *Cook v. McChristian*, 4 Cal. 24; *Taylor v. Hargous*, 4 Cal. 272; *Holden v. Pinney*, 6 Cal. 236; *Cohen v. Davis*, 20 Cal. 187.

If the real estate is not susceptible of division, the whole may be sold by creditors, and the value of the exemption right paid over to the debtor owner. *Gregg v. Bostwick*, 33 Cal. 222; *Mann v. Rogers*, 35 Cal. 319.

8. **Husband and Wife.**—The homestead right survives the owner in case he leaves a wife and children, and the

wife together, they hold it as joint tenants;¹ though, if carved out of the husband's separate property, it has been *held* that she has no estate in it.² She is interested, however, in having her home protected, and is a party to legal proceedings concerning it.³ Out of the property belonging to both, she may have homestead after obtaining a divorce.⁴

probate court may set out the realty thereunder to them. Estate of Tompkins, 12 Cal. 125; Matter of Orr, 29 Cal. 103. If not selected during the life-time of the husband, the court may assign real estate to his widow, as a homestead, to the value of five thousand dollars. Rich v. Tubbs, 41 Cal. 34; Shadt v. Heppe, 45 Cal. 437.

1. Joint Tenancy and Tenancy in Common.—Husband and wife hold the homestead as joint tenants when it has been selected by them and duly recorded. McQuade v. Whaley, 31 Cal. 531. Declaration and recordation are essential. Matter of Reed's Estate, 23 Cal. 410; Noble v. Hook, 24 Cal. 639. It has been *held* that a homestead may be carved out of lands held in joint tenancy or tenancy in common. Seaton v. Son, 32 Cal. 481. Compare Bishop v. Hubbard, 23 Cal. 517; Elias v. Verdugo, 27 Cal. 425.

In April, 1861, the defendant, a married woman, filed a declaration of homestead upon a tract of land then inclosed and occupied by herself and husband, but which formed part of a large tract owned by her husband and others as tenants in common; and from that date occupied the land with her husband, claiming it as a homestead, until his death in January, 1878, and afterwards by herself until the beginning of this action. After the declaration of homestead, her husband and his co-tenants mortgaged the larger tract to one C, and the mortgage having been foreclosed, C became the purchaser of the mortgaged premises and received his deed. Subsequently, in January, 1873, the interests of C in the homestead premises, by proper *mesne* conveyances, became again vested in the husband of Concepcion and another of the original co-tenants, and was by them subsequently mortgaged, and under judgment of foreclosure sold and conveyed to the plaintiffs. In an action to quiet title, to which Concepcion was made a party, the court below found that the homestead premises had been held adversely by her from the date of the filing of the homestead. *Held*, the declaration of homestead filed by de-

fendant was invalid because the premises were then held by tenancy in common. The finding as to adverse possession cannot avail her. It was by virtue of her marital relations with her husband that she filed a declaration and has continued to claim the premises as a homestead. There is no pretense that her husband claimed adversely to any one, and she could not claim adversely to him, or those holding under him, so long as he remained as the head of the family, which he did until his death. The declaration of a homestead was not validated by the act of March 19, 1868. There was no interest on which the provisions of the act could operate—the interest of her husband having previously passed from him to C under the foreclosure proceedings.—First Nat. Bank v. Guerra, 61 Cal. 109.

2. Wife's Estate in Homestead.—The homestead, in California, carved out of the husband's land, gives the wife no estate in it. Gee v. Moore, 14 Cal. 472; Bowman v. Norton, 16 Cal. 217. But when it is carved out of the estate of both, each enjoys the exemption right till it is lost by the acquisition of a new homestead, or by abandonment or forfeiture. Dunn v. Tozer, 10 Cal. 171; Gee v. Moore, 14 Cal. 472; Barber v. Babel, 36 Cal. 11. The wife, however, can only protect her interest and those of her children, through her husband during his life and control. Poole v. Gerrard, 6 Cal. 71. Compare Cook v. McChristian, 4 Cal. 24; Guiod v. Guiod, 14 Cal. 506.

3. Co-parties.—In legal proceedings, in California, husband and wife must jointly assert homestead rights. Cook v. Klink, 8 Cal. 347; Marks v. Marsh, 9 Cal. 97; Moss v. Warner, 10 Cal. 297. A judgment against the husband as sole party is binding on neither him nor his wife, so far as it affects the homestead right. Revalk v. Kraemer, 8 Cal. 71.

4. Homestead After Divorce.—A wife, out of the property belonging to herself and her husband, may have a homestead laid out for her, after having obtained a divorce from him. Gimmy v. Doane, 22 Cal. 635.

10. Inscription on the Deed.—The exemption of residence is a very simple process in Colorado. The owner indorses, on the margin of the record of the deed, that he elects to make the property his homestead. He merely writes the word "homestead." This is all the formality that is required, but it is necessary. There is no exemption until the owner has elected to make a particular property, on which he resides, his legal homestead under the law. His inscription on the margin of the deed is evidence of the selection. The property is then shielded from execution or attachment upon any indebtedness arising after February 1, 1868, to the amount allowed by law.¹

11. Actual Residence.—The head of a family must occupy his home with them in order to have it set apart as exempt in Florida. He cannot, for instance, reside in a city and yet have a farm in the country protected from forced sale for his debts. Declaration and recordation of his selection of the land would be inoperative in such case.² The design to reside upon the land in future is of no present avail.³

12. Descent of Homestead.—Whether a testator is indebted or not, he cannot dispose of his homestead by will. By the operation of the law of descent, his heirs take it at his death. They

1. Recording.—If one records his homestead before a creditor acquires a lien on the land, he records it seasonably for protection against such creditor. *Barnet v. Knight*, 7 Colo. 365; Gen. Stat. of Colo., §§ 1631, 1632.

2. Declaring Without Occupying.—A homestead of a person who is the head of a family residing in this State, within the meaning of the exemption clauses of the constitution and the statutes, is the place of actual residence of the party and his family. A party residing in an incorporated town or city with his family, and owning land several miles from the town, cannot claim the latter as exempt from forced sale as a homestead, it having never been occupied by him as a residence. Filing a declaration or claim of homestead under the law of 1869 does not exempt the property so claimed, unless it be actually occupied as a home. *Oliver v. Snowden*, 18 Fla. 823; s. c., 43 Am. Rep. 338.

A piece of land, never occupied as a dwelling place or home, and incapable of such occupancy, is not a homestead within the meaning of the constitution and laws of this State. The bare fact of filing and recording in the records of the probate office of the county judge, a statement in writing, containing a description of the real property claimed to be exempt, and declaring that the

same is the homestead of the party in whose behalf such claim is made, under the law (*McClellan's Digest*, p. 531, § 11,) does not of itself exempt the land as a homestead from forced sale. R filed and recorded his statement as provided by law, claiming a certain bare and unoccupied lot as his homestead. He then made a contract with a builder to erect upon it a residence for himself and family, caused estimates and specifications and had drawn upon such lot some of the building material. D filed a creditor's bill to subject such lot to the payment of a debt. *Held*, that inasmuch as the lot was not actually occupied by R as a homestead, or in a condition to be so occupied, it was not as such exempt under the constitution and laws. The provisions of the homestead laws should be carried out in the liberal and beneficent spirit in which they were enacted, but at the same time great care should be taken to prevent them from becoming the instruments of fraud. *Drucker v. Rosenstein*, 19 Fla. 191.

3. Intent to Occupy.—The actual use and occupation by the owner and his family of premises designed as a homestead, is essential to impress the property with that character. The mere intention, at some future day, to repair and occupy them as such, where such intention is not manifested by acts

are thus entitled, notwithstanding his indebtedness, and they inherit the homestead freed from debts due by the estate, by virtue of a constitutional provision to that effect. The language is clear: "A homestead to the extent of 160 acres of land, owned by the head of a family, and the improvements on the real estate, shall be exempted from forced sale under any process of court." And, under this constitutional provision, it is *held* that, whether the testator be indebted or not, the exemption appertaining to the homestead during his life, continues to be attached to it after the heirs have inherited it.¹

This constitutional provision is with respect to rural property, so far as concerns the quantitative limit, without regard to the use made of any portion not belonging to the actual residence and its inclosures.²

13. Exemption under the Constitution of Georgia.—There are two classes of homestead in Georgia, called there respectively the constitutional and the statutory homestead. No one can avail himself of both, but must elect between them. One cannot be supplemented by the other.³

Both the constitution of 1877 and its predecessor of 1868 are to be noted in considering the decisions under them respectively. The homestead provisions in the older are kept in force by the newer instrument, in respect to debts incurred under it.⁴ But the dedication of a homestead under the constitution of 1868, though confirmed in a bankrupt court, was *held* not protective from a judgment rendered prior to the adoption of that constitution, and prior to the enactment of the bankrupt act.⁵

14. Applications under the Constitution and Statute.—One wishing to become a beneficiary must set forth the grounds of his application. He may be entitled, though not the head of a family, but he must state the capacity in which he applies. It is usual to aver the ownership of the property sought to be exempted, but a failure to do so is not fatal. The presumption that the applicant is the owner supplies the defect. But if a married woman seeks to have a homestead for herself carved out of her husband's real estate, she must allege the fact of his ownership. She cannot have a homestead set apart for her out of her own separate property while she is living with her husband.⁶

as well as words, is not sufficient. *Solary v. Hewlett*, 18 Fla. 756.

1. Exemption of Inherited Homestead.—Const. of Fla. Art. 9, §§ 1, 3; *Wilson v. Fridenburg*, 19 Fla. 461; *Brokaw v. McDougall*, 20 Fla. 212; *Wilson v. Fridenburg*, 21 Fla. 386.

2. McDougall v. Meginniss, 21 Fla. 362.

3. Johnson v. Roberts, 63 Ga. 167.

4. Gerding v. Beale, 63 Ga. 561.

5. Dixon v. Lawson, 65 Ga. 661.

6. Application for Homestead.—An application for homestead under the

constitution of 1877, must state the grounds therefor. An application simply claiming homestead, without stating whether as head of a family or in what capacity, is not sufficient; and the record of a homestead so granted will be rejected from evidence. Such a failure in the application cannot be cured, on the trial of a claim case based thereon, by parol testimony. *Clark v. Bell*, 67 Ga. 728.

Where the application for homestead stated the county and alleged the applicant to be "of said county," his

Assignment of Homestead.—The ordinary, or probate judge, assigns or sets apart the exempt portion when the estate exceeds the value authorized to be held against creditors. If the homestead is indivisible, yet of excessive value, the whole may be sold, and the interest of the debtor reserved for him out of the proceeds.¹

How Selected and Constituted in Idaho.—The homestead consists of the dwelling of the claimant and the ground on which it is situated, selected from the community property if the claimant is married, or the separate property of the husband, or from that of the wife if she consents; but, if unmarried, from any of his or her property.

A declaration of homestead must be made, acknowledged and filed of record. It must show the declarant to be the head of a family; or, if made by the wife, that her husband has not made

residence was sufficiently set forth. In 1873 it was not necessary to set out the names and ages of the beneficiaries in an application for a homestead. While it is better in all cases to state the ownership of the property sought to be exempted, and in case of a married woman it is necessary, its omission does not render an application by her husband invalid. The presumption is that the property is his. *Wilder v. Fredrick*, 67 Ga. 669.

Where a petition for a homestead was signed by the attorney of the applicant and verified by the affidavit of the latter, it was not void. Where a homestead was asked for the benefit of a wife and children, a failure to allege the age of the wife did not render the proceeding void. *Roberts v. Cook*, sheriff, 68 Ga. 324.

Claiming homestead and causing it to be allowed by the ordinary, is in the nature of a recovery by the applicant for the benefit of his family, and after the fruits of the proceeding have been enjoyed for nine or ten years, the allowance will not be *held* void, at the instance of him or his privies, because the application did not disclose expressly that he was the head of a family, or that he was a resident of the county in which the proceeding took place. *Torrance v. Boyd*, 63 Ga. 22.

Where a husband and father, as head of his family, applied for a homestead, a failure to allege out of whose property it was to be carved was not such a fatal defect as would render the proceeding void. The presumption would be that the homestead was to be carved out of his estate. Especially was the proceeding not void in this case

where the application asked that a homestead should be set apart out of the place on which the applicant lived. *McWilliams v. McWilliams*, 86 Ga. 459.

Where a married woman applies for a homestead, it must affirmatively appear from her petition that it is claimed out of her husband's property; otherwise, the homestead granted to her will be invalid: *aliter*, if the husband were the applicant, the presumption being in that case that the property is his. A married woman cannot have a homestead set apart out of her own property unless she is living separate and apart from her husband. *Bechtoldt v. Fain*, 71 Ala. 495.

1. *When the Estate Exceeds Homestead Limitation, How Set Apart.*—It has been *held* that if the estate does not exceed the amount exempted by statute, in Georgia, the debtor may hold it without its being formally designated as a homestead. *Pinkerton v. Turnlin*, 22 Ga. 165; *Dearing v. Thomas*, 25 Ga. 224. It must be set apart, and must include the dwelling, if the estate exceed the homestead limit. *Davenport v. Alston*, 14 Ga. 271. Where the estate thus exceeds, and is yet indivisible, the creditors may sell the whole, but the amount of reservation for a homestead must be paid to the debtor out of the price. *Dearing v. Thomas*, 25 Ga. 224.

The homestead is set apart by the ordinary (or probate judge) upon the application of the beneficiary, subject to subsequent appraisal at the instigation of creditors. Should a home be selected of greater value than \$2,000, the legal limit, it may be sold by order of the ordinary, and a new one of the

one, and that she makes it for the joint benefit of both. It must contain a description of the property, an averment that the claimant resides on it, and an estimate of its cost value.

The homestead vests in the survivor, if carved out of the community property of husband and wife; in the heirs the owner if carved out of his or her separate property.

Homesteads are awarded to others than heads of families.¹

15. Exemption from Execution.—The debtor, in Indiana, may save his homestead from forced sale to the amount exempt by law, unless he prefer to have personal effects protected to that extent.

The method of asserting the right is not the previous dedication and recording, but the pointing out to the officer in charge of an execution the property which the defendant wishes to have exempted from seizure and sale. Should he point out too much there may be an appraisal. Should he select a homestead with more than the small sum exempt in that State, it may be sold, and the sum may be paid to him by the officer.²

16. Right of Resident Householder.—Though a husband cannot protect his wife's property from execution, she may, to the extent, legally exempt. A man with no family of his own, but living with relations whom he supports, may save his homestead from forced sale, or otherwise have the exemption right, within the monetary restriction.³

17. Dedication of Homestead in Illinois.—An owner and occupant is entitled to homestead protection, good to his widow during her life, and to his children during their minority.⁴

It is for families that the right is granted by law; for the benefit of the wife and children;⁵ or for a widow,⁶ though she cannot have homestead and also dower in her husband's estate.⁷

required value be purchased by him for a homestead for the debtor; or, if the realty consist of scattered lots, that officer may order their sale and the investment of the price in a dwelling house for the home of the debtor and his family. Georgia Code, § 5135; *Blivens v. Johnson*, 40 Ga. 297; *Harris v. Colquit*, 44 Ga. 663.

1. Revised Stat. of Idaho (1887), §§ 3035 &c.; 3070-3; 3085-8.

2. **Selection in Indiana.**—Property to be exempted as a homestead must be selected by the debtor in Indiana, who must furnish the sheriff with a list of his property; but, in his absence, his wife may furnish the list and indicate the reservation. *Austin v. Swank*, 9 Ind. 109, 112; *State v. Melogue*, 9 Ind. 106. If the value of the selected home be greater than the legal limit, the creditors may have an appraisal and relative reduction; and, if it be indivisible, the whole may be sold and the beneficiary of the homestead be paid its value, as authorized by

law, out of the price of the whole, as in Illinois.

3. **Selection by Wife.**—The debtor, to avail himself of the exemption, must be the owner of the property exempted. He cannot protect his wife's home by it when execution is directed against her own land. *Holman v. Martin*, 12 Ind. 553. But she may. *Crane v. Waggoner*, 33 Ind. 83. So may a brother, living with his sister, and supporting, or helping to support, the family. *Graham v. Crockett*, 18 Ind. 119.

4. **Widow and Children's Right.**—*Kitchell v. Burgwin*, 21 Ill. 40; *Deere v. Chapman*, 25 Ill. 612.

Protection against judgments. *Conroy v. Sullivan*, 44 Ill. 451; *Loomis v. Gerson*, 62 Ill. 11.

5. *Pardee v. Lindley*, 31 Ill. 187; *Hubbell v. Canaday*, 58 Ill. 427.

6. *Schaefer v. Kienzel*, (Ill.) 15 N. E. Rep. 164. But not if her children reside permanently out of the State. *Rock v. Haas*, 110 Ill. 528.

7. *Knapp v. Gass*, 63 Ill. 492.

18. Actual Occupancy as a Family Home.—It is essential to the availment by the owner of the legal protection offered, that the house and lot, or farm, which he wishes to hold exempt, should be the permanent abiding place of his family. He and they may be temporarily absent, without design to relinquish the place as a home. He may leave it even for a protracted time—just as one leaves his home to go abroad, for instance, without reference to debt or exemption—and yet retain his homestead right. But he cannot quit it, for even a brief period, with the intent to use it no more as a home, without relinquishing his right.¹

19. Establishing on Two Premises.—It has been *held* that a homestead cannot be established on two different premises by the householder, or anyone, though both together be within the thousand dollar limit prescribed.² The land and dwelling must be owned by the applicant,³ though his title need not be in fee simple. It is sufficient if he has an estate for life.⁴ It is essential that he be actually occupying the premises as a permanent home, in order to the establishment of its character as exempt property.⁵

20. Establishment in Iowa.—Homestead may be carved out of estates under almost any title;⁶ on a town lot, or lots contiguous, or upon forty acres, or less, in the country; either, within the limit of value.⁷

The real estate set apart must be in actual and permanent use as a family residence at the time of the selection and continuously thereafter, excepting temporary absences without intent to abandon it.⁸

21. Selecting and Recording.—The debtor, or his wife in his absence, or an officer in charge of an execution, may select the property to be exempted, if occupied by the debtor's family, and cause the dedication to be recorded.⁹

1. Continuous, actual occupancy as a home, without interruption, not necessary. *Walters v. People*, 21 Ill. 178; *Kitchell v. Burgwin*, 21 Ill. 40; *Vanzant v. Vanzant*, 23 Ill. 543; *Miller v. Marckle*, 27 Ill. 405; *Titman v. Moore*, 43 Ill. 169; *Smith v. People*, 44 Ill. 16; *Cipperly v. Rhodes*, 53 Ill. 351; *Potts v. Davenport*, 79 Ill. 459.

Occupancy for mere business would not be sufficient. *Reinback v. Walter*, 27 Ill. 394.

2. *Walters v. People*, 18 Ill. 194.

3. *Brown v. Keller*, 32 Ill. 154.

4. *Deere v. Chapman*, 25 Ill. 610, holding that homestead may be established on land held for life. It may be, on land held under bond, before the deed has been given. *Blue v. Blue*, 38 Ill. 18; *Tomlin v. Hilgard*, 43 Ill. 302; *Conklin v. Foster*, 57 Ill. 104.

5. Residing on, when establishing homestead. *Tourville v. Pierson*, 39 Ill. 453.

6. *Estate for Years.*—*Pelan v. De Bevard*, 13 Iowa 53.

7. *What Land Selected; in Town.*—*Rhodes v. McCormick*, 4 Iowa 368; *Kurz v. Brusch*, 13 Iowa 371, and what in the country. *Thorn v. Thorn*, 14 Iowa 49, in which *held*, that more than forty acres may be dedicated, if necessary to reach the value allowed.

8. *Actual Occupancy.*—*Christy v. Dyer*, 14 Iowa 440; *Davis v. Kelly*, 14 Iowa 525; *Cole v. Gill*, 14 Iowa 530; *Elston v. Robinson*, 23 Iowa 208.

When a floor of a building was occupied as a residence, though temporarily vacant, and another floor was used as a place of business, the whole building was *held* exempt as a homestead. *Smith v. Quiggans*, 65 Iowa 637.

9. *Selection.*—The debtor may select his homestead, and have it recorded as such. If absent, his wife may have it recorded; or, the sheriff must do so before execution upon the debtor's lands.

22. Intent to Occupy.—Before actual residence upon the realty designed as a homestead, the right of exemption may be acquired.¹

23. Husband and Wife.—A homestead, partly carved out of the wife's land and partly out of the husband's, may wholly be exempt as her homestead after her husband has disappeared.² If carved from land wholly hers, the husband may hold it as his homestead for life, after her death.³

24. Occupancy in Kansas.—It is not essential to the existence of a homestead in Kansas that it should be wholly occupied by the beneficiary's family as a place of residence. The legal requirement of the statute, in this respect, is observed, though a part of the building be used as a grocery store or other business purpose, if his family reside in another part of it.⁴

It has been *held* that the house in which the debtor dwells is deemed his homestead, all of which is exempt. *Rhodes v. McCormick*, 4 Iowa 368; *Kurz v. Brusch*, 13 Iowa 371.

A partner cannot select and establish a homestead in the real estate of the partnership. *Drake v. Moore*, 66 Iowa 58.

1. Intent.—One having sold his homestead, and reserved possession for six months, bought another a month before the expiration of the time, and moved upon it, as his new homestead, soon after. It was impressed with the character of a homestead during the period between purchase and occupancy, as he had bought with the intention of making it his homestead. *Cowgill v. Warrington*, 66 Iowa 666.

2. Partly of Husband's Land and Partly of Wife's.—Where the dwelling house was situated on the wife's land, lying contiguous to land owned by the husband, and both tracts were occupied as a homestead, and the husband had disappeared, the wife could claim, as against his creditors, a homestead carved in part out of her own land, and in part out of her husband's. *Lowell v. Shannon*, 60 Iowa 713.

3. Property of Deceased Wife—Rights of Surviving Husband.—Where the title to the land, including the homestead, is in the wife, the surviving husband has the right to elect to retain the homestead for life, or to take, in lieu thereof, one-third of the whole property in fee. In such case, the continued occupancy of the homestead, in the absence of an election to take a distributive share, will be deemed an election to occupy as a survivor (*Butterfield v. Wicks*, 44 Iowa 310); and a court has

no authority in such a case to make an election for the survivor, and assign to him a distributive share, even though such share is more valuable than the right of occupancy; and much less has it authority to subject such share, so set apart, to the payment of his debts. *Holbrook v. Perry*, 66 Iowa 286.

The head of the family may be a childless widower or widow, and yet have the homestead privilege, provided he or she be the owner and occupant of it. *Elston v. Robinson*, 23 Iowa 208. The widow may remarry, yet retain her homestead; and like privilege is extended to the surviving widower under like circumstances. *Nicholas v. Purcell*, 21 Iowa 265; *Stewart v. Brand*, 23 Iowa 481; *Dodds v. Dodds*, 26 Iowa 310.

The presence of the wife and children at the protected domicile is not *held* essential to the owner's right of homestead exemption, under the laws of that State. *Williams v. Swetland*, 10 Iowa 51. His own occupancy of it, however, is necessary; and it is only from the commencement of the occupancy that there is protection; prior debts are not deprived of their original relation to the premises, though other property must be exhausted before this can be executed. *Stevens v. Myers*, 11 Iowa 184; *Cole v. Gill*, 14 Iowa 527; *Hale v. Heaslip*, 16 Iowa 452; *Campbell v. Ayres*, 18 Iowa 255; *Hyatt v. Spearman*, 20 Iowa 513.

4. Part Occupancy of a Building.—*Rush v. Gordon*, 38 Kan. 535.

Part Occupancy of Whole Tract—Constructive Use.—It is often the case that the owner of a tract of land, which he occupies and claims as his homestead, does not actually use every part and

The exemption holds good from the time the property is acquired as a homestead, though occupied as such at a later date, not remote.¹ But without eventual occupancy, such right cannot be acquired.²

25. Occupancy in Kentucky.—There must be actual occupancy in order to the securing of the benefit of exemption. The acquisition of title with intent to occupy has been *held* insufficient.³

26. Carving from Larger Estate—Massachusetts.—Homestead estate, which is only during the life of the beneficiary, may be carved out of an estate too large for the monetary limit though held in common before the partition.⁴ But, while held in common before the homestead was carved out of it, no right of homestead existed under the statute of 1855.⁵

Homestead for a wife was allowed to be carved out of land fraudulently transferred by her husband to her and afterwards reached by creditors in a suit against her.⁶

27. Title and Occupancy.—The right of homestead does not depend on the title of the owner—whether *in fee* or for life; but the

portion thereof; but so long as the whole tract is devoted to the purposes of a homestead, and not to any other purpose inconsistent with the owner's homestead interests, the whole of the tract, up to 160 acres of farming land or one acre within the limits of an incorporated town or city, will be considered as a part of the owner's homestead, whether he actually uses every part and portion thereof or not. Under such circumstances all is constructively used. *Morissey v. Donohue*, 32 Kan. 646.

1. Right Acquired Before Occupancy. *Monroe v. May*, 9 Kan. 475.

2. The wife of a trustee who has never occupied the premises which have always been in the actual possession of the *cestui*, and who subsequently conveys them to the *cestui*, has no homestead therein. *Osborn v. Strachan*, 32 Kan. 52.

3. Occupancy After Execution.—Although appellee Hise intended to remove upon the land claimed by him as a homestead, and did actually remove upon it after it was sold under an execution, the occupancy was too late to give him a homestead. A mere intention to move upon land and make it a residence does not create a right to a homestead under the statute. *Fant v. Talbot*, 81 Ky. 23.

Under the Kentucky statute, there can be no estate of homestead as against a debt secured on the land prior to its acquisition by him who claims the right. He has no homestead

estate against the lien of the vendor of the land, to him, when he has recognized the lien as a part of the consideration in making the purchase. *Purcell v. Dittman*, 81 Ky. 148; *Fish v. Hunt*, 81 Ky. 584.

One who had a homestead, sold the part of the tract of land on which it was situated, but still occupied it, though as a tenant of the purchaser. He had adjoining lands which he cultivated (belonging to the original tract), on which he built another dwelling house. It was *held*, that he was entitled to an estate of homestead in the unsold tract. *Bennett v. Baird*, 81 Ky. 554.

4. In Massachusetts, though homestead estate is only for life, one entitled to it may have it carved out of a larger estate than that he is privileged to have under the legal limitation of value, though the larger estate be held in common with others before the partition. *Silloway v. Brown*, 12 Allen (Mass.) 35.

5. *Holmes v. Winchester*, 138 Mass. 542, in exposition of Stat. of 1855, ch. 238.

6. Carved from Land Fraudulently Conveyed.—Land conveyed by a husband to his wife, though subsequently reached by creditors of his on the ground of fraudulency in the transfer by suit against her, may yet have a homestead carved out of them for her benefit upon her plea in bar of absolute recovery by the creditors. *Castle v. Palmer*, 6 Allen (Mass.) 404;

owner must hold it under good title and deed, and have a home upon the land and live in it.¹ Out of his own property the debtor selects his homestead and executes a written act as evidence of the dedication, which must be put upon record.²

28. Creating the Right in Michigan.—No formality is required. No declaration or recording is prescribed. The essentials are that the real estate, not exceeding the limitation of value, shall be owned by the householder and shall be occupied by his family.³ It may be owned by the wife.⁴ The fee is not exempt.⁵

Stebbins v. Miller, 12 Allen (Mass.) 597.

1. Title and Residence.—The homestead may be held upon lease, and a widow may be the beneficiary. *Mercier v. Chace*, 11 Allen (Mass.) 194. The owner must hold it under deed, which is not retroactive to the date of a bond given at the time of the purchase so as to protect against debts intermediately made. *Thurston v. Maddocks*, 6 Allen (Mass.) 428. Prior to the erection and occupation of a dwelling thereon, the land is not exempt. *Lee v. Miller*, 11 Allen (Mass.) 38. Land disconnected with the residence is not included as part of the homestead. *Adams v. Jenkins*, 16 Gray (Mass.) 146. A homestead cannot be located on land in common, so as to give the owner the benefit of the exemption. *Thurston v. Maddocks*, 6 Allen (Mass.) 427. A new mortgage substituted for an old one is not rendered nugatory by homestead right having been acquired between the dates of the two. *Burns v. Thayer*, 101 Mass. 426.

2. Selection—Widow's Right.—The debtor, in Massachusetts, selects his homestead making the designation by written act, which must be signed, sealed and recorded, and the home thus exempted by compliance with law, must be for himself and his family. *Bemis v. Driscoll*, 101 Mass. 421. And they must occupy it. *Lee v. Miller*, 11 Allen (Mass.) 37, though they need not occupy the whole, in order to perfect the right. *Mercier v. Chace*, 11 Allen (Mass.) 194. If the value be in excess of the legal authorization, the creditors may cause its appraisal and reduction. The widow of a deceased debtor may retain the homestead, if it is within the legal limit of valuation. She may retain it till partition is made, even if it is in excess of such limit. *Parks v. Reilly*, 5 Allen (Mass.) 77. Her right to it in addition to her dower, if "so much estate remains

to which the character of a homestead right attaches" has been *held*. *Mercier v. Chace*, 11 Allen (Mass.) 196. If her husband's heirs deny her right of homestead, her remedy to recover it is the suing out of a writ of entry. *Mercier v. Chace*, 9 Allen (Mass.) 242; *Woodward v. Lincoln*, 9 Allen (Mass.) 239. See *Lazell v. Lazell*, 8 Allen (Mass.) 575.

3. Occupancy.—When the homestead does not exceed the quantity and value exempted; no requisite for creating the right of exemption exists, except occupancy and ownership; and occupancy is *held* to be sufficient notice, without recording the selection. *Beecher v. Baldy*, 7 Mich. 488; *Thomas v. Dodge*, 8 Mich. 51; *Coolidge v. Wells*, 20 Mich. 79; *McKee v. Wilcox*, 11 Mich. 358.

Otherwise when quantity or value is excessive. First National Bank v. *Jacobs*, 50 Mich. 340; *Henschfeldt v. George*, 6 Mich. 468.

4. The ownership may be in the wife. *Orr v. Shaft*, 22 Mich. 264.

5. Fee not Exempt.—The fee is not exempt, but the land is, while occupied as a homestead by the owner. *Drake v. Kinsell*, 38 Mich. 232.

It has been *held* that the homestead right does not attach in favor of the widow and children unless the estate is insolvent. The property goes to the heirs at once, if the estate is solvent, and the widow has her dower. *Zoellner v. Zoellner*, 53 Mich. 620. See Const. of Mich, Art. xvi, § 2, *Howell's Stat.* § 7721.

Homestead rights can be claimed in land held under a part paid school-land certificate from the State land office. *Allen v. Cadwell*, 55 Mich. 8.

Where the owner of two lots takes up his residence on one, and puts up a building which covers all the other lot and a small part of that on which he resides, his homestead right does not cover that portion of the residence

29. Establishing Homestead in Minnesota.—No formality, such as written declaration and recordation is necessary in order to secure the right of exemption. Occupancy and ownership are the requirements. The debtor, in case of execution against his property, could not hold a homestead of a greater quantity than the law allows; but there would be no need of appraisement when the law sets no limit as to value, if his claim is confined to one city lot, or to eighty acres of land in the country.¹

30. Character of Estate to be Exempt in Mississippi.—The supreme court of Mississippi said: "The manifest object of the legislature was to secure, to the head of every family resident within the limits of any city or town, the possession and enjoyment of a sufficient quantity of his own land for the maintenance of himself and family. It is manifest that the object could not be fully attained unless we so construed the act as to extend the exemption to all cases in which the head of a family might own, hold and possess any estate in lands which theretofore was subject to levy and sale under execution. These objects, it is scarcely necessary to say, would be so frequently defeated as to render the act itself, to a great extent, useless, if its remedial provisions were *held* to apply alone to lands in which the execution debtor held, at the least, a freehold estate. Any person holding an interest in land for years, for life, or any greater estate, freehold, in reversion or remainder, is *held* to be an owner."²

(a) *In Mississippi—Life Estate.*—The law requires that the householder and his family should live upon the premises which he claims to be exempt. He need not own the fee—even a life estate is sufficient, so far as title is concerned. If he owns the homestead in fee, he may devise it by will; and his widow will have no homestead right therein, provided she owns, in her own right, an estate equal to what would have been her share of the deceased husband's estate, had she nothing of her own.

With respect to occupancy, it may be remarked that a building within the monetary limit, if partly used as a residence, may be employed also as a place of business, without doing violence to the law of homestead exemption, as *held* by the courts.³

lot used for the building. *Geney v. Mayard*, 44 Mich. 578.

Debtor may give his interest in homestead to his child; and if occupied by her, it becomes her homestead free from his debt. *Shay v. Wheeler*, (Mich.) 13 West. Rep. 899.

1. A city lot, or eighty acres in the country, may constitute an exempt homestead in Minnesota, without reference to value. *Tillotson v. Millard*, 7 Minn. 513; *Sumner v. Sawtelle*, 8 Minn. 321; *Cagel v. Mickow*, 11 Minn. 475. It must be continuously used as a family residence by the debtor or his widow and minor children. *Folsom v.*

Carli, 5 Minn. 337; *Kelly v. Baker*, 10 Minn. 154. It is *held* that the homestead cannot be located on an undivided half of two city lots, though within the monetary value of one lot, (*Ward v. Huhn*, 16 Minn. 161), nor can it include a lot merely touching the premises resided upon. *Kresin v. Man*, 15 Minn. 118.

2. *Johnson v. Richardson*, 33 Miss. 462.

3. **Essentials.**—Ownership and occupancy are the requisites to entitle the head of a family to exemption right in his residence. *Morrison v. McDaniel*, 30 Miss. 217; *Campbell v.*

31. When Occupancy Should Begin.—Though the homestead holder in Missouri may have acquired title prior to the creation of a judgment lien thereon, yet may not have occupied the premises before, the occupancy is *held* to retroact to the date of purchase by the law of relation, and the homestead is protected against the lien.

Occupancy, however, under a recorded title, determines the homestead character of the property claimed as such. He may, however, change his residence with impunity, and be entitled to his homestead rights in his new home as soon as he has made the removal.

Upon the death of the homestead holder the right vests at once in his widow and minor children, and there is no need of a formal assignment to them by commissioners.¹

(a) *In Nebraska.*—Ownership and occupancy, and confinement

Adair, 45 Miss. 170; Smith *v.* Wells, 46 Miss. 71.

The character of the owner's title is not considered. He may have his homestead carved out of an estate for years. Johnson *v.* Richardson, 33 Miss. 462.

Home and Business Place.—In the corner of a one acre town lot, the owner's dwelling house and outbuildings were located. Separated from these premises by a fence, was a store-house in which his wife did business. All, being within the monetary limitation, were *held* to constitute the homestead. Baldwin *v.* Tillery, 62 Miss. 378.

Temporary Disuse.—Continuous occupancy is not essential, if, during temporary absence, the design is to resume occupancy at an early day. Campbell *v.* Adair, 45 Miss. 170.

Wife's Separate Estate.—Where a wife, at her husband's decease, had a separate estate equal in value to what would have been her lawful portion of her husband's real and personal estate, she had no interest in the homestead devised to another. Osburn *v.* Sims, 62 Miss. 429.

1. Occupancy.—The acquisition of land for a homestead must be followed by its occupancy by the claimant, and this occupancy, whenever it occurs, relates back to the time when the deed was filed for record. Finnegan *v.* Prindeville, 83 Mo. 517.

Exemption: Non-Resident.—Land acquired in Missouri for a homestead by a non-resident is exempt from execution for a debt contracted after the deed therefor was filed for record, provided such acquisition is followed by occupancy before the judgment for the debt

becomes a lien upon the land. Finnegan *v.* Prindeville, 83 Mo. 517.

Residence.—The right to a homestead in Missouri does not depend upon the residence of the claimant and his creditor, or either of them, at the time the land was acquired. Finnegan *v.* Prindeville, 83 Mo. 517.

A homestead may be sold and another acquired with the proceeds, and the premises sold pass to the vendee discharged of judgment debts of the vendor. The visible occupancy of the premises as the head of a family, under a recorded title, fixes the character of the property as a homestead. Beekmann *v.* Meyer, 75 Mo. 333.

Exchange.—One who has exchanged an estate in which he had a right of homestead, for another estate, has the same right of homestead in the latter which he had in the former. Creath *v.* Dale, 84 Mo. 349.

Homestead Vests in Widow and Children, Without Being Set Apart, When.—If land occupied by a man and his family as a homestead does not exceed in quantity and value what the law allows for that purpose, the homestead estate conferred by the statute will vest in his wife and children immediately upon his death, without being set apart by commissioners. Rogers *v.* Marsh, 73 Mo. 64.

Homestead in Dower Estate.—A widow may have a homestead in her dower estate before the latter has been set apart. Murdock *v.* Dalby, 13 Mo. App. 41.

Not in Proceeds From Deed of Trust, When.—She cannot have homestead rights assigned to her in the money which was proceeds of the sale under a

to the legal limitations, constitute the rule. If an owner, intending to occupy a purchased property as his family home, is temporarily prevented from doing so, but afterwards occupies, his exemption right begins from the date of his purchase.

In the settlement of an estate, a county court may set apart the allowed portion of real estate for a homestead. The title need not be in the husband; it is sufficient if the family home is the separate property of the wife.¹

(b) *Nevada*.—Occupancy and ownership are not sufficient to entitle the head of a family to homestead exemption. They are necessary requisites but not available without the observance of the statutory provisions as to claiming and recording.²

(c) *New Hampshire*.—The home of the debtor, within the small amount in value fixed by law, is inviolable from any attack of the creditor. If worth more than the limit, the whole is not saved from execution, but the officer must set apart the amount exempt by law. This may be done after the whole has been levied upon. The property should be sold subject to the homestead right, if no part has been set aside for a homestead before sale; or, if the whole is indivisible, the value of the debtor's right must be reserved for him out of the proceeds.

The rights of the wife are secured. She may even have her homestead laid off to her after sale by her husband without her assent.³

deed of trust executed by the husband and wife. *Woerther v. Miller*, 13 Mo. App. 567.

1. **Set Apart by Court**.—A homestead may be assigned by a county court on settlement of an estate. *Guthman v. Guthman*, 18 Neb. 98.

Tenant in Common.—A tenant in common is not entitled to homestead right as against a co-tenant for value of his interest. *Lynch v. Lynch*, 18 Neb. 586.

Wife's Title.—If the title to the family residence is in the wife, it is the homestead, and is exempt. *Stout v. Rapp*, 17 Neb. 462; *Hugh v. Smiley*, 17 Neb. 620.

Occupation Delayed.—The purchaser of property for a homestead was held to have acquired the exemption right thereby, though the premises were occupied by a tenant till the expiration of his lease then existing. *Hanlon v. Pollard*, 17 Neb. 369.

2. **Declaration Must be Recorded**.—No person is entitled to the benefit of the homestead law without filing a written declaration claiming the premises as a homestead. *Lachman v. Walker*, 15 Nev. 422.

3. **How Created**.—One's residence is protected without a formal setting of

it apart as a homestead, if it is not more valuable than the statute contemplates. *Morrison v. McDaniel*, *Norris v. Moulton*, 34 N. H. 392; *Hoitt v. Webb*, 36 N. H. 158; *Horn v. Tufts*, 39 N. H. 484. If the limit, five hundred dollars, be exceeded, the sheriff, in making a levy, must have the portion rightly subject to exemption set apart. *Tucker v. Kenniston*, 47 N. H. 267. The debtor may have a partition made after the levy if the whole has been seized. *Barney v. Leeds*, 51 N. H. 253. If indivisible, the whole may be sold and the debtor get his exempted five hundred dollars out of the purchase price. *Norris v. Moulton*, 34 N. H. 392; *Fogg v. Fogg*, 40 N. H. 289. If neither the debtor nor his wife apply for a division of the property so that the homestead may be set apart, the sheriff may take it for execution subject to the homestead right. *Barney v. Leeds*, 51 N. H. 253. If the husband sell his estate without the concurrence of his wife, she may afterwards have her homestead carved out of it, even while her husband is living. *Tidd v. Quinn*, 52 N. H. 341.

If the husband die seized, the probate judge may assign a homestead to the widow out of the estate. *Norris v.*

32. Dedication in Nevada.—There must be in Nevada a written declaration, signed by the declarant, or by both husband and wife when they are to be the beneficiaries, stating the intent to dedicate the designated and described property as a homestead, the condition of the declarant—whether married or single, that he or she is the head of a family, and residing with it or is living with a person or persons, cared for and maintained on the premises by the declarant.

The declaration must be signed and acknowledged as a deed is required to be, and must be recorded.

If the property designated belongs to either husband or wife, as separate property, both must join in the dedication, but the right of homestead ceases upon the death of the one who is sole owner. Tenants in common may declare upon their respective estates, subject to the rights of partition of their co-tenants.¹

33. Designation in New York.—To dedicate or designate a homestead in New York, either of the following methods is effective: There must be a conveyance of the property for the purpose with the designation stated in the deed; or there must be a notice with a full description of the property, stating the designation, which the owner must sign and acknowledge; or, it must be proved and certified in the same manner as a deed, and also recorded, like a deed, in the county where the real estate, thus dedicated, is situated. The designation must be recorded, under either method, in the office of the county clerk in the "Homestead Exemption Book."²

34. Occupancy in North Carolina.—Occupancy, and such ownership as entitles the occupant to possession (whether legal or equitable the title), must combine to give the householder the homestead right.

35. Omission in Allotment.—The omission of the date of an allotment by commissioners in their report was *held* to work no injury to a defendant who was cognizant of the allotment at the time it was made, and who was invited to attend. He could not successfully except to the report because of the omission, under such circumstances.³

Moulton, 34 N. H. 392; Horn *v.* Tufts, 39 N. H. 484. If, during his lifetime, the husband has sold his estate, the widow may have her homestead set apart notwithstanding. Atkinson *v.* Atkinson, 37 N. H. 434; Gunnison *v.* Twitchell, 38 N. H. 67.

Right, Without a Building.—There may be a right of homestead in land on which there is no building, if it is occupied as a part of the place of the householder's home and owned by him, though it be a hired house. Rogers *v.* Ashland Savings Bank, 63 N. H. 428.

1. Gen. Stat. of Nev., § 539; Smith *v.* Shrieves, 13 Nev. 303; Lach-

man *v.* Walker, 15 Nev. 422; Child *v.* Singleton, 15 Nev. 461.

2. N. Y. Code Civ. Procedure, §§ 1398, 1399.

3. **Title.**—The provisions of law in reference to homestead do not apply to a remainder dependent upon a life estate. Whatever may be the nature of interest in land, whether legal or equitable, in order to constitute a homestead, it must be such as carries with it a present right of occupancy. Murchison *v.* Plyler, 87 N. Car. 79.

Allotment.—Beavans *v.* Goodrich, 98 N. Car. 217.

Selection.—In North Carolina, the

36. Interest under Lease—Ohio.—In construing a statute providing that "any person owning the superstructure of a dwelling-house occupied by him or her as a family homestead, shall be entitled to the benefit of this act, although the title to the land on which the same may be built shall be in another; and lessees shall be entitled to the benefits of this act in the same manner as the owner of the freehold or inheritance, provided nothing herein contained shall be construed to prevent a sale of the fee simple, subject to the lease," the supreme court of Ohio said: "This clause of the statute is designed for the benefit of the debtor; and it should be so construed as to effectuate, and not thwart, its object and policy. And yet it is obvious that, if all lessees, whatever may be the character of their buildings, are compelled either to regard and claim their tenancy as a homestead, or to forego the benefit alike of its exemption and the further exemption of personal property not exceeding three hundred dollars in value, then the mere tenant at will or by sufferance, dependent entirely on the mercy of his landlord for the roof that shelters himself and family, may be placed in a worse condition than the head of a family who has no pretense of a domicile of any sort. . . . The intention, we think, was that such a lessee should 'not be deprived of the benefit' of claiming his tenancy as a homestead, if he shall choose so to claim it."¹ . . . "

37. Exemption of Homestead on Execution.—Homestead is set apart before execution.²

Pennsylvania.—Before a forced sale the debtor may interpose his legal exemption of his home.³

There is exemption in South Carolina in favor of the head of the family, and the protection of homestead extends to the wife, against her own debts, while she lives with her husband though

owner may select his homestead, or it may be done by appraisers, laying it off and marking the bounds. The value is limited to \$1,000. If not done by him or them, his widow or minor children may have it set off to them after his death. It is necessary that it be occupied as the home of the family. It is not essential that the \$1,000 worth of property should be in one parcel. *Martin v. Hughes*, 67 N. Car. 293; *Mayho v. Colton*, 69 N. Car. 299. Subject to a mortgage, it may be carved out of an equity of redemption. *Chatham v. Jones*, 68 N. Car. 155.

1. *Colwell v. Carper*, 15 Ohio St. 285.

2. **How Homestead is Set Off.**—On application of a debtor, his wife, agent or attorney, it becomes the duty of the officer having charge of the execution of a judgment or order for the sale of the debtor's real estate to set apart the homestead where the debtor resides

with his family. The land set apart must be appraised and marked by metes and bounds; and the officer must return the assignment of the homestead with his writ. *Rev. St. Ohio*, § 5438.

3. When levy is made in *Pennsylvania* the debtor must claim his exempt homestead or forfeit his right. When claimed, the officer causes the estate to be appraised and the homestead set apart, and sells only the excess. If indivisible, all is sold and the debtor's due reserved and paid to him out of the price. *Bowman v. Smiley*, 31 Pa. St. 225; *Miller's Appeal*, 16 Pa. St. 300; *Dodson's Appeal*, 25 Pa. St. 234.

A claim to homestead, made only on the day of sale, was held allowable. *Seibert's Appeal*, 73 Pa. St. 361. The statute does not confer the homestead but the right; hence the claiming of it is essential. *Line's Appeal*, 2 Grant's Cas. (Pa.) 198.

she owns no property in her own right. This right may be secured to her by the legislature, under the constitutional provision which provides for the granting of a homestead to "the person entitled thereto, or to the head of any family."¹

Commissioners set off the homestead before sale, in case of judgment and execution against the debtor. The widow is entitled to have homestead assigned to her if the deceased husband has neglected to have one set apart to himself which would become hers upon her succeeding to the headship of the family.²

38. Intent to Claim.—A debtor who is insolvent and has a homestead which he occupies for residence and business, cannot shield other property from his creditors by declaring his intent to claim it, at a future time, as a homestead.³

He must be a present occupant. And he must occupy the premises as a home. It will not do merely to live upon premises while they are mainly devoted to business purposes. A mansion house must be included with the premises, though business be done also.

The occupancy, however, is not so sacramental that the householder should be *held* to unreasonable strictness; nor is the doctrine relative to intent so illiberal that homestead right in a lot should be denied because the owner, ejected from the major part of his premises, had not yet time to carry out his design of building on the vacant part remaining. His intent to build and occupy should plainly appear, however.⁴

1. Norton v. Bradham, 21 S. Car. 375.

2. In South Carolina, where homestead to the amount of \$1,000 is allowed and set off by commissioners, if claimed by the debtor when execution is pending, and which may be paid in money when the property is not divisible out of the proceeds of the sale, the debtor may pay the excess of the estate above \$1,000 and hold the property free from all debts previously contracted. His widow may claim homestead, if he die before one has been set apart to him. Manning v. Dove, 10 Rich. (S. Car.) 403.

Assignment sustained although plat not recorded. Adams v. Agnew, 15 S. Car. 36.

Minor Orphans.—The right of infant children to homestead in their deceased parent's estate cannot be divested by their own act or that of others during their minority. If they are occupants of the premises when the right accrues they do not cease to be beneficiaries of the right by afterwards living elsewhere. Farrow v. Farrow, 13 Lea (Tenn.) 120.

3. Archibald v. Jacobs, (Tex.) 6. S. W. Rep. 177.

4. One owning and occupying as such an urban homestead, carried on his business, which was that of a druggist, in a house on lots disconnected from his dwelling-house. Another house owned by him, and situated in the same town, but not adjacent to or connected with either the property used as a dwelling or that occupied as a drug store, was used by him as a warehouse for the storing of drugs. *Held*, the lot on which the warehouse was situated was not "used to exercise the calling or business of the head of the family" so as to exempt it from forced sale under the homestead clause of the constitution of 1876. The fact that the warehouse was used in a way which was incidentally useful or profitable in carrying on the business of a druggist, was not sufficient to shield it from forced sale as the place used by the head of the family to carry on his business, when that business was actually carried on at a place disconnected therefrom. The warehouse was only auxiliary to the business store lot which the consti-

tution exempts, and was not a part thereof. *McDonald v. Campbell*, 57 Tex. 614.

The doctrine heretofore announced in homestead cases, that a homestead necessarily includes a house for a residence or a mansion house, and that the intent to appropriate a homestead should be evidenced by some unmistakable acts showing an intention to carry into execution such intent, has no application to a case where homestead rights are claimed in property which constituted a part of a late homestead, the whole of which had been occupied as such, and a part of which, only, including the mansion house, had been sold. Hence, when the mansion house was sold, and a part of the homestead ground attached thereto was reserved from sale, with the intention existing in the mind of husband and wife to build and again establish their home on the portion reserved, the reserved portion, though not occupied (when the family has no other place for a home), remains impressed with the homestead character, and is protected from forced sale. *Scott v. Dyer*, 60 Tex. 135.

The words which occur in the constitution in the homestead article, "used for the purposes of a home," refer to lots other than those on which the family resides, and whether they constitute a part of the homestead must depend on their use. Mere ownership will not constitute them a part of the home. *Axer v. Bassett*, 63 Tex. 545.

If a lot be continuously used in connection with the home residence, in such way as to contribute to the comfort of the home place, as if it be used for an inclosed pasture in which to keep the domestic animals of the family, that will constitute such use for purposes of a home as will invest it with homestead character, though it be disconnected and separated by streets from the home place proper. *Axer v. Bassett*, 63 Tex. 545.

If the property acquired by voluntary exchange of exempt property be, from its character or use, likewise exempt by the terms of the constitution or laws it must receive the same protection from forced sale which shielded the property given in exchange for it. This rule applies to the acquisition by the widow, after the death of the husband, of a new homestead in exchange for the old one, even though there be no constituent of her own family for whose support she is liable, residing

with her. **CONSTRUCTION OF HOMESTEAD LAWS**—Homestead laws are to be construed liberally, to give effect to their object. *Schneider v. Bray*, 59 Tex. 668.

Gaming.—The constitution accords protection to the place where the head of a family exercises his calling, but it does not extend its protection to a place in which the occupation followed is prohibited by the penal laws of the State, such as gaming. Though the party claiming homestead exemption did engage in gaming on the premises, still, if his real business conducted there was legitimate, he would be protected; he would not be so protected, however, if the legitimate business was conducted only as a blind to conceal the gaming. *Tillman v. Brown*, 64 Tex. 181.

Used for Illegal Calling.—The homestead protection, under the constitution, does not extend to a place where the head of a family follows a prohibited calling, such as gaming. The conducting of legitimate business subsidiary to the unlawful one, does not relieve him. *Tillman v. Brown*, 64 Tex. 181.

Used to Keep Animals.—A lot, continuously used in connection with the home residence to keep the domestic animals, is used for "the purposes of a home," within the statute, and becomes part of the homestead, though separated by streets from the home. *Axer v. Bassett*, 63 Tex. 545.

In an application by the widow, pending administration on the estate of her deceased husband, for an allowance in lieu of homestead, it was shown that up to death of deceased he lived with his family on lots 6 and 7, in a town. He carried on his business as a merchant in a storehouse on lot 4, in which he owned an undivided interest of five feet in the front thereof, his children by a former marriage owning the remainder of that lot. Lot No. 6 was the exclusive property of the children of the deceased by a former marriage. One-half of lot No. 7 was also owned exclusively by the children of the first marriage, and the other half was owned jointly by the children of both marriages. **Held**: An allowance should have been granted the surviving widow and children in lieu of the homestead. It was immaterial to the issue to inquire what separate property might be owned by the children of the first marriage, or held by them as property once constituting the estate of the first wife. The homestead allowance, when set

39. Residence and Right of Exemption.—The claimant of a homestead, in Vermont, must not only possess the land claimed as such, but a mansion house thereon, occupied as the home of his family. The right is secured by the constitution, but the mode of dedication is statutory; and with this mode the applicant must comply. He cannot enjoy two homesteads at the same time. Though he may intend to change from one to the other, his homestead right in the intended one is not gained while he actually occupies the first. His intention, when he has yet made no selection by occupancy, though he has disposed of his homestead by sale, must be gathered from circumstances with respect to a new house for which he has collected material to build.

In case of judgment against him, the surplus of his estate, after the homestead has been set apart, is liable to execution. The judge of probate may assign a homestead to the widow.¹

aside, must be taken alone from the estate of the deceased husband or wife. Considering the condition of the title, both of the business house and family residence, there was no such homestead as could be set apart to the widow and children. The fact that a step-child, ward or niece, who for the time being is a member of the widow's family, owns a home in which all live, is no answer to her demand for an allowance in lieu of homestead. The cessation of business on the death of the husband; which he had conducted on lot 4, did not divest his undivided interest of five feet of its protection from forced sale by reason of its homestead character. He being insolvent, his title and interest in it passed at once to and vested in his heirs. This case, in this respect, distinguished from *Shryock v. Latimer*, 57 Tex. 674; *Clift v. Kaufman*, 60 Tex. 64.

It is not necessary, under the constitution of 1876, that a block of ground inclosed and adjoining one on which a dwelling house stands, should be necessary to the enjoyment of the dwelling house as a homestead, to be protected as a part of the homestead from forced sale. The question is one of fact as to whether it constituted a part of the designated homestead. *Arto v. Maydole*, 54 Tex. 244.

The fact that such a lot in a town or city may have been used as an approach to the mansion, or for purposes of ornamentation or pleasure only, would not divest it of its homestead character. The law in such a case would not make the distinction between necessity and convenience determine the homestead

character of the property. *Arto v. Maydole*, 54 Tex. 244.

1. Circumstances as to Occupancy.—That the defendant deeded to his brother his interest in the house; that he gathered materials to build *another house*; that he filed his petition to have a homestead set out from another part of the mortgaged premises; that he lived for several years in several different towns,—are actions inconsistent with the idea that he was *keeping* the premises for a homestead. *Whiteman v. Field*, 53 Vt. 554.

One cannot have a homestead in mere land; nor in land with no buildings but a barn on it; a dwelling-house, owned, used, or kept by the housekeeper as a home for himself and family, is the first essential of a homestead; thus, the defendant's husband, living with her in her house, and owning land contiguous to that of his wife, mortgaged the same without her joining in the deed. A barn was the only building on his land; which land he used in connection with his wife's house as a home for his family. On a foreclosure: *Held*, that the husband never had a homestead in his land; and, that, therefore, his widow could not hold one in it. *Rice v. Rudd*, 57 Vt. 6.

One cannot be the owner of two homesteads *at the same time*. When one owns two farms in different towns, but lives and makes his home with his family on one,—the one first acquired,—although he intends to sell it, and move on to the other as his home, the one first acquired and so occupied, contains the homestead; and it is not necessary that the wife sign with the hus-

40. Recording Deed.—The constitution of Virginia confers the right of homestead. The statute requirement that a deed to the homestead property, or a sworn inventory, shall be made of record in order to secure the benefit, cannot impair the constitutional right.¹

III. BENEFICIARIES: WHO MAY CLAIM HOMESTEAD PROTECTION.—1.

In General.—Wherever, throughout the Union, homestead exemption exists, it is accorded to the heads of families who are fathers and husbands, and owners of the mansion houses where their families live with them. While this rule is universal in all the States which grant such exemption at all, there are variations of it respecting the requisites necessary to constitute a head of a family. While the general purpose of the beneficent provision is the protection of wives and children in homes not liable to be taken from them by forced sales, many States by direct statutory provision or by liberal construction, include all members of a family dependent upon the head for support, whether they be his wife and children, or sustain some other relation. It is not universally true, therefore, that the head of a family must be a husband and father. If he is a householder and owner, and the supporter of persons living with him in his home, he comes under the requirements of most of the statutes. However few the members of the family, (if only a wife, under some constructions, and even a single servant, in a rare instance to be noted), he may be a beneficiary, as its representative. And the policy of some States is to exempt the homestead within a specified limit, whether the householder have any family or not.

The benefit is conferred on citizens or permanent residents only, in most of the States having homestead laws, while in others it is more broadly extended. In Alabama non-residents cannot claim. The benefit is for residents and their families, under the constitution and statute. The claimant must be an

band a mortgage deed of the other farm to give such deed validity. *Goodall v. Boardman*, 53 Vt. 92.

Mode of Claiming.—Constitution, Article XI, secures homestead, yet legislature may prescribe mode of setting it apart, only it cannot defeat or impair the benefit thereof. Chapter 183, Code 1873, is within legislative authority, and to avail himself thereof householder must actually claim the exemption and set it apart as prescribed. *Wray v. Davenport*, 79 Va. 19.

The surplus of an estate, after the homestead has been set apart, is subject to levy in Vermont; or, after the death of the debtor, the judge of probate may assign homestead to his widow. *Howe v. Adams*, 28 Vt. 544. If the estate be indivisible and sold by creditors, the widow and children are

entitled to the value of the exemption, out of the price. *Chaplin v. Sawyer*, 35 Vt. 286.

Widower Without Family Entitled.—A widower may be a housekeeper under the homestead exemption law, though he have no family but himself and a servant. *Pierce v. Kusic*, 56 Vt. 418.

1. *Wray v. Davenport*, 79 Va. 19, in exposition of Va. Code (1873), ch. 183.

The owner and occupant of a dwelling house, cannot claim homestead exemption in another to the defeat of his creditors. *Schoffen v. Landauer*, 60 Wis. 334.

A hotel leased to another cannot be successfully claimed as a homestead, though the owner live in it by permission. *Green v. Pierce*, 60 Wis. 372.

actual occupant—not merely intending to be. His widow cannot claim on the ground that her husband had purchased premises for a homestead and designed to become a resident of the State and occupant of the home.¹

2. Family.—A debtor has no family, such as would entitle him to homestead exemption, though his father live with him occasionally, and his nephews reside with him, if none of these be dependent upon him—according to the laws of Arkansas. A mere aggregation of individuals, independent of the householder, though living with him, cannot be considered a family in such sense as to entitle him to the benefit of homestead exemption.

It is not required that the householder should be a man. The widow of a beneficiary may sustain the character when living with her minor children on the homestead. Anyone, whether married or not—even an alien, in this State—may be a beneficiary, if he has a family living with him (and dependent upon him), at the residence which he owns and occupies.²

1. (1) **Homestead Exemption, as Affected by Residence of Debtor.**—The constitutional and statutory provisions of this State, in regard to homestead exemptions, are intended for the benefit of residents and their families, and cannot be invoked by non-residents.

(2) **Change of Domicile.**—A domicile cannot be changed by mere intention—the intention must be carried into effect; and the old domicile continues until a new one is acquired.

(3) **Domicile of Husband and Wife; Claim of Exemption by Widow.**—The domicile of the husband determines that of the wife; and where he was not a resident of this State at the time of his death, although he had bought property here, and was making preparations to remove, his widow cannot claim a homestead exemption in the lands. *Talmadge v. Talmadge*, 66 Ala. 199.

When Claim not Void, Though Insufficient as Against Debt Sought to be Collected.—A declaration claiming a tract of land in the country, containing *eighty-eight* acres, of less value than \$2,000, as a homestead exemption, made and filed in the office of the judge of probate in due form, and in conformity to the provisions of section 2823 of the Code, being valid as against debts contracted after April 23, 1873, is not void, although it is insufficient as against debts contracted prior to that date, and after the adoption of the constitution of 1868, in that it does not select and designate which eighty of the eighty-eight acres are claimed. *Clark v. Spencer*, 75 Ala. 49.

Exemption; Repeal of Law.—A claim to a homestead exemption is worthless, when not asserted until after the repeal of the law which conferred it. *Clark v. Snodgrass*, 66 Ala. 233.

2. What is a Family.—To constitute a family, within the meaning of the homestead laws, a mere aggregation of individuals in the same house is not sufficient. There must be an obligation upon the head of the house to support the others, or some of them, and on their part a corresponding state of dependence. *Greenwood v. Maddox*, 27 Ark. 684, explained; *Harbison v. Vaughan*, 42 Ark. 539.

The statutory requisite is that the beneficiary must be married, *or* the head of a family. Ark. Dig. of Stat. (1884), § 2994.

Relatives.—If relatives, who are not children, constitute the family, yet are not dependent upon the household, it has been *held* that he is not a beneficiary. *Harbison v. Vaughan*, 42 Ark. 539.

The object is to protect the family from dependence and the loss of home. *Tumlinson v. Swinney*, 22 Ark. 400.

Heads of Families—Claiming.—The right of homestead is given to heads of families, which may consist of the husband and father of a household, or of his widow and children after his decease. Under different phraseology, such heads of families are entitled to homestead protection wherever the system prevails in any form. It has been *held*, in construing a statute, that any householder, whether married or

(a) *What Family Necessary.*—It is not sufficient, in Georgia, that the applicant is the supporter of the family, he must be supporting those whom he is legally obliged to care for. But, having a family legally dependent on him, if he neglects to make application for the exemption of the homestead when a levy is being made, his wife may interpose and claim in his stead.

And a widow, with dependent minor children, may claim and become entitled to the homestead during her widowhood, though the children have outlived their minority meanwhile.

Guardians and trustees may claim in behalf of minors who are entitled. Unmarried men, supporting those whom they are morally bound to succor, have been held entitled to homestead, like those legally so bound.

One who is a housekeeper, yet has no family, except servants, is not such a "head of family" as the homestead laws contemplate, in this State.¹

not, whatever the sex, is entitled to the right of homestead exemption. *Greenwood v. Maddox*, 27 Ark. 648. Aliens have been held so entitled. *McKensie v. Murphy*, 24 Ark. 155.

The wife may become the head of the family, entitled to homestead protection, if she survive her husband; but if he be the survivor, and without children, he is no longer entitled to such protection, in California. *Revalk v. Kraemer*, 8 Cal. 71; *Gee v. Moore*, 14 Cal. 476; *Bowman v. Norton*, 16 Cal. 217; *Estate of Busse*, 35 Cal. 310. The survivor, where there are children, becomes head of the family and entitled to the homestead, though a widow with children holds it for them as well as for herself. *Estate of Wixom*, 35 Cal. 320; *Higgins v. Higgins*, 46 Cal. 259. Compare *Rich v. Tubbs*, 41 Cal. 34.

Any one, of either sex, married or not, who is head of a family residing on the premises, is entitled to claim. *Ellis v. White*, 47 Cal. 73; *Santa Cruz Bank of Savings v. Cooper*, 56 Cal. 539.

Husband and wife are entitled while residing in the State, though not intending to be permanent residents. *Dawley v. Ayers*, 23 Cal. 108.

A widow, to whom a homestead is set apart, may claim a second homestead in the estate of a second husband. *Higgins v. Higgins*, 46 Cal. 260.

An unmarried woman, having care of her minor illegitimate child, was held entitled. *Ellis v. White*, 47 Cal. 73.

The purpose of homestead exemption, in Colorado, is to secure the housekeeper himself, as well as his family, from destitution; and also to strengthen

the State by the maintenance of settled homes. *Barnett v. Knight*, 7 Colo. 365, 370.

1. What Head of Family May Claim.

—An indigent sister and her children, though mainly dependent on the applicant for support, do not constitute a family for whose benefit he can take a homestead. To constitute one head of a family within the meaning of the homestead clause of the constitution of 1868, there must be some legal obligation on him to support its members. *Dendy v. Gamble*, 64 Ga. 528.

A man, as head of a family consisting of a wife and children, applied for a homestead. A caveat was filed, and while it was pending the land was sold at judicial sale, and the caveator and another, with full notice, bought it. Appraisers were appointed, and on their return the schedule was approved. The caveator appealed, and pending the appeal the applicant died. Held, that a bill would lie at the instance of the widow and children to have them subrogated to the rights of the applicant, to enforce their right to the homestead, and to compel the purchasers to pay over the rents and profits arising from the land since the original grant of the homestead. *Hodges v. Hightower*, 68 Ga. 281.

The wife of the tenant cannot take a homestead in the premises of the landlord. *Cherry v. Ware*, 63 Ga. 289.

While it might be more regular for the husband as head of the family to interpose a claim to a levy on a homestead for his debts, yet the wife has sufficient interest to support a claim by her. *Brady v. Brady*, 67 Ga. 368.

Where, after the death of a husband, his widow, "as the head of a family, consisting of herself and two minor children," applied for and obtained a homestead out of his estate, she occupied the double position of a *quasi* trustee and also a beneficiary, and the homestead estate did not terminate upon the arrival of the children at majority, but remained during her widowhood. *Groover v. Brown*, 69 Ga. 60.

A man who, in December, 1868, procured a constitutional homestead of realty and personality, having at the time a wife, some minor children, and two adult daughters, all members of his family, the daughters being indigent and dependent, and his application not being restricted so as to exclude by its terms any portion of his family, is to be understood as having claimed and secured the homestead in behalf of them all. So long as the daughters, or either of them, continued indigent and dependent, and remained with him, having no other home, and deriving support from him, the homestead estate was not determined, though his wife died, and the minors became of age, married, and left him. In these circumstances, on marrying again in 1878, he was not entitled to another homestead. *Torrance v. Boyd*, 63 Ga. 22.

A homestead in the undivided half of real estate belonging to a firm may be set apart to the wife of one of the partners, the husband not applying therefor himself, but consenting to the wife's application, and such homestead will be valid against general creditors of the firm. *Hunnicut v. Summey*, 63 Ga. 586.

After the assignee of a bankrupt has set apart certain property to him as a homestead, and the custody of the property has passed out of the bankrupt court, the wife of such bankrupt can take a valid homestead in the property. *Colquitt v. Brown*, 63 Ga. 440.

Tenant in Common Entitled to Homestead.—A tenant in common is entitled to a homestead, exempt from execution, in the common estate, and on his death the right descends to his widow and heirs. *Ward v. Mayfield*, 41 Ga. 94.

Guardians and trustees of minor children are protected to the amount of the legal exemption, in the interest of minors, in Georgia. There an unmarried man who supports his mother and sisters, has been *held* entitled to

homestead rights as the head of a family. *Marsh v. Lazenby*, 41 Ga. 154, though the right is not extended to such a one whose only family consists of servants. *Calhoun v. McLendon*, 42 Ga. 405. Minor children, inheriting a homestead, may defend it against creditors as such. *Roff v. Johnson*, 40 Ga. 555.

A Wife May be Claimant.—*Larence v. Evans*, 50 Ga. 216; *Page v. Page*, 50 Ga. 597; *Smith v. Ezell*, 51 Ga. 570; *Cheney v. Rodgers*, 54 Ga. 168; *Bowen v. Bowen*, 55 Ga. 282.

A bankrupt, so declared, has been *held* incapable of claiming homestead exemption. *Lumpkin v. Eason*, 44 Ga. 339.

Idaho.—The "head of family" is the husband or wife, or any person who has under his roof and care one or more minors related to him as set forth in the statute, or parents or grandparents or other relatives indicated (one or more). Revised Statutes of Idaho (1887). § 3058.

Illinois.—Under the homestead act a family is a collection of persons living together,—hence one person cannot constitute a family. Nor can a person and his or her children, permanently separated, constitute a family. A person never having been married, and having no family, or a man or woman having once been married, but having no family, cannot claim an estate of homestead. *Rock v. Haas*, 110 Ill. 528.

Where a widow having children in another State, comes to this State leaving them in other homes, with no purpose of bringing them with her, they cannot be said to constitute a family, with her at its head. *Rock v. Haas*, 110 Ill. 528.

Homestead—In Wife, Not Created by a Verbal Promise of Husband to Live on Lot.—A mere verbal promise of a husband to his wife, while temporarily residing in another State, that they would return and use a house and lot of the former in this State as a homestead, will not create or pass to the wife a right to homestead therein, when they fail to occupy the same as a residence. *Greenman v. Greenman*, 107 Ill. 404.

Not Released by Ante-Nuptial Contract.—A widow's homestead right cannot be barred by an ante-nuptial contract to that effect. Such contract may bar dower, but not the right to the homestead, even though the widow may not have any issue of the marriage.

3. Owners Claiming Homestead.—Though not a general rule in all the States, it is held in Kentucky that two joint owners residing in separate buildings, though there has been no partition of the property, may each be a homestead beneficiary.

One is there entitled to the benefit if he, having owned two tracts of land, has sold the one containing his dwelling-house, if he retained the other for a homestead and built a new home thereon.

A claimant there may have only life estate in the homestead property, with the fee in the children. An occupant keeping house on premises purchased and improved prior to the creation of debt, may claim it against creditors.

A widow there may claim homestead in her deceased husband's land, though she have no family after the death of an only child,

The provision securing a homestead being a matter of public concern, cannot be abrogated by private contract. *McMahill v. McMahill*, 105 Ill. 596; s. c., 44 Am. Rep. 819.

Right of Married Woman on Separation From Her Husband.—After a permanent separation of a husband and wife, even by agreement, and his refusal or neglect to furnish her with a home or support, the wife will have the right to acquire and hold property in the same manner as if she were sole or had been divorced, and if she purchases and occupies premises by herself and family, as a homestead, she will be protected, under the statute, the same as any other householder. *Kenley v. Hudelson*, 99 Ill. 493; s. c., 39 Am. Rep. 31.

Right of Homestead in Case of Exchange of Lands.—During the pendency of a statutory lien under a collector's bonds, the collector acquired a tract of land as his homestead, which he exchanged for another, occupying the latter as a homestead, it was *held*, on bill by the sureties of the collector, who had been compelled to pay on his default, to be subrogated to the lien and have these lands sold under the lien, that in consideration of the equitable rights of purchasers from the collector, the sureties should be subrogated as to only one of the two tracts, viz.: the tract last acquired, and as to it only as to the excess in value above \$1,000. *Crawford v. Richeson*, 101 Ill. 351.

Occupant.—The head of the family must be the owner and occupant of the home to entitle him to protection. The right extends to his widow during her life, and to the family till the youngest child reaches majority. In Illinois, the

essential requisite is that there be a family as beneficiaries of the law. *Kitchell v. Burgwin*, 21 Ill. 40; *Deere v. Chapman*, 25 Ill. 612. The protection is good against judgments. *Conroy v. Sullivan*, 44 Ill. 451; *Loomis v. Gerson*, 62 Ill. 11.

A wife, who owns the family home, is entitled to homestead protection under the law of Indiana, which grants it to a "resident householder." *Crane v. Waggoner*, 33 Ind. 83. And there a brother, living with his sister and supporting, or helping to support, the family, was *held* entitled to the household right. *Graham v. Crockett*, 18 Ind. 119.

The head of the family may be a childless widower or widow and yet have the homestead privilege in Iowa, provided he or she be the owner and occupant of the protected premises. *Elston v. Robinson*, 23 Iowa 208. There the widow of a homestead proprietor may re-marry, yet retain her protected home. And if only two persons reside together, they have been *held* "a family," so that the managing one might be the "head" of it, and successfully claim homestead exemption. *Parsons v. Livingston*, 11 Iowa 104. But when a single man had his brother and sister-in-law living in his house on a rented farm, he was not *held* to be the "head of the family," though he was the manager of the work and furnished the household with supplies. *Whalen v. Cadman*, 11 Iowa 226.

When Not Acquired by Debtor.—A debtor being insolvent and having his creditors pressing him for the payment of their claims, and being fully cognizant of his inability to pay the same, cannot, to defraud his creditors, trans-

provided she occupies it as her home. She may even be the beneficiary, though she has rented the property to a tenant, and though she may have other property in her own right sufficient for her support.¹

4. Mortgage—Wife's Subsequent Right to Claim.—The wife of a householder who mortgaged the homestead did not join in the act. The mortgagee paid part of the money secured by the mortgage to satisfy a lien held against the land by the State of Kentucky. He was not subrogated to the right of the State, but relied alone on his mortgage. The court held that, upon the death of the mortgagor, his wife was entitled to a homestead in the mortgaged property, and that the mortgagee had derived no right from the State by removing the lien.²

fer possession of goods and merchandise purchased by him upon credit, and take in exchange therefor real estate, either in his own name or the name of his wife, and then claim the real estate exempt as a homestead against said existing creditors. *Long v. Murphy*, 27 Kan. 375.

1. Owner, as Claimant.—Two joint owners of a tract of land, upon which they both reside in separate buildings, are each entitled to a homestead. The fact that no partition has been made is immaterial. *Megular v. Burr*, 81 Ky. 32.

Appellant owned two tracts of land adjoining each other. The tract upon which was situate the dwelling he sold, but remained in possession as tenant of the purchaser, cultivating the other tract, upon which finally he built a small dwelling-house. He is entitled to a homestead in the unsold tract. No construction of the homestead act, not necessary for the protection of purchasers and creditors against fraud, should be adopted which tends to defeat the object of its enactment. *Bennett v. Baird*, 81 Ky. 554.

A party holding the title to a tract of land for life, with remainder to her children, and in the occupancy of the land, is entitled to a homestead therein as against her creditors. *Robinson v. Smithey*, 80 Ky. 636.

Purchase Before Indebtedness.—If the land was purchased or the improvements made prior to the creation of the debt, the homestead right attaches when the claimant is in occupancy as a housekeeper in good faith at the time the attempt is made to subject it by execution. *Nichols v. Sennitt*, 78 Ky. 630.

Although the infant child, which the widow had at the time of her husband's

death, died soon afterwards, yet she is entitled to a homestead in the land of her husband. Her right to the homestead is not impaired by the death of her child, but continues so long as she occupies it. *Gay v. Hanks*, 81 Ky. 552.

When the right to a homestead, as such, is derivative, the legal title to the land is in the heirs, subject to the right of occupancy; but when it is original, the title is in the party claiming the homestead, with the right to dispose of it as well as its proceeds. The appellant, as the devisee of her husband, holds an independent right to a homestead in the land devised, which cannot be subjected to debts incurred by her after his death. *Allensworth v. Kimbrough*, 79 Ky. 332.

The law gives to a widow a homestead for her use as long as she occupies it by herself, her tenant, or agent, without reference to the kind or value of other property she may have in her own right, or the source whence she derived it, and she cannot be divested of it, except by her own act. The property given to her by her husband before his death cannot be estimated in fixing the value of her homestead. *Sansberry v. Simms' Admx.*, 79 Ky. 527.

2. Mortgage—Claim by Wife.—*White v. Curd*, (Ky.) 5 S. W. Rep. 553.

A married woman cannot claim homestead in Louisiana, even out of her separate property, under the statute authorizing "the debtor having a family, or mother or father, or person or persons dependent upon him for support" to claim the benefit of homestead against his creditors. The married applicant was shown to have a granddaughter living with her and dependent upon her. *Fusillier v. Buckner*, 28 La. Ann.

5. Right of Claimant without a Family.—It has been held in Massachusetts that a widower may be a homestead beneficiary after the loss of his wife and children, but that a childless single woman cannot be. A widow there may claim homestead out of her deceased husband's estate, though she has had her dower assigned out of his whole estate.¹

(a) *Michigan*.—It has been held, in Michigan, that without actual occupancy, one who had purchased the site of a future home before marriage, and inclosed it afterwards, might claim it as a homestead prior to the erection of a dwelling. But occupation by a son of a residence owned by his father, gives him no right to claim.² The general rule in this State is that only the owner and occupant may claim homestead exemption.³

1. Sole Occupants.—A householder, owning and occupying his home with his family, does not forfeit its protection as a homestead by the loss of his wife and children, in Massachusetts. *Doyle v. Coburn*, 6 Allen (Mass.) 71; *Silloway v. Brown*, 12 Allen (Mass.) 34; though a childless, single woman is not entitled to it. *Woodworth v. Comstock*, 10 Allen (Mass.) 425; *Woodbury v. Luddey*, 14 Allen (Mass.) 1, 6.

A widow having an estate of homestead is entitled to have her dower assigned to her out of the whole of the real estate of her deceased husband, and then to have her estate of homestead set off to her from the remainder of the estate. *Cowdrey v. Cowdrey*, 131 Mass. 186.

2. Right Prior to Building a Home.—A city lot, purchased by a single man in contemplation of his marriage, and with the intention of making it a homestead, will be exempt as such from the levy of execution, even before any dwelling is erected on it, if the man and his wife have inclosed, improved and used it with the constant purpose of making it their home as soon as their means would permit. *Reske v. Reske*, 51 Mich. 541; s. c., 47 Am. Rep. 594.

A son who goes upon his father's land with his father's consent, and occupies a building already there, but who takes and holds possession under no claim of enjoyment that would create a homestead interest, and after his father's death pays rent to the representative of the estate, is merely a lessee, so far as his exclusive possession is concerned. *Tharp v. Allen*, 46 Mich. 389.

3. Generally, only the owner and occupant may claim in Michigan. *Beecher v. Baldy*, 7 Mich. 488.

The same is true in Minnesota, though not confined to the debtor, but extend-

ed to his widow and minor children. *Folsom v. Carli*, 5 Minn. 337; *Tillotson v. Millard*, 7 Minn. 520; *Kresin v. Mau*, 15 Minn. 118. Similar is the provision in Mississippi. *Morrison v. McDaniel*, 30 Miss. 217; *Campbell v. Adair*, 45 Miss. 170; *Smith v. Wells*, 46 Miss. 71. The wife may claim as "head of the family," if the fee of the land to be set apart, is in herself. *Partee v. Stewart*, 50 Miss. 720; *Hand v. Winn*, 52 Miss. 784.

At the death of the husband and father, the widow and minor children take an absolute title in the homestead, and the substantive right of the children in such homestead cannot be divested by any act of the widow, of the father's creditors, or of the probate court. *Plate v. Koehler*, 8 Mo. App. 396.

Prior to the amendment of 1875 the homestead act conferred upon the widow and minor children of a decedent a right to a homestead whether he left debts or not. *Freund v. McCall*, 73 Mo. 343.

Exchange Of.—Under Revised Statutes, section 2696, the owner of a homestead, acquired by successive exchanges from a former one, is entitled to the same homestead rights in the one so acquired, that he had in the original one. *Creath v. Dale*, 84 Mo. 349.

Claim of Wife after Death of Husband.—Where a wife voluntarily abandoned her husband several years before his death, purchased lots in her own name, erected a house thereon in which she had her home, held, that upon his death she could not claim the homestead of her late husband as her own, but she had a dower interest therein. *Dickman v. Birkhauser*, 16 Neb. 686.

Owning and Occupying.—*People v. McClay*, 2 Neb. 7.

6. Claimants in New York.—A married woman, owning and occupying a residence, may claim and designate it as her homestead, and thus render it exempt to the same extent that any householder could do. If she is a judgment debtor, she enjoys the same immunity from the forced sale of her property as any householder. And this immunity extends to unmarried women. Formerly, the property of married women was unprotected while they were living with their husbands, as they were not then deemed householders. The exclusion did not apply to unmarried women. Now, both classes may alike hold property, and are liable to suit, and, therefore, equally may need that homestead protection which the law now accords to both.¹

7. Right to Allowance.—Homestead to the amount in value of a thousand dollars is exempt under the constitution of North Carolina of 1868.² For debt contracted prior to the adoption of that constitution, a sale was ordered; and it was held that the sheriff need not lay off any homestead, but could sell the property as a whole; that the debtor, on his own application, might have a homestead set apart, if the property is more than the satisfaction of the debt should require.³

Nevada.—Both husband and wife together, or either, may make the selection in this State. Any head of a family may select and claim. Genl. Stat. § 539.

In Nevada, a widow, without children is entitled to claim homestead. Estate of Walley, 11 Nev. 260.

1. N. Y. Code Civ. Pro., § 1399. y. § 1392.

Any owner of a residence, having charge of a family, is entitled, in New York. *Griffin v. Sutherland*, 14 Barb. (N. Y.) 458.

A head of a family is entitled in New Hampshire, to the protection of the home he owns and occupies; and a widower with but one child is embraced in the provision. *Barney v. Leeds*, 51 N. H. 253.

2. Const. N. C. (1868), Art. 10, § 2.

3. *McCanless v. Flinchum*, 98 N. Car. 358.

See *McCracken v. Adler*, 98 N. Car. 400, in exposition of N. C. Code, §§ 502, 506.

A widow is not entitled to homestead in lands of her husband if he die leaving children—minors or adults. An heir twenty-one years old is not entitled to homestead in the lands of his ancestor. *Saylor v. Powell*, 90 N. C. 202.

A debtor, who conveys his land in fraud of creditors, is still entitled to a homestead in the fraudulently conveyed land. *Rankin v. Shaw*, 94 N. C. 405.

Who May Claim in Ohio.—A husband and wife living together, a widow or a widower living with an unmarried daughter or unmarried minor son, may hold an exempt homestead. The husband, or the wife in case of his failure or refusal, shall have the right to make the demand; but neither can claim if the other has a homestead. Rev. Stat. of Ohio, § 5435.

One owning the superstructure of a dwelling-house and occupying it as a family homestead, or living thus in it under a lease, is entitled to the benefit of homestead therein, though not owning the land on which it stands; but the fee simple is subject to sale. Rev. Stat. Ohio, § 5436. *Codwell v. Carper*, 15 Ohio St. 279.

Unmarried minor children of decedents are entitled to have the homestead, on which they reside at the time of the death of their parents owning, continued to their use. Rev. Stat. Ohio, § 5437.

A widow is not authorized by section 5435, Rev. Stat., to have a homestead assigned to her, in the lands belonging to her deceased husband at the time of his death; the only right to a homestead in such lands is created by § 5437. *Taylor v. Thorn*, 29 Ohio St. 569.

Re-marriage—Effect of.—Judgment was obtained against a married man, after which his wife died, leaving no one residing with him except an adult mar-

ried son, whose wife was living apart from her husband. Levy was then made, and a homestead and chattel exemption laid off, to both of which exceptions were taken by the creditors. Pending these exceptions, the debtor again married. *Held*, that the defendant was "the head of a family" at the date of the levy and was therefore entitled to both homestead and chattel exemption. Moreover, the debtor, at the hearing below, was entitled to his homestead as the head of a family by virtue of his second marriage before sale had, even if not such head at the time of the levy previously made. *Rollings v. Evans*, 13 S. Car. 316.

A widow without a family of her own, is herself the family of her deceased husband, and as such, is entitled to a homestead exemption out of his property as against his debts. *Moore v. Parker*, 13 S. Car. 486.

The child of slave parents, living with his father, entitles the latter to a homestead. *Myers v. Ham*, 20 S. Car. 522.

One who has no family but servants, it has been *held*, cannot claim. *Garaty v. DuBose*, 5 S. Car. 398.

The adoption of children was *held* not to give the right to claim homestead. *Re Lambson*, 2 Hugh. (U. S.) 233.

Claim after Forced Sale.—"It has been *held* by this court that a husband may mortgage a part of the tract of land on which he resides with his family, without his wife joining with him, provided he retain enough of it for a homestead; and that if the wife subsequently join him in the conveyance of the homestead, she cannot afterwards claim homestead in that part previously conveyed by the husband alone. *Hilderbrand v. Taylor*, 6 Lea (Tenn.) 659; *Enochs v. Wilson*, 11 Lea (Tenn.) 228. We hold the same rule applies where a creditor has levied upon and sold a part of such tract as where the husband had himself sold it." *Rayburn v. Norton*, 85 Tenn. 351.

Infant Children.—Infant children occupying the homestead with their surviving parent at his or her death, are entitled to the homestead exemption during their minority, and cannot be deprived thereof either by their own act or the act of third persons. *Farrow v. Farrow*, 13 Lea (Tenn.) 120.

Evidence.—The claim of homestead rights cannot be affected by the dec-

larations of the husband of his opinion in regard thereto; nor can he be required in a suit to subject property to the satisfaction of a mortgage claimed by him on the trial as a homestead, to state whether he considered the property a homestead or not when the mortgage was executed, if, in fact, the property was in use as a homestead at the time. *Jacobs v. Hawkins*, 63 Tex. 1.

Preemption.—One whose wife owns a homestead which is occupied as such by the family, cannot acquire by preemption another homestead on the public domain. *Garrison v. Grant*, 57 Tex. 602.

The constitution protects the surviving husband or wife in his or her right to the occupancy and enjoyment of the homestead, whether as against the heirs of the deceased seeking partition, or the creditors of the survivor, so long as such survivor occupies it as such. It is immaterial whether the title to the homestead property was vested in the deceased or the survivor, or was community property; in either case it is protected against forced sale or partition while occupied as a home, whether with or without others to constitute a family. *Eubank v. Landram*, 59 Tex. 247.

The widow who, during the life and at the death of her husband, occupied with him a homestead on a tract of land which belonged, as community property, to the deceased husband and the wife of a former marriage, is entitled, on partition with the heirs of the first marriage, to have her deceased husband's interest set aside, and to retain on it a homestead so long as she may choose to occupy it as such. The heirs of a wife by a former marriage are entitled to so have the land partitioned that their interests, inherited from her, may be set aside to them in severalty. In such a case, while the fee of the land descended (there being no heirs by the second marriage) to the children of the first marriage, it did so subject to the homestead rights of the widow of the second marriage in the interest owned by her husband.

The homestead right of a widow does not attach to the undivided interest of the children of the deceased husband inherited from his wife by a former marriage. *Gilliam v. Null*, 58 Tex. 298.

A tenant in common may acquire a homestead in the estate in which his interest, as such, is held. *Williams v.*

IV. LIMITATION OF HOMESTEADS: QUANTITY AND VALUE OF REAL ESTATE EXEMPT.—1. In General.—Quantitative and monetary limits are fixed in the States granting homestead exemption, beyond which protection from forced sale does not extend. There is no exception to this, except the lack of restriction as to quantity in one and as to value in another, which will be pointed out.

There is wide range of difference as to the value reserved. Great liberality is extended in most instances, while in others the amount exempted is quite meager. The policy of some States is to secure the families of citizens in comfortable and even moderately luxurious homes, while that of others is more considerate of the rights of the creditor than of the comforts of the debtor. And, considering the liberal construction of homestead statutes generally prevailing, and contrasting it with the strict construction exceptionally practiced, we shall see that the protection afforded is varied to a great degree in the several States.

Distinction is made between urban and rural property. The former is usually limited to a house and lot, while the latter is designated by acreage sufficient for a farm with its buildings and appurtenances. The pecuniary restriction is ordinarily the same in any given State, whether the homestead be in a city or the country.

2. Widow's Right.—When one hundred and sixty acres of land, valued at less than \$2,000, were allotted by commissioners to a widow, and return to court duly made by them, and recorded by judicial order, without any objection having been interposed, and the widow held possession of the land allotted her till her death, which occurred six years after the allotment, her title will be sustained in favor of her own heirs as against those of her husband, who died before the allotment. No order of court homologating the allotment of the commissioners was necessary to her title, in the absence of objections.¹

3. Claim for Two Tracts in Alabama.—Rural property not exceed-

Wethered, 37 Tex. 132; Smith v. Deschaumes, 37 Tex. 429.

The legal protection precedes actual occupancy, if the owner is preparing to fit the premises for a home. Franklin v. Coffee, 18 Tex. 416.

But merely keeping a bed-room in a building, and devoting other rooms to business, will not be sufficient to create a homestead. Phillio v. Smalley, 23 Tex. 498.

Housekeeper Without Family.—Under the homestead act a widower with no family but himself and a servant may be a *housekeeper*; and if he owns and occupies with his servant a dwelling-house not exceeding \$500 in value, it is exempt. Pierce v. Kusic, 56 Vt. 418.

The owner of a house standing on rented ground may claim homestead exemption for it.

The head of family claiming homestead need not be a married man to avail himself of the benefit. Myers v. Ford, 22 Wis. 141.

The protected property should be a home, and disconnected pieces, not reasonably constituting any part of the family residence, are not protected from the creditor. Bunker v. Locke, 15 Wis. 638; Casselman v. Packard, 16 Wis. 116; Herrick v. Graves, 16 Wis. 166.

1. Dossey v. Pitman, 81 Ala. 381. Ala. Code, §§ 2827, 2841, Act Feb. 9, 1877.

ing one hundred and sixty acres of land, and not exceeding \$2,000 in value, with its appurtenances, is exempt in Alabama.¹

4. Limitation in Illinois.—The homestead holder, entitled to his \$1,000 of exemption as the value of his homestead, does not increase this amount by the growth of his home property owing to a rise in real estate, improvements made on the property or any other cause. Nor does he lose this sum, though his home (having appreciated in value beyond the limit), should

1. Ala. Code, § 2820.

A house and lot worth \$2,000 in a town, or eighty acres of land, which may be in different parcels, is exempt in Alabama. *Melton v. Andrews*, 45 Ala. 454; *Pizzala v. Campbell*, 46 Ala. 40.

Exemption Where Lands are Worth More than \$2,000.—The constitution of 1868, like the present constitution, without the aid of statutory provisions, exempted a homestead not exceeding \$2,000 in value; but, if the homestead, when reduced to its lowest practicable area, exceeded that value, no part of it was exempted, and the whole might be aliened by the husband by any ordinary mortgage or other conveyance. *Farley v. Whitehead*, 63 Ala. 295.

Arkansas.—Real property to the value of \$2,500, in a town lot not exceeding one acre and house resided in; or one hundred and sixty acres of land in the country, with improvements, is the extent of the exemption protection in Arkansas, "and in no event shall it be reduced to less than eighty acres, regardless of value," nor to less than one-fourth of an acre of city property, "regardless of value." Digest of Statutes, (1884), §§ 2994, 2995, 2996; Constitution of Arkansas, Art. 9, §§ 1-5. Formerly the exemption was \$5,000. *Wassall v. Tunnah*, 25 Ark. 104.

California.—The pecuniary limit is fixed in California at \$5,000. *McDonald v. Badger*, 23 Cal. 393. It must be a residence worth that or less, actually occupied (*Prescott v. Prescott*, 45 Cal. 58) when the right is acquired, and it has been held that it must be a permanent abode. *Cook v. McChristian*, 4 Cal. 24. The extent of the lands held does not affect the exemption; the value is the test. *Gregg v. Bostwick*, 33 Cal. 220; *Mann v. Rogers*, 35 Cal. 319; *Estate of Delaney*, 37 Cal. 176.

It may be carved from lands held in common or joint tenancy. *Seaton v. Son*, 32 Cal. 481. But not consist of partnership estates. *Kingsley v. Kingsley*, 39 Cal. 665.

If not the owner, the person in possession cannot protect it against the rightful owner, merely because he has had it set apart as a homestead. *Spencer v. Geissman*, 37 Cal. 96; *Brooks v. Hyde*, 37 Cal. 366.

Mixed Uses.—The family occupying a homestead may use it also as a place of business (*Estate of Delany*, 37 Cal. 176), but occupants of a second floor cannot devote the major part of the premises to use as a theater, store, factory, office or bar-room, and yet claim the benefit of the homestead exemption. *Reynolds v. Pixley*, 6 Cal. 165; *Ackley v. Chamberlain*, 16 Cal. 181; *Riley v. Pehl*, 23 Cal. 74.

An owner not using premises as the home of his family is not entitled to homestead privileges; though a married man, he cannot acquire homestead if his wife or family be not living with him at the time. *Cary v. Tice*, 6 Cal. 625; *Rix v. McHenry*, 7 Cal. 91; *Benedict v. Bunnell*, 7 Cal. 246; *Elmore v. Elmore*, 10 Cal. 226.

Urban Property.—A homestead may include several contiguous lots, if used together as such, and if the aggregate value does not exceed \$5,000. *Engelbrecht v. Shade*, 47 Cal. 627; *McDonald v. Badger*, 23 Cal. 394.

Rural Property.—A homestead in the country may include eleven hundred acres of land. *First National Bank of Santa Barbara v. De La Guerra*, 61 Cal. 109.

Quantitative Limit.—Homestead includes only the land occupied as such, and use and occupation are the only limitation in respect to quantity. *Gregg v. Bostwick*, 33 Cal. 220.

Under the Colorado statute, the homestead is not exempt until the owner elects to make it so, which election is evidenced by so indorsing upon the margin of the record of the deed. Such indorsement being made, the homestead, to the extent of \$2,000 in value, becomes exempt from execution or attachment upon any indebted-

be sold, as indivisible, under execution; for he would be entitled to his thousand dollars out of the proceeds. Such is the case, if the homestead be originally worth more than the limit, and has gained nothing by subsequent improvement.

If the value and extent are not excessive, the property cannot be subjected to forced sale for debt, subject to the homestead right. It is held that no reassignment of homestead can be made on the application of an administrator, on the ground that it has appreciated in value since first set apart; but the householder himself may sell his home and buy a new one, within the limitation.¹

ness arising after February 1, 1868. The householder is in ample time if he records this election before a lien attaches in favor of a creditor whose debt arose subsequent to that date. *Barnett v. Knight*, 7 Colo. 365.

The limit in Florida is half an acre in town or one hundred and sixty acres in the country.

In Georgia, the monetary limit is \$2,000. If sold by the ordinary, because of excessive value and indivisibility, the homestead may be replaced by another of the legal value. If the real estate upon which the householder claims the authorized amount of exemption, is composed of scattered lots, the ordinary may have them sold and the price invested in a dwelling-house for the debtor and his family. Georgia Code, § 5135; *Blivens v. Johnson*, 40 Ga. 297; *Harris v. Colquit*, 44 Ga. 663.

In Idaho, the head of a family is protected in his homestead to the extent of \$5,000; any other person to \$1,000. Stat. of Idaho (1887), § 3058.

1. *Illinois*.—A lot and building, \$1,000 in value, may be selected in Illinois, but must be appraised by a jury of six men, if the creditors deem the value of the selected home to be in excess of that amount; even if the excess has arisen since the selection and since the sale of the other part of the debtor's estate, a new appraisal by a jury may be invoked. *Stubblefield v. Graves*, 50 Ill. 103. If found excessive yet indivisible, the property may be sold, and \$1,000 of the price paid to the debtor. *Hume v. Gossett*, 43 Ill. 299.

The homestead right is complete, without any action by the beneficiary, by reason of the statutory provision. *Fardee v. Lindley*, 31 Ill. 187; *Hubbell v. Canaday*, 58 Ill. 427. And is designed to benefit the wife and children of the debtor; but a widow cannot hold

the homestead in addition to her dower. *Knapp v. Gass*, 63 Ill. 492. Nor can she acquire one as the "head of a family" when her children reside permanently out of the State. *Rock v. Haas*, 110 Ill. 528.

In Illinois, a residence not valued above \$1,000 is exempt. It cannot consist of two premises, though both are within this limit. *Walters v. People*, 18 Ill. 194. The ground as well as the house must be owned to entitle one to claim the benefit of the law (*Brown v. Keller*, 32 Ill. 154), though he may successfully claim if he owns the land though the title be not evidenced by deed; *i. e.*, if he holds it under a bond (*Blue v. Blue*, 38 Ill. 18; *Tomlin v. Hilgard*, 43 Ill. 302; *Conklin v. Foster*, 57 Ill. 104), and is occupying it. *Tourville v. Pierson*, 39 Ill. 453. The occupancy for mere business purposes would not suffice. *Reinback v. Walter*, 27 Ill. 394.

The right, when acquired, would not be forfeited for lack of continuous residence. *Vanzant v. Vanzant*, 23 Ill. 543; *Miller v. Marckley*, 27 Ill. 405. It may be asserted upon life estate. *Deere v. Chapman*, 25 Ill. 610.

Lot or Tract of Land.—Where a debtor's dwelling-house, garden, orchard, and all the homestead improvements, are upon a forty-acre tract of a farm consisting of six hundred and forty acres, and such forty-acre tract exceeds in value \$1,000, the homestead exemption or estate will be confined to such forty-acre tract, and any of the remaining portion of the farm may be sold on execution against the debtor, free from any claim of homestead. If several tracts of land constituting a single, entire farm, occupied as a homestead, do not exceed in value \$1,000, the estate of homestead will include the farm; but if one lot of land occupied as a homestead exceeds in value \$1,000, the

5. Low Limit and Estimate on Value in Fee.—Though in most of the western States, as in the southern, the amount of property exempted is large, extending in several instances to \$5,000 in value, yet we find an exceptional case in Iowa, where the limitation is to one-tenth of that sum. And the estimate is based on the fee simple value of the real estate—not from the value of the homestead holder's interest therein, which may be that of a life estate only; so that he would be entitled to no more than his forty acres of rural land, if the fee simple value be \$500, though his own interest therein be far less.

If the fee of forty acres is worth less than this sum, it has been held that more land may be added.¹

estate of homestead must be limited by the boundaries of that lot, although it may have been used as a part of a larger farm. Where the lot of land in which there is an estate of homestead exceeds in value \$1,000, the excess is subject to the lien of a judgment against the owner, or of a mortgage. *Raber v. Gund*, 110 Ill. 581.

Exempt From Administrator's Sale.—No sale can be rightfully made of the homestead by the administrator of the deceased householder to pay his debts, when the property does not exceed in value \$1,000, until the exemption in favor of the widow and minor children has been in some mode terminated; and if such a sale is made, a court of equity has the power to set the same aside at the instance of the homestead occupant. The homestead, when not exceeding \$1,000 in value, cannot even be sold subject to the homestead right. *Hartman v. Schultz*, 101 Ill. 437.

Reassignment on Change of Value.—The administrator of an estate filed his petition in the county court for an assignment to the widow of the intestate, of dower and homestead in the lands of the estate, and for an order of sale of the residue for the payment of debts. A decree was entered accordingly. Subsequently the heirs exhibited their bill in chancery to impeach that decree, or rather the sale made by the administrator under it, for fraud, and among other things prayed for a reassignment of the homestead. It was considered there was no case made for such reassignment, even if that might be done. If, because the land assigned for homestead has increased in value, a new assignment may be had to reduce the quantity, it would seem that when it has depreciated in value, for the same reason a new assignment might be had

to increase the quantity. *Kenley v. Byran*, 110 Ill. 652.

New One Bought From Proceeds of Sale of Former One.—Where a person lawfully entitled to a homestead in premises sells his interest therein, and out of the proceeds of the sale within one year purchases a house and lot for a residence for himself and family, which does not cost or exceed in value \$1,000, and goes into its actual occupancy, by residence, in four of five days afterwards, such house and lot will constitute his homestead, and any sale thereof on execution against him will be a nullity, and the sheriff's deed will pass no title. *Watson v. Saxer*, 102 Ill. 585.

Estate, real or personal, to the value of \$300, designated by the debtor, or by his wife in his absence, is the exemption limit in Indiana. *State v. Melogue*, 9 Ind. 196.

The debtor, to avail himself of the exemption, must be the owner; he cannot protect his wife's property by it, when execution is against her own land. *Holman v. Martin*, 12 Ind. 553.

1. Iowa.—A half-acre in town, or a farm of forty acres in the country, not exceeding \$500 in value, including the improvements, is exempt. *Iowa Code*, §§ 1996, 1997. *Boot v. Brewster*, (Iowa) 36 N. W. Rep. 649; *Rhodes v. McCormick*, 4 Iowa 368; *Kurz v. Brusck*, 13 Iowa 371.

First Floor of Dwelling Used as Grocery: Intention to Reoccupy.—Where the head of a family for a while occupied both floors of a building as his dwelling, but afterwards used the lower or first floor for the purposes of a grocery store carried on by himself, while the family occupied the second floor as their dwelling, held that the first floor, being worth less than \$300,

6. Homestead Residence on Two Lots.—Where a building covered parts of two adjacent lots, and their united value was within the limitation fixed by statute, exemption was held with respect to both.¹

was all the time exempt as a part of the homestead, within the meaning and spirit of § 1997 of the Code; and the fact that, after he went out of the grocery business, he did not for a while actually use the first floor for any purpose, though it was his intention to again occupy it with his family, did not make it liable for his debts. *Rhodes v. McCormick*, 4 Iowa 368; *Mayfield v. Maasden*, 59 Iowa 517, distinguished; *Smith v. Quiggans*, 65 Iowa 637.

Extent in Case of Life-Tenancy.—The extent of a homestead is to be determined from the fee-simple value of the land, and not from the value of the tenant's estate therein. Accordingly, where plaintiff's home was upon a forty-acre tract, worth more than \$500 (Code, § 1996), but her interest in it and an adjoining forty-acre tract was only a life-estate, worth less than \$500, she was not entitled to have more than the forty acres on which she lived exempt from debt as a homestead. *Yates v. McKibben*, 66 Iowa 357.

If the forty acres be worth less than \$500, more land may be added to reach that value. *Thorn v. Thorn*, 14 Iowa 49.

The home must be actually occupied by the family of the owner. *Christy v. Dyer*, 14 Iowa 440; *Davis v. Kelley*, 14 Iowa 525; *Cole v. Gill*, 14 Iowa 530; *Elston v. Robinson*, 23 Iowa 208.

Homestead may be carved out of an estate for years. *Pelan v. DeBevard*, 13 Iowa 53.

Kansas.—A tract of one hundred and sixty acres of farming land, or one acre in an incorporated town, used as a family residence, is exempt in Kansas. *Sarahas v. Fenlon*, 5 Kan. 360.

The exemption holds good from the time the property is acquired for a homestead, though occupied as such at a later date, not remote. *Monroe v. May*, 9 Kan. 475.

Massachusetts.—The limitation in Massachusetts is to a residence not above \$800 in value, consisting of a lot or farm with the buildings on it. *Mercier v. Chace*, 11 Allen (Mass.) 194. But residence, to be exempt, cannot be situated on land held in common. *Holmes v. Winchester*, 138 Mass. 542, in exposition of Stat. of 1855, ch. 238.

Michigan—Quantity and Value.—Rural real estate to the amount of forty acres, with a dwelling-house and appurtenances, or urban property "not exceeding in amount one lot" (with dwelling, etc.), not exceeding in value \$1,500, is exempt in Michigan, if occupied by the owner, or by his widow, minor child or children. *Howell's Stat.*, § 7721; *Const. of Mich. Art. XVI*, § 2. *Beecher v. Baldy*, 7 Mich. 488; *Dye v. Mann*, 10 Mich. 291; *McKee v. Wilcox*, 11 Mich. 360; *Cooledge v. Wells*, 20 Mich. 79.

Forty acres of unplatted urban land not worth more than the law allows, may constitute the exempt homestead. *Barber v. Rorabeck*, 36 Mich. 399. But two platted lots, with a business block thereon, in which he resides, cannot constitute an exempt homestead, though within the monetary limit. *Geney v. Maynard*, 44 Mich. 579.

The forty acres may be platted without losing exemption. *Bouchard v. Bourassa*, 57 Mich. 8.

An undivided interest in a homestead is not exempt, though within the quantitative and monetary limitation. *Amphlett v. Hibbard*, 29 Mich. 208; *Thorp v. Allen*, 46 Mich. 389. But lands held in joint tenancy, owned and occupied by tenants in common, may constitute an exempt homestead. *Lozo v. Sutherland*, 38 Mich. 168; *Sherrid v. Southwick*, 43 Mich. 515; *Cleaver v. Bigelow*, 61 Mich. 47. The homestead, to the value prescribed, may be owned by the wife. *Orr v. Shraft*, 22 Mich. 264.

1. *Geiges v. Greiner*, (Mich.) 36 N. W. Rep. 48.

Mississippi.—Four thousand dollars is the limit in Mississippi, invested in a town lot, dwelling and household goods, out buildings, etc., continuously used as a home by the debtor and his family. Or, the homestead may consist of two hundred and forty acres of land occupied as a home plantation, without reference to the pecuniary limit. *Morrison v. McDaniel*, 30 Miss. 217; *Johnson v. Richardson*, 33 Miss. 462. Temporary disuse as a residence does not forfeit the homestead right, when the design of the early resumption of occupancy appears. *Campbell v. Adair*, 45 Miss. 170.

7. Limit in New York.—The residence, with the out-buildings and the ground on which they stand, owned and occupied by a householder with his family, not worth more than a thousand dollars, selected and designated as a homestead in the manner prescribed by statute, is exempt from execution sale for any debts except those stated in the next division of this article.

The homestead right does not expire at the death of the original claimant, if a widow or minor children survive, but continues till the youngest comes of age, unless forfeited by non-occupancy or other cause to be mentioned in the sixth division of this article.¹

Homestead may be upon an estate for years. *Johnson v. Richardson*, 33 Miss. 462.

Storehouse and Residence on Same Lot.—D is the owner of a one acre town lot upon which is located his dwelling-house with out-buildings; and in one corner thereof and separated from the residence by a fence is a storehouse in which his wife conducts a mercantile business. A judgment creditor of D had his execution levied upon that part of the lot cut off from the residence and inclosed with the storehouse. The debtor claims that the property levied upon constitutes a part of his homestead. The creditor contends that it is not "occupied as a residence," within the meaning of the statute providing for the exemption of homesteads. *Held*, that the property not being of greater value than is allowed, the entire lot and appurtenances are exempt as a homestead. *Baldwin v. Tillery*, 62 Miss. 378.

Nebraska, \$2,000 Exempt.—Act of 1877. *Spitley v. Frost*, (Neb.) 15 Fed. Rep. 299, 303.

New Hampshire.—An occupied family residence, worth not more than \$500, is protected from execution for ordinary debts, in New Hampshire. *Norris v. Moulton*, 34 N. H. 394; *Hoitt v. Webb*, 36 N. H. 158; *Horn v. Tufts*, 39 N. H. 484; *Austin v. Stanley*, 46 N. H. 51. The homestead may embrace pasture land used in connection with it, if both do not exceed the amount of pecuniary exemption. *Buxton v. Dearborn*, 46 N. H. 43.

Five thousand dollars is the limit of value in Nevada. Genl. Stat., § 539.

1. N. Y. Code Civ. Proc., §§ 1397, 1400.

Ohio.—A thousand dollars is the monetary limit. Revised Statutes of Ohio, § 5438.

A widow may hold a homestead ex-

empt, of value not exceeding \$1,000, though not "living with an unmarried daughter or unmarried minor son." *Allen v. Russell*, 39 Ohio St. 336, in exposition of Rev. Stat., § 5435.

A homestead having been assigned to the widow and unmarried minor children of a decedent, in a proceeding in a probate court by an executor to sell lands to pay debts, orders of such court in the proceeding, directing and confirming a sale of the real estate so assigned, subject to the homestead, and while it is occupied as such homestead, are not merely voidable, but void. *Wehrle v. Wehrle*, 39 Ohio St. 365; Rev. Stat. 5435, *et seq.*

South Carolina.—The limit of value, is \$1,000. *Manning v. Dove*, 10 Rich. (S. C.) 403; *Norton v. Bradham*, 21 S. C. 375.

Tennessee: Value, to be Ascertained and its Effect.—The value and boundaries of the homestead are ascertained when it is set apart by judicial proceedings, and when it is done it is not subject to future valuations by reason of the appreciation of its value. *Hardy v. Lane*, 6 Lea (Tenn.) 379.

Texas.—Two hundred acres in the country, without pecuniary restriction, or \$2,000 worth of a town or city residence, may constitute an exempt homestead in Texas. Either may be in different parcels. *Homestead Cases*, 31 Tex. 678; *Campbell v. Macmanus*, 32 Tex. 442; *Williams v. Hall*, 33 Tex. 215; *Ragland v. Rogers*, 34 Tex. 617; *Macmanus v. Campbell*, 37 Tex. 267. Should the country homestead, after being set out as such, become urban property in whole or in part, it would not therefore become subject to the city limitation of value it has been *held*. *Bassett v. Messner*, 36 Tex. 604, 636.

A man may, however, keep his family in the homestead residence, and have

8. Increased Value Beyond Limit.—Property set apart as a homestead under the legal valuation had increased in value beyond the limit. Under such circumstance the court properly refused to set it all apart to the widow of the original beneficiary.¹

Under the constitutional provisions of Texas, the homestead in an incorporated town may not only embrace more than one lot, but also the business place of the beneficiary, though it may be detached from the place of residence. But all together must not exceed the monetary restriction.

Rural and urban property cannot both be included in the homestead so as to exempt both, though within the limit of value. If any exception to this rule can be recognized by the courts, the *onus* is on the homestead holder to show circumstances by which his claim may come within the constitutional and statutory provisions.²

his shop or office on a different lot, and have both protected from execution, if within the pecuniary restriction. *Hancock v. Morgan*, 17 Tex. 582; *Pryor v. Stone*, 19 Tex. 371; *Stanley v. Greenwood*, 24 Tex. 225.

A widow may claim the homestead, and \$500, extra, in improvements. If the urban homestead and improvements exceed \$2,500 in value, and the widow do not contribute the overplus, the whole, if indivisible, may be sold for debt, but that sum must be restored out of the price. *Wood v. Wheeler*, 7 Tex. 13.

1. *Linch v. Broad*, (Tex.) 6 S. W. 751.

2. Urban Exemption—Place of Business.—Under the present constitution the urban homestead exemption embraces not only the lots on which is the residence of the family, but, in addition thereto, the lot or lots where the head of the family exercises his calling or business, although the latter be not contiguous to the former, but entirely detached and separate therefrom. When so detached from the residence, the exemption of the lots used as a place of business can only be kept up by the continued use thereof. An abandonment of their use as a place of business terminates the exemption of those lots, notwithstanding the lots on which the home of the family may stand may still be used as a home. In this respect the urban and rural homestead differ. *Miller v. Menke*, 56 Tex. 539.

Blending of Rural and Urban—Burden of Proof.—Ordinarily there can be no blending of homestead rights so that the exemption can be partly in town and partly in the country; and

the burden of establishing facts making a case an exception to this rule devolved on him whose residence and place of business were in town, and who claimed, as part of his homestead, a separate ten-acre tract, one thousand yards distant from his residence, and lying partly outside of the corporate limits. Where proof was not made showing, *prima facie*, that any part of the ten-acre tract within the corporate limits was used for homestead purposes, or that it was acquired and improved previous to the incorporation of the town and designation of its boundaries, in view, too, of the distance of the ten acres from the residence, the evidence was insufficient to establish its exemption. *Keith v. Hyndman*, 57 Tex. 425.

The act of February 2, 1860, re-enacted November 10, 1866, which exempted from forced sale as homestead \$2,000 in value, to be estimated at the time of its destination as a homestead, without regard to improvements afterwards made, did not enlarge the rights of the surviving widow with reference to a deed of trust conveying the homestead in 1859. To permit such a result would be to give to the act of February 2, 1860, a retroactive effect in violation of the constitution. *McLane v. Paschal*, 62 Tex. 102.

The homestead right of one having an undivided interest in a tract of land exceeding two hundred acres in quantity is not confined to the undivided interest in two hundred acres, including the improvements, but extends to an undivided interest of two hundred acres of the entire tract. The party claiming homestead rights under such circumstance cannot designate the home-

9. **Exempt Proceeds of Sale.**—In Wisconsin, the proceeds of the sale of a homestead designed for the purchase of another residence, are exempt for two years.¹

When a vendor of his home took notes in part payment, borrowed money on them, bought a new residence and meant to use the interest from the notes to improve it and to pay his debts, it was held that the interest was exempt, under the statute.²

V. INDEBTEDNESS: HOW FAR HOMESTEADS ARE PROTECTED FROM DEBTS.

1. **In General.**—The rule is that homesteads are protected from forced sale for all debts. The principal exceptions are liabilities for taxes, purchase money, torts and pre-existing liens. There are a few others, peculiar to certain States, to be noticed. The taxes due upon the homestead—not those levied on other property of the householder—may be collected by the sale of the residence, if necessary. Manifestly, this is so because government must be supported as the first necessity, and the protection of homes is secondary because dependent upon the first.

The price of the homestead must be paid before the occupant is really the owner, though there may be a protectable interest. The injustice of allowing him to incur a debt for a home and

stead by meets and bounds. *Brown v. McLennan*, 60 Tex. 43; *Jenkins v. Volz*, 54 Tex. 639.

Vermont.—Five hundred dollars is the limit in Vermont. It must be owned by the beneficiary and used as his family home, though the estate may be either legal or equitable. *Howe v. Adams*, 28 Vt. 544; *Davis v. Andrews*, 30 Vt. 683; *Jewett v. Brock*, 32 Vt. 65; *McClary v. Bixby*, 36 Vt. 257; *Morgan v. Stearns*, 41 Vt. 398; *Doane v. Doane*, 46 Vt. 485.

The amount of property protection cannot be eked out by adding other parcels not adjoining, when it is worth less than \$500 in itself. *True v. Morrill*, 28 Vt. 672; *Davis v. Andrews*, 30 Vt. 683; *Mills v. Estate of Grant*, 36 Vt. 269. Money to the amount of the limit, being the price of a homestead sold in New Hampshire, was held exempt in the hands of the husband and wife who had moved into Vermont with it, though they had not yet invested it in a new home there. *Keyes v. Rines*, 37 Vt. 260.

The defendant owned two lots of land, one containing an acre and a half with a house on it kept for his home, worth \$450, and the other lot, forty rods distant, kept and occupied as a part of homestead, worth \$650, and sold both; *Held*, that \$500 was exempt; as the

homestead included not only the house and lot on which it stood, but \$50 in value in the other lot. *Hastie v. Kelley*, 57 Vt. 293.

1. Rev. Stat. Wis., § 2983.

2. *Bailey v. Steve*, 70 Wis. 316.

A debtor who owns and actually occupies one dwelling-house cannot claim that another dwelling-house not so occupied is exempt as his homestead. The quarter of an acre which is exempt as a homestead must be occupied solely for the purposes of a homestead. The debtor cannot select such quarter of an acre in such a way as to include, besides the building occupied by himself, other buildings leased to tenants, unless they are occupied by servants employed in his family. *Schoffen v. Landauer*, 60 Wis. 334.

Where a building, covering less than one-fourth of an acre, is occupied by the owner as his homestead, the fact that he keeps a *hotel* therein will not prevent its being *exempt* as a homestead, under the authority of *Phelps v. Rooney*, 9 Wis. 70; *Harriman v. Queen's Ins. Co.*, 49 Wis. 71.

Rural real estate to the extent of forty acres with the improvements; or urban, to the extent of a quarter of an acre with a residence and other necessary houses, is exempt in Wisconsin. *Phelps v. Rooney*, 9 Wis. 70.

then claim it as exempt from the payment of such indebtedness is so apparent that it needs no comment to expose it.

Liability for tort committed by the head of the family is not so generally made an exception, to the general rule of exemption, as the others mentioned. Homesteads are liable for it, under judgment and execution, in several States to be hereafter designated, while others do not except this character of debt from those for which the residence is not liable.

Pre-existing liens—those resting on the property prior to its dedication as a homestead—cannot be affected by setting it apart as a family residence under the exemption laws. Based upon contract, there would be constitutional impediment, were exemption from such liens attempted. Whether the statutes of a State expressly except them, or remain silent on the subject, liens existing before the establishment of a homestead and bearing upon it, are susceptible of vindication against the property. Whether the suspension of their enforcement, while the right is unaffected, may be considered a matter of remedy, and, therefore, within legislative power, need not be here discussed. Authorities for this general section will be found in the following notes. It must be added that the four principal exceptions named above are not universal; some States do not recognize all of them.

2. State Provisions.—The statute of Alabama, providing that a homestead within the limitations of value and quantity, "shall be exempt from levy and sale under execution, or other process for the collection of debts," is applicable to all judicial proceedings and processes which seek to appropriate the homestead to the payment of debts.¹

3. Indebtedness for Tort.—Homesteads are not protected against judgments for torts in Alabama. Provided the execution shows the character of the judgment to be such, the sheriff is safe in selling the homestead of the defendant under his writ.² The constitutional protection is very broad.³

There is a direct, constitutional inhibition of the exemption of property from execution for "debts contracted for the purchase money thereof while in the hands of the vendee" in Arkansas.⁴

4. Judgment for Debt in California: Homestead Made During the Litigation.—An ordinary money judgment cannot be collected by execution against a homestead established during the pendency of the litigation. The establishment of it, during the progress of the suit, was held to be not fraudulent against creditors.⁵

1. *Hines v. Duncan*, 79 Ala. 112.

2. *McLaren v. Anderson*, 81 Ala. 106.

3. **Constitutional Exemption.**—Homesteads are exempt from liability to execution, in Alabama, for any debts contracted after the adoption of the constitutional provision creating the ex-

emption so long as the children of the debtor remain minors.

The right is held next in rank to the contract lien. *Ray v. Adams*, 45 Ala. 168.

4. Const. Ark. (1874) Art. IX, § 6, 1, 2. *Friedman v. Sullivan*, 48 Ark. 213.

5. *Fitzell v. Leaky*, 72 Cal. 477.

A married man, after executing a mortgage, filed a declaration of homestead on the mortgaged premises. It was held that his wife must be made a party defendant in a proceeding to foreclose the mortgage; that, otherwise, the purchaser at the mortgage sale cannot have a writ of assistance against the husband.¹

After having conveyed community property by trust deed to secure a debt, the head of the family was held entitled to make a valid claim of homestead on the same property. The claim covered other land besides the debtor's home. It was held good with respect to the part occupied as a residence. The establishment of a homestead under such circumstances was not deemed fraudulent.²

A defendant in execution had his homestead set apart to him as the head of a family of minor children. While the children were still in their minority he re-married. His wife was allowed to hold the homestead after all the children had come of age, and it was held not liable for the defendant's debt, though secured by deed, executed by both him and her, to a part of the land.³

1. *Hefner v. Orton*, 71 Cal. 479.

2. *King v. Gotz*, 70 Cal. 236.

All debts, even that due as purchase money for the homestead itself, are cut off in California, so far as the creditor's remedy against the homestead is concerned, unless he can vindicate the vendor's lien in a court of equity. *Williams v. Young*, 17 Cal. 406.

A levy and sale of the homestead is void. *Kendall v. Clark*, 10 Cal. 18; *Ackley v. Chamberlain*, 16 Cal. 181. All else of an estate is liable to execution. If the homestead be of more value than \$5,000, and be indivisible, it may be sold by judgment creditors with the rest of the estate, and the sum of \$5,000 paid to the beneficiary of the exemption; or, if divisible, a homestead of that value may be cut off, and the remainder sold. *Cohen v. Davis*, 20 Cal. 187.

A wife may enjoin execution, and compel the sheriff to exhaust all the other property of the estate before touching the family residence, even though it has not yet been declared and recorded as a homestead. *Bartholomew v. Hook*, 23 Cal. 278.

The levy should be on the estate, less the homestead, if the judgment cover it in amount. *Gary v. Eastabrook*, 6 Cal. 457; *McDonald v. Badger*, 23 Cal. 400.

Florida.—Homestead exemption, in Florida, does not extend to the inhibition of the collection of taxes, the purchase price of the residence or the cost of its improvements. Const. Art. 9, § 1.

3. *Dismuke v. Eady*, (Ga.) 5 S. E. Rep. 494.

Georgia.—Where a factor furnishes supplies and provisions to a planter to make a crop, and takes a lien on the growing crop therefor, such advances are in the nature of purchase money or materials furnished for the crop so raised, and the landlord's debt therefor is superior to the homestead right of the debtor's wife. *Cook v. Roberts*, 69 Ga. 472.

Attorney receiving claim for collection before 1868, collecting and failing to pay over, superior to homestead. *Douglass v. Boylston*, 69 Ga. 186.

A deed made to secure a debt conveys the title to land, and a homestead therein will avail nothing as against such title. There is nothing in the debtor upon which a homestead can operate save the equity of redemption; if he never redeems, there is nothing to which it can attach. *Kirby v. Reese*, 69 Ga. 452.

If the debt is for any part of the purchase money of land in which a homestead has been taken, the entire homestead is subject therefor; if the debt be for the purchase money of a part of the homestead, only that part is subject. *Cook v. Cook*, 67 Ga. 381.

Where money was borrowed to pay off the balance of purchase money due for land embraced in a homestead, and was used for that purpose, and a note was given for the amount so borrowed, the homestead was subject to such debt. *White v. Wheelan*, 71 Ga. 533.

The homestead is not subject to a debt created for materials used in building the house thereon before it was set apart as exempt. *Wilder v. Frederick*, 67 Ga. 669.

Where the division of the estate of a decedent was by agreement submitted to arbitrators, whose finding should vest a fee simple title to the lands assigned, and they set apart certain land to one of the distributees, and returned as part of the assets of the estate a debt due by him (part of which was incurred before the death of the intestate), such debt was neither legally nor equitably for purchase money so as to take precedence of a homestead in the land. *Brady v. Brady*, 67 Ga. 368.

Incumbrances and judgments for torts are not affected by the exemption law, and may be collected by levy upon the homestead, if necessary. *Davis v. Henson*, 29 Ga. 345.

Debts due the State are not good against a homestead, unless for taxes. *Colquitt v. Brown*, 63 Ga. 440.

Idaho.—The homestead is subject to forced sale on judgments obtained before the filing of the declaration; on attachments made before such filing; on mechanic's, laborer's or vendor's lien upon the premises; on debts secured by mortgage given by the husband and wife, or by the single beneficiary, and on mortgages of the premises given before the declaration. Revised Stat. of Idaho (1887), § 3039.

The excess of value of a homestead may be subjected to execution. If the homestead be of excessive value, and indivisible, the owner is entitled to the proceeds to the amount of the homestead exemption, which is exempt for six months thereafter. Revised Stat. of Idaho (1887), §§ 3045-3057.

Indiana.—Homestead exemption in Indiana does not protect the debtor's residence against judgments for purchase price, tort or the mechanic's lien. *State v. Melogue*, 9 Ind. 196.

The onus is upon the debtor to assert his homestead rights, or they will be deemed abandoned. *Sullivan v. Winslow*, 22 Ind. 154.

Illinois—When Debt is for Purchase Money.—Where the assignee of notes given for a part of the purchase price of land, by an arrangement with the principal maker, who was the purchaser of the land, surrenders the notes and takes from him in lieu thereof the note of the purchaser alone, with a trust

deed on the land to secure the note, the debt will be unchanged and will remain a debt incurred for the purchase money. The object of the limitation of the homestead exemption to debts not incurred for the purchase money is not merely to protect the vendor's lien; so, although there be a waiver of the lien by taking other security for the purchase money, the holder of the indebtedness will not thereby lose the protection of the statute. *Williams v. Jones*, 100 Ill. 362.

Whether Lien Attaches Before Homestead is Occupied.—Where, after the recording of a collector's bond, which is declared a lien on all his lands, he purchases land for a homestead, and within a reasonable time thereafter moves upon and occupies it as such, the land so bought will be considered as becoming his homestead from the time of acquiring the title, and the lien will not attach, although a short space of time may have intervened between its purchase and occupancy. *Crawford v. Richeson*, 101 Ill. 351.

Exemption from Sale for Taxes.—Real estate occupied as a homestead is exempt from levy and sale under execution issued upon a judgment *in personam* against the debtor, notwithstanding such judgment may be for taxes on the same property due the State or county by the defendant therein. That part of section 3 of the act relating to exemptions, which provides that no property shall be exempt from sale for nonpayment of taxes, etc., has application only to proceedings *in rem* against the property in which two years' redemption is allowed, and not to sales under a judgment *in personam*, except where it is based on a debt or liability for the purchase money or improvements. *Douthett v. Winter*, 108 Ill. 330.

Homestead exemption does not protect the debtor against taxes, purchase-price, and the cost of improving the residence. *Phelps v. Conover*, 25 Ill. 314; *Tourville v. Pierson*, 39 Ill. 447; *Magee v. Magee*, 51 Ill. 500; *Hubbell v. Canaday*, 58 Ill. 427. Liability for purchase money rests on the homestead when the debt is contracted at the time of purchase. *Austin v. Underwood*, 37 Ill. 438; *Eyster v. Hathaway*, 50 Ill. 521.

A judgment lien may be created upon and enforced against the homestead, only when based on one of the

above named causes of action. *Green v. Marks*, 25 Ill. 221.

It has even been *held* that an insolvent may buy a homestead and hold it against his creditors, and that this would not be fraud. *Cipperly v. Rhodes*, 53 Ill. 346. *Compare Titman v. Moore*, 43 Ill. 169.

Judgment for torts, fines and costs in criminal trials, form no exception to others; they cannot be enforced against the homestead. *Conroy v. Sullivan*, 44 Ill. 451; *Loomis v. Gerson*, 62 Ill. 11.

Property conveyed by a deed not signed by the wife, would not debar her from her homestead rights therein. *Mooers v. Dixon*, 35 Ill. 208; *Wing v. Cropper*, 35 Ill. 256, 263; *Ives v. Mills*, 37 Ill. 73.

The onus of showing the homestead liable, is on the creditor. *Stevenson v. Maroney*, 29 Ill. 532; *White v. Clark*, 36 Ill. 289.

An indivisible homestead worth more than a thousand dollars may be executed, and the exempt sum reserved for the debtor. *Walsh v. Horine*, 36 Ill. 242. The purchaser acquires a lien entitling him to possession on the termination of the homestead right, when the property is sold for more than a thousand dollars, and the value of the homestead is not paid to the debtor. *Blue v. Blue*, 38 Ill. 18; *Tomlin v. Hilyard*, 43 Ill. 302.

If the debtor or owner conveys the estate, yet retains possession as homestead beneficiary, his wife, not signing the deed, the purchaser is entitled to possession on the termination of all homestead rights. *McDonald v. Crandall*, 43 Ill. 231; *Coe v. Smith*, 47 Ill. 226; *Hewitt v. Templeton*, 48 Ill. 369; *Finley v. McConnell*, 60 Ill. 263; *Black v. Curran*, 14 Wall. (U. S.) 463.

Levy and sale would be void, if the homestead should sell for less than a thousand dollars. *Wiggins v. Chance*, 54 Ill. 175.

Iowa—Exceptions to exemption from debts, of a homestead in Iowa, include those for the purchase of it; those contracted in another State to persons non-resident in Iowa; those contracted by the debtor on the credit of the homestead; taxes and mechanic's lien-claims. *Babcock v. Hoey*, 11 Iowa 376; *Laing v. Cunningham*, 17 Iowa 513; *Barnes v. Gay*, 7 Iowa 26; *Christy v. Dyer*, 14 Iowa 442; *Cole v. Gill*, 14 Iowa 530. *Compare Helfenstein v. Cave*, 3 Iowa 589.

A judgment lien upon land cannot be defeated by a subsequent acquirement of a homestead, but may be satisfied out of it, though the levy be later than the homestead acquisition. *Elston v. Robinson*, 21 Iowa 531; s. c., 23 Iowa 208.

When a homestead right is complete, a judgment must await its termination before execution; then the lien may be vindicated. *Lamb v. Shays*, 14 Iowa 570. That may be at the debtor's death if no wife or children survive him. *Floyd v. Mosier*, 1 Iowa 513; *Rhodes v. McCormic*, 4 Iowa 371.

Proceeds of: Liability for Debts.—Whether the proceeds of a homestead shall become liable for debts depends always upon the manner of dealing with it. In this case the husband, who had the title to the homestead, exchanged it for a new homestead and the lot in controversy, but had all the property thus taken in exchange conveyed to his wife; *held*, no fraud upon creditors of the husband, and they could not subject the lot to the payment of the husband's debts. *Jones v. Brandt*, 59 Iowa 332.

Liability for Prior Debt.—A debt contracted prior to the acquisition of a homestead will be enforced against the homestead, unless the owner affirmatively establishes facts which show that it is exempt from such debt. *Paine v. Means*, 65 Iowa 547.

Change of Liability for Debts.—A new homestead of no greater value than the old one, though purchased in part with proceeds of the old one, and in part with other means, is exempt from the debts of the owner contracted subsequently to the occupancy of the old homestead. *Lay v. Templeton*, 59 Iowa 684.

A judgment debtor's homestead is not exempt from the payment of a judgment recovered before the purchase of the homestead. *Peterson v. Little*, (Iowa) 37 N. W. Rep. 169.

Kansas—Debts of Deceased—Land Subject to Sale to pay.—S was the owner of a parcel of land of less than one acre, in an incorporated city, and with his wife occupied it as a homestead for several years prior to his decease, and after his decease, it was occupied by his widow as a homestead until her decease, which occurred about three months after the decease of S. They left no minor children, and none of their children ever resided upon the land, and no conveyance of the land

5. Antecedent Debts.—By the Louisiana constitution of 1879, claims to exempt homesteads must be registered prior to the contracting of the debts against which the protection is given. The law provides for the registry, and exemptions are inoperative against debts contracted prior to the registry.

Those who invoke the benefit of the homestead exemption laws against debts have the burden of proof on themselves to show that they come within both the spirit and letter of those laws, which are held, in this State, to be derogatory to common right, and, therefore, to be strictly construed.¹ But claims of homestead exemption against debts existing prior to the adoption of the constitution are governed by laws then existing.²

Debts contracted after registry may be enforced upon the owner's abandonment of the exemption right by removal from the premises.³ And a mortgage recorded *eo instanti* with the registry of the homestead may be enforced.⁴ Debts arising from the misappropriation of money by one in fiduciary capacity are not exempt under the constitutional and statutory provisions.⁵

was made while it was so occupied as a homestead. S was owing debts, and left no real or personal property other than the land so occupied as a homestead. *Held*, that on the decease of the widow of S, the land was subject to sale for the payment of the debts of S, and it was the duty of the executor or administrator to his estate to sell it and pay the debts. *Stratton v. McCandliss*, 32 Kan. 512.

From taxes, purchase debt and debt for the improvement of the premises, homesteads are not exempt in Kansas: these may be enforced against the homestead on which the lien rests. *Morris v. Ward*, 5 Kan. 244. Judgments upon other causes of action create no lien that can be enforced against it even after the termination of the homestead right. *Morris v. Ward*, 5 Kan. 244.

Kentucky.—D and wife bought of P a tract of land, upon which H, who sold to P, held a vendor's lien for \$1,000. By agreement of parties, H accepted the note of D and wife and retained his lien, and then P conveyed to the wife of D, the appellant acknowledging the payment of \$1,500, one thousand of which was the debt to H as vendor. The debt really existed prior to the purchase of the land, and under the statute appellant has no homestead right as against it. Although appellant was a married woman when she executed the note, she cannot hold the land and at the same time repudiate the contract. *Purcell v. Dittman*, 81 Ky. 148.

The debt of appellee existed prior to the erection of the improvements on the land, and the land was never occupied by appellee as a homestead until after the improvements were made. There is by the statute no homestead exemption "if the debt or liability existed prior to the purchase of the land or of the erection of the improvements." A debtor will not be permitted to improve his land *not occupied as a homestead*, by expending his means for that purpose so as to affect existing creditors. *Fish v. Hunt*, 81 Ky. 584.

A party became indebted after June 1, 1886, and while in debt inherited land from his father. He is entitled to a homestead out of the land. Not so if he had purchased the land. *Jewell v. Clark*, 78 Ky. 398.

1. **Louisiana.**—Const. La. (1884), Arts. 219 to 223. *Gilmer v. O'Neal*, 32 La. Ann. 980; *Poole v. Cook*, 34 La. Ann. 331; *Succession of Furniss*, 34 La. Ann. 1013; *Galligan v. Payne*, 34 La. Ann. 1057; *Thomas v. Guilbeau*, 35 La. Ann. 927; *Bossier v. Raines*, 37 La. Ann. 263; *Kinder v. Lyons*, 38 La. Ann. 713.

2. **La. Rev. Stat. of 1870**, § 1691. *Crilly v. Sheriff*, 25 La. Ann. 219; *Hargrove v. Flournoy*, 26 La. Ann. 645; *Roberts v. Gordy*, 28 La. Ann. 575; *Kinder v. Lyons*, 38 La. Ann. 713.

3. *Chaffe v. McGehee*, 38 La. Ann. 278.

4. *Taylor v. Saloy*, 38 La. Ann. 62.

5. *Bridewell v. Halliday*, 37 La. Ann. 410.

6. Liability After Conveyance.—Homestead property, after conveyance, was held liable to execution for “just debts” under the following circumstances: It appeared, in a litigation in Michigan, that the plaintiff’s intestate had conveyed her homestead to her brother, by deed, in consideration of “one dollar and love and affection.” There was evidence, in an action by her administrator to subject the property to the payment of her debts, tending to show that she had meant to convey it subject to her debts, and that her brother agreed to pay them and support her. The property was held liable for her liabilities, notwithstanding the conveyance, under the circumstances established.¹

The homestead is liable for taxes and purchase money. *Roupe v. Carradine*, 20 La. Ann. 244.

Maine.—The homestead is liable in Maine to judgments on pre-existing debts and costs thereon, damages for water overflow and mechanic’s liens. *Mills v. Spaulding*, 50 Me. 60.

Massachusetts.—It is liable, in Massachusetts, for taxes, purchase-price, pre-existing debts and ground rent. *New Eng. Jewelry Co. v. Meriam*, 2 Allen (Mass.) 390; *Stevens v. Stevens*, 10 Allen (Mass.) 146.

The reversionary right of the debtor, beyond the homestead interest, is leviable, and may pass to assignees if he be insolvent. *Smith v. Provin*, 9 Allen (Mass.) 516; *White v. Rice*, 5 Allen (Mass.) 76; *Doyle v. Coburn*, 6 Allen (Mass.) 71; *Woods v. Sanford*, 9 Gray (Mass.) 16.

The wife cannot validate a levy upon the homestead by consent. *Castle v. Palmer*, 5 Allen (Mass.) 404; *Silloway v. Brown*, 12 Allen (Mass.) 32.

1. *Farrand v. Catron*, (Mich.) 37 N. W. Rep. 199.

Michigan.—Homesteads are exempt from all debts in Michigan, unless the protection be waived by both husband and wife, or by an unmarried beneficiary. *Beecher v. Baldy*, 7 Mich. 488.

If they are worth more than the monetary limit, the surplus may be reached by creditors; the estimate being made at the time of the levy. *Herschfeldt v. George*, 6 Mich. 456.

Pre-existing Debt.—When the lien of an attachment has been made to rest on the land, it cannot be defeated by the subsequent establishment of a homestead on the land. *Avery v. Stephens*, 48 Mich. 246.

No right to sell debtor’s land for debt ever existed in England or this

country except by statute. *Riggs v. Sterling*, 60 Mich. 643.

In distributing the surplus received on a foreclosure sale of a homestead exceeding \$1,500 in value, and incapable of division, a mortgage of the homestead interest is entitled to be paid before anything is applied to antecedent levies. *Vermont Savings Bank v. Elliott*, 53 Mich. 256.

A mechanic, for erecting a building on the homestead, cannot enforce his lien unless evidenced by writing. *Hammond v. Wells*, 45 Mich. 11.

A chattel mortgage given by the husband alone, on the building, for its construction, may be enforced. *Fourrier v. Chisholm*, 45 Mich. 417.

Minnesota.—In Minnesota, homesteads are protected from execution, (except from taxes, purchase price, debts due for labor, materials, etc., in improvements, resting as liens on them), during the continuance of the homestead right; but any judgments may be executed against them on the expiration of that right, though rendered before. Yet it has been held that the debtor may temporarily abandon, or even convey his estate in the homestead without rendering it liable to execution by his creditor. *Folsom v. Carli*, 5 Minn. 337; *Tillotson v. Millard*, 7 Minn. 520; *Piper v. Johnson*, 12 Minn. 60; *Tuttle v. Howe*, 14 Minn. 145.

Missouri — Pre-existing Debt.—A homestead is not exempt from execution for a debt created before its acquisition, whether the debt was created in this State or elsewhere. And the date of the filing of the deed will be held to be the time when the homestead was acquired. *O’Shea v. Payne*, 81 Mo. 516.

The homestead reserved to the widow and minor children of a deceased debtor does not become liable to his debts after

7. From What Homesteads are Exempt.—The homestead, in Nevada, is exempt from forced sale on execution, or any final process of court for any liability contracted prior to November 13, 1861, except for the price of the homestead itself or the costs of improving it, or for taxes due on it, or for a mortgage given on it by the householder, signed by his wife if he is married.¹

(a) *Exceptions.*—Exemption in Nevada does not cut off liens on the premises in favor of vendor, mechanic or laborer. The beneficiaries cannot mortgage or sell the homestead, except to pay or secure the purchase money. In this exceptional case, the wife must sign and acknowledge, separate and apart from her husband, to render the act valid where the right is in both the marital parties; that is, in all cases where the householder is married.

A like written and executed and recorded act as that in dedication must be made in order to abandon the homestead.²

(b) *Exceptional Debts.*—The exceptions to exemption, in New York, are debts contracted before May, 1850, or at any time before the homestead was selected and designated; and those for the price of the property thus set apart, for torts committed by the householder and for costs recovered by a defendant.³ It has been held that judgment liens may rest upon the premises, enforceable at the expiration of the homestead right.⁴

the widow dies and the children come of age. The statute exempts it absolutely. Wag. Stat. 698, § 5. French v. Stratton, 79 Mo. 560.

Nebraska—Mortgage Sale.—Homestead may be sold under mortgage. Rector v. Rotton, 3 Neb. 175. Premises on which the owner moves after recovery of judgment against him, are subject to lien. Bawker v. Collins, 4 Neb. 496. While a debtor owns and occupies his homestead, a judgment, though a lien upon it, cannot be enforced. State Bank v. Carson, 4 Neb. 501; Eaton v. Ryan, 5 Neb. 49.

1. Gen. Stat. Nev., § 539.

2. Gen. Stat. Nev., §§ 539, 540.

New Hampshire.—The home is exempt in New Hampshire from liability to execution for debt, except for taxes, liens of vendors and mechanics, and of laborers for sums less than a hundred dollars. Indivisible property, of value exceeding the monetary value protected as a homestead, may be sold, the value being reserved out of the price; but the debtor may obviate this by paying the excess of value. Norris v. Moulton, 34 N. H. 392; Weymouth v. Sanborn, 43 N. H. 171.

3. N. Y. Code Civ. Proc., § 1397; Schouton v. Kilmer, 8 How. Pr. (N.

Y.) 527; Lathrop v. Singer, 39 Barb. (N. Y.) 396. Compare Cook v. Newman, 8 How. Pr. (N. Y.) 523.

4. Allen v. Cook, 26 Barb. (N. Y.) 374.

North Carolina: Obligation Contracted for the purchase of Land.—A party, whose contract for the purchase of land had not been discharged, is not entitled to homestead against a judgment obtained on the same; therefore, where the bargainee contracted with the bargainor to pay a note which the latter owed to a third person, in consideration of a land purchase, it was held that the land is subject to the payment of such debt. Fox v. Brooks, 88 N. Car. 234.

The legal effect of the homestead laws is to protect the occupant in the enjoyment of the land set apart as a homestead, unmolested by his creditors. No judgment lien attaches to the homestead where the debts was contracted since May 1, 1877. Markham v. Hicks, 90 N. Car. 204.

A note given since the adoption of the constitution of 1868, in renewal of an "old note," is a new contract, and subject to the homestead right. Wilson v. Patton, 87 N. Car. 318.

The debtor is entitled to his homestead, where judgment is rendered on

a note given since the passage of the homestead laws, but for an indebtedness contracted prior to that time. *Arnold v. Estis*, 92 N. Car. 162.

Ohio.—A recorded lien is not removed from that part of real estate afterwards set off as a family homestead and used as such. When the rights of homestead are removed, liens on it may be enforced.

McComb v. Thompson, 42 Ohio St. 139; *Roig v. Schultz*, 42 Ohio St. 165; *Wildermuth v. Koenig*, 41 Ohio St. 180.

Allowance in Lieu of.—F, being the owner of a tract of land, and entitled to a homestead therein, mortgaged the same. She also owned other land subject to another mortgage made by her. Both mortgages were foreclosed and the lands ordered sold to satisfy the same, at the instance of a judgment creditor, who sought to subject her equity of redemption in both tracts to the payment of his judgment, she having no other property to satisfy the same. Before sale, F demanded an allowance of \$500 in money out of the surplus proceeds of such sales, on the ground that she was precluded from having a homestead by metes and bounds, by reason of her mortgages. The homestead tract was first sold, the sale was confirmed, but the surplus under order of distribution, after the payment of prior liens, was insufficient to satisfy this demand. Afterward the other lands were sold, leaving a surplus, after satisfying the mortgage thereon. *Held*, the right to demand an allowance in lieu of a homestead under Rev. Stats., § 5441, out of the proceeds of the second sale, is to be determined by the state of facts at the time the surplus arising from such sale was finally disposed of by the court. That by the sale and confirmation of the homestead tract, F was divested of her ownership therein, and was no longer the owner of a homestead, and if the surplus, arising from the first sale, was insufficient to satisfy her demand, she was entitled under section 5441 to have the same satisfied out of the surplus arising from the sales of the other lands, though not entitled to a homestead therein. *Niehaus v. Faul*, 43 Ohio St. 63.

When a transcript of a judgment rendered by a justice of the peace is duly filed in the office of the clerk of court of common pleas, such judgment becomes a lien, as against the debtor, on the real estate of such judgment debtor within the county. Such lien does not

become lost or removed from that part of the real estate thereafter set off as a family homestead, by the assignment and use of such a homestead. *McComb v. Thompson*, 42 Ohio St. 139.

Pennsylvania.—Homesteads are not protected, in Pennsylvania, against liens of mechanics, of vendors of the homestead, of judgment-creditors in suits not on contracts, and judgments for official misfeasance. *Lauck's Appeal*, 24 Pa. St. 426; *Kirkpatrick v. White*, 29 Pa. St. 179; *Bowman v. Smiley*, 31 Pa. St. 225.

A judgment for purchase money may be executed upon the homestead after the debtor has gone into bankruptcy. *Fehlcy v. Barr*, 66 Pa. St. 196. And after he has fraudulently sold it to defeat his creditors, it may be levied upon by a judgment creditor. *Huey's Appeal*, 29 Pa. St. 220.

South Carolina.—Exemption, in South Carolina, does not extend to taxes, the purchase money due for the homestead, and a mortgage given prior to the adoption of the constitution. *Shelor v. Mason*, 2 S. Car. 233.

The debtor must claim exemption when a levy is made, or he will be deemed to have waived it. *Manning v. Dove*, 10 Rich. (S. Car.) 403.

Homestead as against the husband's debts cannot be defeated by wife's individual debt. *Hosford v. Wynn*, 22 S. Car. 309.

The legislature had full power to enact the act of 1874 (15 Stat. 589), which extends to a wife, living with her husband who owns no property, the protection of a homestead exemption as against her own debts. *Norton v. Bradham*, 21 S. Car. 375.

Assignment of a homestead is not binding upon a debt not in judgment, and a purchaser under such debt, afterwards in judgment, is protected. *Bull v. Rowe*, 13 S. Car. 355.

A and B jointly purchased a tract of land and paid in part, B paying more than A; B then died and A became his administrator; afterwards a resale was ordered, titles to be withheld until full payment, and the land to stand pledged for such payment one-half of the purchase money to be paid to A, and the other half to the distributees of B; A became the purchaser. Upon settlement in the probate court, A was found indebted to B's estate on account of B's interest in this land, and for rents and profits before the resale. *Held*, that as against this indebtedness A was

not entitled to a homestead exemption in this land *Edwards v. Edward*, 14 S. Car. 11.

Tennessee—Improvements—Mechanic's lien.—Real estate in the occupancy of the head of the family is not exempt from sale for the satisfaction of a debt contracted for improvement made thereon, although the creditor may have lost his lien as a mechanic for the debt. *Miller v. Brown*, 11 Lea (Tenn.) 155.

Rights of an Equitable Estate.—The homestead right is not a fee simple right, but a right of occupancy for life. The right of homestead exists in equitable estate, but all liens acquired before the homestead has been established must be raised by the claimant of the right of homestead, or it will be sold to satisfy such liens. *Fauver v. Fleenor*, 13 Lea (Tenn.) 622.

Contracts before Enactment of Exemption—Official Bonds.—The relation between principal and surety, or between sureties themselves, and the rights deduced therefrom, originate in the execution of the instrument of suretyship and is substantially a contract by implication of law from the relation created by the execution of the instrument. Where, therefore, an official bond was executed before the passage of the homestead exemption, and a mortgage given on property to indemnify the sureties, the liability was created by the bond, and the homestead is not exempt, though default was made after the passage of the homestead exemption. *Bryant v. Woods*, 11 Lea (Tenn.) 327.

Texas.—Pre-existing liens have been held enforceable against a homestead, in Texas. *Farmer v. Simpson*, 6 Tex. 303; *North v. Shearn*, 15 Tex. 176. Purchase money is recoverable. *Stone v. Darnell*, 20 Tex. 14; *McCreery v. Fortson*, 35 Tex. 641.

The protection prevents the enforcement of all liens and the collection of all debts against the homestead, except as above indicated; and levy and sale are void. *Stone v. Darnell*, 20 Tex. 14.

When one homestead is substituted for another, the former one becomes liable to execution. *Stewart v. Mackey*, 16 Tex. 58; *Berlin v. Burns*, 17 Tex. 537. So, if the homestead be abandoned. *Gouhenant v. Cockrell*, 20 Tex. 96.

Two adjoining parcels of land separated by a partition fence belonged to a man and his wife, who occupied as their home a residence on one of them; each parcel was improved, having on

it a dwelling-house, with out-houses. The husband executed in February, 1876, a deed of trust to secure a loan on the parcel of land, the houses on which were not then actually occupied by him. The wife did not join in the deed. In a suit between the wife asserting homestead rights, and the purchaser at sheriff's sale, after foreclosure of the lien, held: If the money was loaned and the deed of trust executed before the husband and wife asserted a homestead claim to, and used the place for homestead purposes, the homestead right could not attach so as to defeat the trust deed. In the absence of such assertion of homestead claim and exercise of homestead use, the husband could execute a valid trust deed on the property to secure a loan. *Perego v. Kottwitz*, 54 Tex. 497.

One purchasing land at sheriff's sale borrowed the money with which to pay for it, and executed a deed of trust to the land contemporaneously with the sheriff's deed, in which he recited that "the property is not incumbered, and is not my homestead; my homestead lies in Dallas county, west of Dallas." Held, no homestead right could attach to the land in favor of the purchaser as against the deed of trust. The sheriff's deed and the deed of trust must be regarded each as parts of the same transaction by virtue of which the purchaser acquired the land. *Denni v. Elliott*, 60 Tex. 337.

No homestead rights can be acquired in land as against one subrogated to the rights of the vendor for unpaid purchase money, nor can the widow of one in possession, claiming such homestead rights, claim that an allowance shall be made her from the land in proportion to the money actually paid, since the entire tract of land would be liable for what remained unpaid. *Wahrmund v. Merritt*, 60 Tex. 24.

Forced Sale.—No forced sale of the homestead can be made, since the adoption of the constitution of 1876, for work done and material furnished in constructing improvements on it, unless the contract therefor is in writing, and the consent of the wife given thereto, under the same formalities required in making the conveyance of the homestead. *Barnes v. White*, 53 Tex. 628.

Vermont.—Pre-existing debt and taxes may be enforced against a homestead in Vermont. *West River Bank v. Gale*, 42 Vt. 27; *Lamb v. Mason*, 45 Vt. 502.

Before assigning as a voluntary bankrupt, the debtor settled certain real estate upon his wife by a deed, which was subsequently adjudged to be fraudulent and was set aside accordingly. Being a householder and the head of a family, he was allowed to claim the property embraced in the deed, as his homestead, in the bankruptcy proceedings. The amount thus claimed not being equal to that allowed by the exemption law of his State, he was afterwards permitted to claim an extension of his homestead to the full value, notwithstanding his fraud and his prior allowance.¹

West Virginia.—Pre-existing liens not being exempt in West Virginia by the law of homestead exemption, they may be enforced against a householder who has declared and recorded his exemption right to it when he is an obligor on a forthcoming bond, which has been already forfeited and returned to the clerk's office. The return creates a lien on his property, and the subsequent selection and recordation of that property as a homestead does not dislodge the lien.²

If one homestead be substituted for another, the former one may be levied upon. *Howe v. Adams*, 28 Vt. 544; *Jewett v. Brock*, 32 Vt. 65. Unless a new homestead be acquired, the sale of the first by the debtor-husband alone, would be void *quoad* his wife. *Howe v. Adams*, 28 Vt. 544; *Davis v. Andrews*, 30 Vt. 678; *Jewett v. Brock*, 32 Vt. 65.

1. *Hatcher v. Crew*, (Va.) 5 S. E. Rep. 221.

Virginia—Homesteads, in Virginia, are exempt from all demands, even pre-existing ones, except for purchase money, work by a mechanic or other laborer on the premises, official misfeasance or liability, taxes, rent, court fees or those due any public officer, and for debt due upon mortgage, pledge, deed of trust or like obligation.

The debtor may render his homestead liable by a waiver of the right of exemption when making a contract that incurs indebtedness.

Debts Not Affected.—The homestead exemption does not protect against a demand for damages for breach of promise to marry, which is not a *debt contracted*, but a *quasi tort*. *Burton v. Mills*, 78 Va. 468.

H, while residing in L in 1874, by deed recorded, declared his intention to hold exempt as his homestead personal property to the amount of \$1,468. Having removed to B and become indebted, he created in 1878 a new homestead of property valued at \$1,844.50, by recorded deed, wherein he assails

the validity of his original homestead deed, without accounting for the amount thereof, thereby seeking to hold exempt from his creditors an aggregate of \$3,312.50 worth of property, and obtained an injunction to restrain sale under executions levied. Creditors moved to dissolve, but the circuit court perpetuated the injunction. *Held*: Debtor must be charged with \$1,468, the value of the property set apart as exempt by the original homestead of 1874. And he is entitled to enough of the property levied on to make the aggregate of his exemptions equal the maximum of \$2,000; and no more. *Oppenheimer v. Howell*, 76 Va. 218.

2. *Cabell v. Given*, (W. Va.) 5 S. E. Rep. 442.

West Virginia.—A husband dies seized of real estate and owing debts exceeding the value of all his estate, personal and real, leaving a widow and infant children. The widow as guardian of said children files a declaration of homestead on the part of said real estate after the death of the husband. *Held*: That the widow and children took said real estate subject to the liens and equities against it in the hands of the husband, and said declaration does not exempt it, or any part of it, from the debts contracted by the husband and due from his estate. *Reinhardt v. Reinhardt*, 21 W. Va. 76.

Wisconsin.—Mechanics' and laborers' liens on the homestead may be enforced against it, in Wisconsin, but not claims for tort nor ordinary judgments even

VI. ALIENATION: HOW AND WHEN HOMESTEADS MAY BE CONVEYED OR MORTGAGED.

1. **In General.**—The statutes of the several States approach more nearly to uniformity with respect to alienation than to any other particular in homestead legislation. The prominent feature is that both the husband and the wife must join in the deed of sale or mortgage, unless the latter be for the security of the purchase money, to which exemption is inapplicable. Where the husband alone may convey his own title and interest, he can do so, ordinarily, only by reserving his wife's rights of homestead occupancy, and the law itself, in the absence of such reservation, supplies the omission in many States. Where he cannot thus convey subject to the homestead right, the property itself is inviolable while the right continues, unless conveyed by both husband and wife, or sold to satisfy such liabilities as are not barred by exemption, explained under the immediately preceding head of this article.

Notwithstanding the general uniformity of homestead laws with respect to sales and mortgages, there are many minor differences in the statutes of the different States, and in the constitutional provisions of the several which have incorporated home exemption into their organic law. These will appear sufficiently in the following sections and the notes thereunder.¹

though the debtor remove from it, or sell it. *Upman v. Second Ward Bank*, 15 Wis. 449. (*Compare Hoyt v. Howe*, 3 Wis. 752). *Simmons v. Johnson*, 14 Wis. 523; *Smith v. Omans*, 17 Wis. 395.

When the homestead is of greater value than the legal limit of exemption, only the excess can be legally sold for debt. *Myers v. Ford*, 22 Wis. 134, 141. *Compare White v. Polleys*, 20 Wis. 506.

1. **Alienation.**—The constitutional provision which declares that a "mortgage, or other alienation of the homestead," by a married man, "shall not be valid, without the voluntary signature and assent of the wife" (Art. 10, § 2), applies only to instruments which are perfected by delivery, and operative as conveyances; and though an instrument which is duly signed, sealed and acknowledged as a deed, but defective and inoperative as a deed for want of delivery, may be enforced in equity, as against the husband or his heirs, as a contract to convey, it cannot be so enforced as to the homestead. *Jenkins v. Harrison*, 66 Ala. 345.

Alienation: Conflicting Rights of Grantee and Purchaser at Execution Sale.—A conveyance of the homestead, executed by husband and wife, but without the required certificate as to the

separate examination of the wife touching her voluntary signature and assent (Code, § 2822), is a nullity, neither passing any estate to the grantee, nor operating by way of estoppel against the grantors; and on the subsequent surrender and abandonment of the premises to the grantee, they become liable to levy and sale under execution against the grantor, and the purchaser at the execution sale may recover them in ejectment. In this respect, there is no difference between a conveyance of the homestead premises and a conveyance of the right of homestead. *Alford v. Lehman*, 76 Ala. 526.

A conveyance of the homestead by husband and wife, the voluntary signature and assent of the wife not being shown and certified as required by law (Code, § 2822), is a nullity, and has no operation against the husband, by estoppel or otherwise; and a subsequent verbal promise by him to pay rent to the grantee, no surrender or change of possession being shown, is without consideration, and does not create the relation of landlord and tenant between them. *Crim v. Nelms*, 78 Ala. 604.

Wife's Homestead: Examination Separate and Apart Not Required.—The examination of the wife separate and apart from the husband, touching her

2. Wife's Signature to Mortgage.—If the wife voluntarily signs, and her acknowledgment is properly certified, it is not essential that her name should also appear in the body of the mortgage instrument, in Alabama. The certificate of the probate clerk is held sufficient, and it is unimpeachable by parol evidence when no fraud is charged. If the certificate state that the wife, in thus joining with her husband in the hypothecation of her homestead, was examined apart from her husband, that fact is not open to contradiction by parol testimony.¹

Without her voluntary assent and signature, the title given by the husband would be worthless—not even operating as an estoppel against himself. It could not be enforced specifically against the husband, even though the homestead and improvements sought to be conveyed exceed the statutory limit in value, and the purchaser is willing to take title from the husband alone.² His mortgage for an excess in quantity—above 160 acres, would be valid.³

voluntary signature and assent to a mortgage or other alienation of the homestead, is not required when the homestead is the property of the wife, but only when it belongs to the husband. *Dawson v. Burrus*, 73 Ala. 111.

Certificate of Wife's Signature and Assent.—Under the provisions of the constitution of 1868, as under the present, an alienation of his homestead by a married man, "without the voluntary signature and assent of his wife," was void and inoperative—would not support ejectment against the husband, nor operate against a subsequent conveyance by husband and wife; but, prior to the enactment of the statute approved April 23, 1873, no form being prescribed by which the voluntary signature and assent of the wife should be manifested, it was *held* sufficient for her to join with her husband in the execution of the conveyance, and to acknowledge it in the form prescribed by law for other conveyances by husband and wife. By the statute approved April 23, 1873, it was provided, that her voluntary signature and assent "must be shown by the examination of the wife, separate and apart from her husband, touching the same," before some one of certain designated officers; and the officer was required to certify in writing, indorsed on the conveyance, that she was known to him, or was made known to him, to be the wife of the grantor; and that she was examined by him, separate and apart from her husband, touching her signature to the conveyance; and that she acknowledged, on such examination, that she

signed the conveyance "of her own free will and accord, and without fear, constraint, or persuasion of her husband." The form thus prescribed "must be regarded as a negative upon all other modes of alienation," and must be strictly pursued, though a literal compliance may not be necessary. The word *voluntarily*, when used alone in a certificate of acknowledgment, is not the equivalent of "*her own free will and accord, and without fear, constraint, or persuasion of her husband*;" and a certificate using that word, without more, is not a substantial compliance with the statute. *Scott v. Simons*, 70 Ala. 352.

1. *Shelton v. A. & T. Co.*, 82 Ala. 315.

2. *Moses v. McClain*, 82 Ala. 370; *Strauss v. Harrison*, 79 Ala. 324; Ala. Code, § 2822.

3. *Goodloe v. Dean*, 81 Ala. 479.

Wife's Signature.—In Alabama, the wife's "voluntary signature and assent," which are essential to the validity of a mortgage of the homestead of the husband, are sufficiently shown when she signs the mortgage with her husband, and her name is mentioned with his in the concluding part of the instrument, though not elsewhere; but this effect cannot be attributed to such signature when it is expressly stated, in the concluding part of the deed that she "joins in this conveyance for the sole purpose of conveying whatever right of dower she may have in and to the said property." *Long v. Mostyn*, 65 Ala. 543.

Mortgage of—Wife's Signature and Assent.—The wife's "voluntary signature and assent," which are essential to

the validity of a mortgage of the homestead by the husband, are sufficiently shown, when she signs the mortgage with her husband, and her name is mentioned with his in the concluding part of the instrument, though not elsewhere; but this effect cannot be attributed to such signature, when it is expressly stated in the concluding part of the deed that she "joins in this conveyance for the sole purpose of conveying whatever right of dower she may have in and to the said property." *Long v. Mostyn*, 65 Ala. 543.

Deed of—When Void.—A deed, executed by a married man of his homestead after the constitution of 1868 went into effect, without the voluntary signature and assent of his wife, is void as a conveyance of the legal title, although the deed was executed in payment of a debt contracted by him in 1859; and it will not, therefore, support an action of ejectment brought by the grantee, after the death of the grantor, against the surviving widow of the latter, for the recovery of such homestead. *Slaughter v. McBride*, 69 Ala. 510.

Alienation of the homestead by the husband, without his wife's consent, is inhibited in Alabama. Const. Art. 10, § 2. This constitutional provision is held applicable only to instruments which are perfected by delivery and operative as conveyances; and though an instrument which is duly signed and executed as a deed, but not delivered, may be enforced in equity as a contract to convey, it cannot be enforced as to the homestead. *Jenkins v. Harrison*, 66 Ala. 345.

Both husband and wife must join in the conveyance or mortgage of a homestead in California, if done to pay the purchase price; separate deeds are not allowed; and alienation or mortgage of it for any other purpose is prohibited since 1860. *Taylor v. Hargous*, 4 Cal. 273; *Dorsey v. McFarland*, 7 Cal. 342; *Dunn v. Tozer*, 10 Cal. 172; *Estate of Tompkins*, 12 Cal. 125; *Lies v. De Diablar*, 12 Cal. 327; *Brooks v. Hyde*, 37 Cal. 366; *Peterson v. Hornblower*, 33 Cal. 266; *Bowman v. Norton*, 16 Cal. 218; *Swift v. Kraemer*, 13 Cal. 526; *McHendry v. Reilly*, 13 Cal. 76; *Cohen v. Davis*, 20 Cal. 187.

A deed by the husband would convey the excess above the monetary exemption limit, however. *Sargeant v. Wilson*, 5 Cal. 506; *Moss v. Warner*, 10 Cal. 296. A deed by both, conveying

a part of the homestead without division, would be fatal to the exemption right, *Kellersberger v. Kopp*, 6 Cal. 565, though even a deed by both of the whole, except to pay the purchase price, would now be void as above shown.

The surviving husband may sell; he may mortgage the homestead after having abandoned his right of exemption; or, if done before, give the act validity by subsequent abandonment. *Himmelman v. Schmidt*, 23 Cal. 120. The fact that the widower has children, does not seem to affect his right to mortgage the homestead. *Benson v. Aitken*, 17 Cal. 163.

Deed—Power of Attorney.—Under the Homestead Act of 1862, the alienation of the homestead could only be by the *personal* act of the husband and wife; and a deed for that purpose could not be executed by attorney. *Gagliardo v. Dumont*, 54 Cal. 496.

Alienation of the homestead is permissible in Georgia under the ordinary's sanction, by the joint act of the husband and wife. *Burnside v. Terry*, 45 Ga. 629. But it can be neither alienated nor abandoned by the husband alone. *Dearing v. Thomas*, 25 Ga. 224.

The homestead right cannot be defeated by a deed void for usury, nor by calling such instrument an equitable mortgage. *Anderson v. Tribble*, 66 Ga. 584.

Where there are several lessors in ejectment, deeds from one to another are admissible in evidence, whether void or voidable, to show privity between them and to establish the right of the plaintiff to the use of their names. Under the constitution of 1877, Art. 9, § 8, par. 1, a deed conveying a homestead which had been set apart under the prior constitution, is not void. When the securing of the debt was the consideration of the deed conveying the homestead, and the debt of superior rank to the homestead right, the title passed. *Gunn v. Wade*, 65 Ga. 537.

Removal.—Where a homestead was sold for the purpose of the removal of the family to another State, and the making of a re-investment there, the reversionary interest of the head of the family, in the hands of the purchaser, was subject to levy and sale by a creditor of the former.

While a purchaser may be subrogated to the rights of the head of the family, yet a sale and removal from the State terminates any immunity from levy, at

3. Homestead "Estate."—Where the homestead is made an "estate" by law, it cannot be conveyed by deed or mortgage, since there is nothing upon which the contract can effectually operate. Only by releasing or waiving the homestead right, by stipulation in the act and practical abandonment, can such deed or mortgage be made legal and effectual. It is otherwise absolutely void, not even good subject to the homestead right, in Illinois, where such "estate" is created by statute.¹ And the waiver or release must have the joint concurrence of both the marital parties of the first part in the deed or mortgage.²

The "estate" thus created is no impediment, however, to the sale or mortgage of any excess of quantity or value in the property out of which the homestead is carved; and the husband

least as to the reversion. The proceedings to sell the homestead being by law recorded in the county where the land lay, and the petition to sell showing on its face the intention to remove and settle in another State, the purchaser had notice thereof. *Semble*, that upon removal of the debtor from the State, his homestead terminated, and a levy on and sale of the reversion would carry the entire title. *City Bank v. Simsson*, 73 Ga. 422.

Waiver Under Different Constitutions.—General waiver made before constitution of 1877, good against homestead under it. Debt prior to 1877 good against homestead on new grounds then created. Waiver, general, not good under constitution of 1868; *aliter* under that of 1877. *Burroughs v. White*, 69 Ga. 841.

Under the constitution of 1877 and the act of 1878, a written waiver of exemption and homestead is good *inter se* without having the same alleged in the declaration or summons, judgment or execution, and is, after judgment, provable, *aliunde*, whether the lien of the judgment be general or special, and whether the waiver be written on the contract or obligation, or on a separate paper. *Flemister v. Phillips*, 65 Ga. 676.

A husband may waive the right of homestead in his property as against a certain debt, and his waiver will bind his family, although an application for homestead may at the time be pending. If the wife joins her husband in the waiver, and is a party to the foreclosure of the mortgage in which it was made, would it not bind her also, aside from the waiver of the husband? *Quære*. *Jackson v. Parrott*, 67 Ga. 210.

1. "Estate."—In Illinois, since the enactment of the act of 1873 on the sub-

ject, a homestead is made an "estate" in the land to which it attaches, to the extent of \$1,000 in value; and where the entire premises occupied as a homestead do not exceed that sum in value, and a mortgage or deed of the premises contains no release or waiver of the homestead, as required by the statute, and possession is not given or the premises abandoned, the deed or mortgage given on the property will be inoperative and void, as having nothing upon which to take effect. Where the value exceeds \$1,000, it will operate on the excess. *Browning v. Harris*, 99 Ill. 456.

A mortgage given upon a homestead to secure money borrowed from the school fund, in which the exemption right is not released or waived is not operative against that right; although the mortgage be in the form prescribed by the statute in force at the time of its execution; and no forced sale can be had under it. *Board of Trustees v. Beale*, 98 Ill. 248.

2. Waiver of Homestead "Estate."—No alienation or waiver of homestead rights can be made in Illinois without the joint concurrence of both husband and wife. *Patterson v. Kreig*, 29 Ill. 514; *Best v. Allen*, 30 Ill. 30; *Smith v. Miller*, 31 Ill. 161; *Thornton v. Boyden*, 31 Ill. 211; *Conner v. Nichols*, 31 Ill. 153.

A pre-existing mortgage remains valid. *McCormick v. Wilcox*, 25 Ill. 274.

A mortgage to secure the purchase money will hold good. *Weider v. Clark*, 27 Ill. 251. A deed of trust, made by the husband alone, may be sustained against a second one made by both him and his wife. *McDonald v. Crandall*, 43 Ill. 231; *Coe v. Smith*, 47

alone may lawfully convey that.¹ And so, after the abandonment of the residence by both him and his wife.²

4. Void Conveyance.—A mortgage made by the husband alone, in Iowa, is absolutely void, so that the subsequent abandonment of the homestead will not retroact so as to give the mortgage validity. Even if the wife assented verbally to the act, such would be the character of it. He cannot, in that State, even mortgage the excess of value without the concurrence of his wife, in writing, as a party to the contract, though a judgment would be operative on the excess.³

The same rule applies to the sale of the homestead.⁴

To this rule there are some exceptions. The husband alone may execute a mortgage to secure the purchase money of the

Ill. 226; *Hewitt v. Templeton*, 48 Ill. 369; *Finley v. McConnell*, 60 Ill. 263.

1. Excess Alienable.—The husband may validly mortgage the excess of value of the homestead. *Young v. Graff*, 28 Ill. 20; *Boyd v. Cudderback*, 31 Ill. 120.

In any mortgage of homestead estate, there must be an express release of the exemption right, if that is intended. *Ely v. Eastwood*, 26 Ill. 114; *Smith v. Marc*, 26 Ill. 150; *Vanzant v. Vanzant*, 23 Ill. 540; *Miller v. Marckle*, 27 Ill. 405; *Moore v. Titman*, 33 Ill. 368; *Redfern v. Redfern*, 38 Ill. 512; *Cipperby v. Rhodes*, 53 Ill. 346; *Hutchins v. Huggins*, 59 Ill. 29.

No judgment lien incumbers the homestead so as to affect the conveyance, except that the value above the exemption limit would be incumbered by such lien. *Green v. Marks*, 25 Ill. 221; *Booker v. Anderson*, 35 Ill. 86; *McDonald v. Crandall*, 43 Ill. 231.

Only by the wife's joining in the act of conveyance can her and her children's rights of homestead be affected by anything that her husband may do or neglect to do, or anything that creditors or others may do. *Pardee v. Lindley*, 31 Ill. 174; *Hoskins v. Litchfield*, 31 Ill. 144.

2. Alienable after Abandonment.—She may, in conjunction with her husband, do acts that amount to an abandonment of exemption rights. *Brown v. Coon*, 36 Ill. 243. After abandonment, the husband may sell and convey. *Russell v. Rumsey*, 35 Ill. 375; *Phillips v. Springfield*, 39 Ill. 83.

If, without prior release by husband and wife of the right, the husband alone conveys the homestead, the act is void, and he may set up his exemption against the purchaser's suit to eject him. *Marshall v. Barr*, 35 Ill. 108.

3. Non-Joinder of Wife—Mortgage not Validated by Subsequent Abandonment.—A mortgage of a homestead by the husband is of no validity, unless the wife concur in and sign the same joint instrument; and such a mortgage is not validated by the subsequent abandonment of the homestead. *Bruner v. Bateman*, 66 Iowa 488.

Where the plaintiff sought to enforce a lien against defendant's homestead, based upon a parol agreement of the wife, who held the legal title, to execute a mortgage on the property, *held* that the petition was properly dismissed, since, under code, section 1990, no incumbrance of the homestead is of any validity unless it be based upon a written instrument signed by both husband and wife. *Clay v. Richardson*, 59 Iowa 483.

Mortgage of Surplus by Husband Alone Not Valid.—Where a husband and wife are occupying as a homestead more land than the law exempts as such, and the homestead has not been selected and platted as required by law, a mortgage executed by the husband alone on any part of the land so occupied is invalid; but a judgment rendered upon the debt intended to be secured may be enforced against the excess of land so occupied, provided the officer holding the execution first causes the homestead to be marked off as provided in section 1998 of the Code. *Helfenstein v. Cave*, 3 Iowa 287 and 6 Iowa 374, decided under a different statute, distinguished. *Goodrich v. Brown*, 63 Iowa 247.

4. Sale, when Valid.—The homestead may be alienated by joint deed made by both husband and wife, in Iowa. *Yost v. Devault*, 9 Iowa 60; *Alley v. Bay*, 9 Iowa 510; *Larson v. Reynolds*, 13 Iowa 581; *Davis v. Kelley*, 14 Iowa 525;

homestead, since exemption does not apply to that; and he may act alone in alienating when the homestead has been abandoned previously by both husband and wife.¹

5. Wife's Signature—Fraud—Duress—In Kansas.—When the signature of a wife was obtained by the fraud of a notary who was interested in the mortgage of a homestead thus acknowledged by her, the act was void;² but when the husband, in making another mortgage act, commanded his wife to sign, there was not such duress as to invalidate her act.³

The husband cannot even lease a homestead that has been carved out of his own separate property, without his wife's consent, if the tenant is to occupy the premises to the dispossession of the wife.⁴ He may lease it, however, and even sell it, if the premises have never been fully dedicated as a homestead and occupied as such by himself and his family.⁵ If, however, there

Lamb v. Shays, 14 Iowa 570; *Eli v. Gridley*, 27 Iowa 378.

The husband alone can convey or mortgage only to secure the vendor of the homestead. *Burnap v. Cook*, 16 Iowa 153; *O'Brien v. Young*, 15 Iowa 5; *Morris v. Sargeant*, 18 Iowa 90.

A written contract made by the husband for the conveyance of the homestead, with only the oral concurrence of the wife, is void, *Donner v. Redenbaugh*, 61 Iowa 269.

Jointly the husband and wife may validly mortgage the homestead, and special mention therein of the release of the exemption right was formerly not held essential. *Stevens v. Myers*, 11 Iowa 184; *Babcock v. Hoey*, 11 Iowa 375.

Such joint mortgage is not affected by others made by the husband alone; and if the whole estate be incumbered by both species of mortgage, the homestead should be saved, if the rest of the estate is sufficient to meet the demands. *Lay v. Gibbons*, 14 Iowa 377.

1. Sale or Mortgage when not Affected by Exemption.—A mortgage to secure the vendor of the homestead outranks the exemption right. *Dickson v. Chorn*, 6 Iowa 19.

An abandoned homestead may be mortgaged by the husband without his wife's joining in the act. *Davis v. Kelley*, 14 Iowa 523.

A new homestead, substituted for a former one, will obviate objection to the alienation of the first. *Robb v. McBride*, 28 Iowa 386; *Marshall v. Rudick*, 28 Iowa 490.

Either of the marital couple may convey, subject to the exemption right of the other. *Stewart v. Brand*, 23

Iowa 481. If the deed recite that the grantor resides on the premises conveyed, the grantee has notice of the homestead right. *Williams v. Swetland*, 10 Iowa 51; *Christy v. Dyer*, 14 Iowa 438.

2. *Warden v. Reser*, 38 Kan. 86.

3. *Gabbey v. Forgens*, 38 Kan. 62.

4. Lease of Homestead without Consent of Wife.—The husband cannot, without the consent of the wife, execute a lease of a homestead, and give possession thereof to a tenant, although the title to the premises is in his own name, when the lease interferes with the possession and enjoyment of the premises by the wife as a homestead. *Coughlin v. Coughlin*, 26 Kan. 116.

5. Deed from Husband Alone—When Valid.—Where a husband and wife in 1871 resided in New York, and the husband, desiring to change his place of residence, came to Kansas and purchased real estate and resided thereon for about four years, and then sold one-half of the same, and executed to the purchaser a deed of conveyance therefor, representing himself to be a single man, and about one year afterward the wife came to Kansas, and thereafter resided upon the land with her husband, and it had been at all times the intention of the husband and wife that she should at some time come to Kansas and reside upon the land with him, and afterward the husband and wife commenced an action to set aside said deed, upon the ground that at the time it was executed the property was their homestead, and that the deed was not executed with the consent of the wife, and was therefore void, *held*, that as the property at the time when said deed was executed had

is such occupancy, though his wife may have quit it and only her husband and a son remain, the husband cannot convey the premises without her joining in the deed or consenting thereto in a legal way; and both cannot convey by separate deeds.¹

6. Mortgage for the Purpose of Building.—The law of Kentucky does not screen homesteads from pre-existing debts; it expressly provides that exemption shall be inapplicable to debts existing before the purchase of the land or the erection of improvements thereon.² Under this statutory provision it was held that one who had mortgaged his lot for the purpose of getting money to improve it by building a residence thereon, without his wife's joining in the act, exposed it to seizure and sale by foreclosure on the part of the mortgagee.³

Whilst a prior conveyance of a residence would preclude the subsequent dedication of the premises as a homestead (the sale being by both husband and wife),⁴ a mortgage or conveyance by the husband after the dedication is inoperative.⁵ Where both

never been "occupied as a residence by the family of the owner," in accordance with the homestead exemption laws, but had been occupied only by the owner himself, that it was not at that time a homestead within the meaning of such homestead exemption laws, and therefore, *held*, that the deed of conveyance from the husband alone to the purchaser of the property was not void. *Koons v. Rittenhause*, 28 Kan. 359.

1. Invalid, though the wife has quit the home.—Where a family consists of a husband and wife and a son of the husband by a former wife, and the title to the homestead is in the husband, and the wife leaves her husband and homestead on account of cruel treatment from the husband, and commences an action against him for alimony, and while such action is still pending, and while the wife is still living apart from her husband but the husband and son still reside upon the homestead, the husband executes a warranty deed for the property to his son, *held*, that such deed is void because it is an attempted alienation of the homestead by the husband alone, and without the joint consent of the husband and wife. *Ott v. Sprague*, 27 Kan. 620.

Where the deed was executed as above mentioned, and, eight years afterwards, when the title was still in the husband but the property was not used as a homestead, the wife executes an independent quit claim for it to the son, and there is nothing in the deed or elsewhere to show that she consents to her

husband's former deed, or that he consents to her quit claim deed, *held*, that her deed conveys nothing, nor does it validate the original conveyance; that joint homestead cannot be conveyed by the separate and independent deeds of the husband and wife, since the constitution requires "joint consent." *Ott v. Sprague*, 27 Kan. 620.

Corroborative Cases.—The conveyance of the homestead of a husband and wife, in Kansas, can be accomplished only by their joint consent and executed deed. *Const. of Kansas*, Art. 15, § 9.

Together, they may sell the homestead free from any judgment lien and from any mortgage given by the husband only. *Morris v. Ward*, 5 Kan. 239; *Dollman v. Harris*, 5 Kan. 598.

If the wife signs a deed conveying the homestead, under duress, it is void though the purchaser be ignorant of the duress. *Anderson v. Anderson*, 9 Kan. 112, 116.

2. *Genl. Statutes of Ky.*, ch. 38, art. 13 § 16.

3. *Thacker v. Booth*, (Ky.) 6 S. W. Rep. 460.

4. A conveyance by husband and wife of land on which they resided, precluded their subsequent claim for homestead rights therein. *Gideon v. Struve*, 78 Ky. 134. Of like import, *Lishy v. Perry*, 6 Bush (Ky.) 515; *Cantrill v. Risk*, 7 Bush (Ky.) 159; *Wing v. Haydon*, 10 Bush (Ky.) 280; *Robbins v. Cookendorfer*, 10 Bush (Ky.) 631.

5. The husband mortgaged to appellee a tract of land, but the wife did

joined and sold, after occupancy, and the alienated homestead proved to be all the property they had had, the conveyance thus to an individual creditor was held to inure to the benefit of all the creditors.¹

not join with him. The homestead did not pass by the mortgage. *Tong v. Eifort*, 80 Ky. 152.

1. S and wife conveyed to C two acres of ground, on which they resided. Certain creditors of S obtained a judgment of sale of the lot under the act of 1856, upon the ground that the conveyance operated as a transfer of all their property to their creditors. S and wife filed a petition for a homestead out of the lot. *Held*, that their conveyance passed all their title for the benefit of S's creditors, and they are not entitled to a homestead in the land conveyed. *Gideon v. Struve*, 78 Ky. 134.

See, *Cantrill v. Risk*, 7 Bush (Ky.) 159; *Leshey v. Perry*, 6 Bush 448; *Wing v. Haydon*, 10 Bush 280; *Robbins v. Cookendorfer*, 10 Bush. Ky. 631.

Massachusetts.—A widow with minor children, may convey her homestead in conjunction with the children's guardian. *Abbott v. Abbott*, 97 Mass. 136.

Buying real estate for a homestead, it may be mortgaged then to secure the payment of the price; and the husband may execute the act. *New Eng. Jewelry Co v. Merrian*, 2 Allen (Mass.) 390.

If a person having a right of homestead, executes a deed to another of an undivided half of the land, this bars the right of homestead, and he cannot acquire a new right of homestead by continuing to occupy the premises in common with the grantee; and it makes no difference that the wife of the grantor does not join in the deed until just before it is recorded, nearly five years after it was made, if the deed was delivered to the grantee with the understanding that she was to sign it, and she signed it in pursuance of the original agreement. *Howes v. Burt*, 130 Mass. 368.

Alienation of homestead by husband and wife may be made in Massachusetts with express release of the exemption right. And so they may mortgage it, but that will not affect the exemption rights of the wife unless expressly abandoned or conveyed in the instrument. *Connor v. McMurray*, 2 Allen (Mass.) 202; *McMurray v. Connor*, 2 Allen (Mass.) 205; *Silloway v. Brown*,

12 Allen (Mass.) 32; *Greenough v. Turner*, 11 Gray (Mass.) 334; *Adams v. Jenkins*, 16 Gray (Mass.) 146.

The husband alone may sell his interest remaining after the satisfaction of his wife and children's exemption rights; and even if his intent were fraudulent, concerning creditors, he would retain the enjoyment of the homestead right for his lifetime, if his wife should survive him. *Silloway v. Brown*, 12 Allen (Mass.) 32; *McMurray v. Connor*, 2 Allen (Mass.) 205; *Smith v. Provin*, 4 Allen (Mass.) 516; *White v. Rice*, 5 Allen (Mass.) 76; *Doyle v. Coburn*, 6 Allen (Mass.) 71.

Michigan—Wife's Signature to Conveyance.—Homesteads conveyed by a married man must be signed by his wife, unless it be a mortgage of the premises for the purchase money. *McKee v. Wilcox*, 11 Mich. 358; *Ring v. Burt*, 17 Mich. 465; *Fisher v. Meister*, 24 Mich. 447; *Snyder v. People*, 26 Mich. 106; *Comstock v. Comstock*, 27 Mich. 97; *Wallace v. Harris*, 32 Mich. 380; *Phillips v. Stanch*, 20 Mich. 369; *Stevenson v. Jackson*, 40 Mich. 702; *Watertown Ins. Co. v. G. & B. S. M. Co.*, 41 Mich. 131; *Girzi v. Cary*, 53 Mich. 447.

The title without the wife's signature cannot be validated by subsequent removal from the premises to destroy its homestead character. *Phillips v. Stanch*, 20 Mich. 369. Nor will the subsequent death of the wife cure the defect of the title. *Shoemaker v. Collins*, 49 Mich. 597.

A conveyance of the homestead without consideration is not a fraud upon creditors. *Smith v. Rumsey*, 33 Mich. 183; *Rhead v. Hounson*, 46 Mich. 244; *Pulte v. Geller*, 47 Mich. 560.

Same—to Mortgage.—A mortgage given by a married man of his homestead requires to its validity the signature of his wife, even though at the time she is not living with him. The signature of a woman, then passing as his wife, when she is not, is merely void. *Sherrid v. Southwick*, 43 Mich. 515.

A lien for anything but purchase money cannot be established on a homestead worth no more than \$1,500 and held by a man and his wife, if the

wife does not sign the instrument declaring the lien; and in any case a bill to establish it would not lie without making the wife a party. *Girzi v. Cary*, 53 Mich. 447.

A mortgage made by a married man and covering his homestead is void, so far as his homestead is concerned, if executed without his wife's signature; and it cannot become valid by the wife's death or by suffering a decree of foreclosure to be taken *pro confesso* in a suit in which no issue as to homestead rights has been raised or passed upon, and in which the wife has not been impleaded as defendant. *Shoemaker v. Collins*, 49 Mich. 595.

Mississippi.—Sale of One Homestead to Buy Another.—An exemption beneficiary in Mississippi, who sells his homestead in order to make a change of residence, can execute a valid conveyance before his removal, though his wife do not join in the deed in the manner prescribed by statute. *Wilson v. Gray*, 59 Miss. 525.

Deed of Trust: Non-Joinder of Wife.—The invalidity of a deed of trust on an exempt homestead, resulting from the non-joinder therein of the wife of the owner (§ 1258, Code 1880), cannot be cured by the family's subsequent removal, temporary or permanent, from such homestead. The conditions existing at the time of the execution of the instrument determine its validity or invalidity, which cannot be affected by subsequent events.—*Cummings v. Busby*, 62 Miss. 195.

Missouri.—It was not necessary, under 1 Wagner's Statutes 697, § 1, that the wife should join with the husband in executing a mortgage upon the homestead to make it valid; but it is otherwise since the enactment of § 2689 of the Rev. Stat. of 1879. *Riecke v. Westenhoff*, 85 Mo. 642.

Nebraska.—Husband Conveying Alone.—A mortgage, under the act of 1877, upon a homestead, is void if made by the husband only. *Bonorden v. Kriz*, 13 Neb. 122. So, also, a lease. *McHugh v. Smiley*, 17 Neb. 626. But it is held that a deed of conveyance from the husband to the wife, of a title in his name, signed and acknowledged by him alone, both occupying the homestead thus conveyed, is valid. *Furrow v. Athey*, 21 Neb. 671; see *Hicks, etc., Co. v. Mack*, 19 Neb. 339.

Wife Conveying Alone.—A contract to convey the homestead entered into by a wife in her own name, will not be

specifically enforced, as the statute requires the instrument of conveyance to be signed and acknowledged by both husband and wife. And the fact that the husband and wife were not living together at the time the contract was made, will not render the contract for the conveyance of the homestead valid. *Larson v. Butts*, 22 Neb. 370; *Aultman v. Jenkins*, 19 Neb. 211; *Swift v. Dewey*, 20 Neb. 107; Comp. Stat. of Neb., ch. 36, § 4.

Fraud.—A homestead cannot be the subject of a fraudulent conveyance. *Schribar v. Platt*, 19 Neb. 631.

Conveyance by Both, and Reconveyance to the Wife.—Judgments were recovered against M and W in the county court in March, 1877, and transcripts filed in the district court in April of that year. In June following M and wife conveyed the homestead to one G, who immediately reconveyed to the wife of M. No consideration was paid nor change of possession, and the premises continued to be occupied as the family homestead of M. Held, that the conveyance to G was not an abandonment of the homestead, and it was not liable for the satisfaction of the judgments. A wife may claim the right of homestead. *McMahon v. Spellman*, 15 Neb. 653.

Nevada.—Declaration Must be Recorded to Prevent the Husband Mortgaging.—A homestead, in fact, in the absence of a recorded declaration that it has been selected as such, can be mortgaged by the husband alone without the consent of his wife. *Child v. Singleton*, 15 Nev. 461.

New Hampshire.—Husband and wife, in New Hampshire, can only alienate their homestead by joint deed of sale, or by a mortgage to secure the purchase money. Conveyance of such property must be under probate order if the wife be dead, and minor or insane children survive her. *Norris v. Moulton*, 34 N. H. 394.

Reserving the rights of his wife and children, the husband may convey any independent interest he may have in the homestead estate, but he cannot affect their rights. *Atkinson v. Atkinson*, 37 N. H. 434; *Gunnison v. Twitchel*, 38 N. H. 67; *Foss v. Strachn*, 42 N. H. 42.

The husband's deed would be good if he leave enough realty unsold to satisfy the homestead claim. *Horn v. Tufts*, 39 N. H. 478.

North Carolina.—Husband and Wife.—Deed.—A deed of the husband, without the joinder of his wife, conveying lands

7. What Carries the Homestead Right.—The husband can convey only his own interest in Tennessee, and he cannot divest his wife of her homestead enjoyment without her consent.¹ Formerly the rule was different.² He may still mortgage part of the homestead to secure the vendor for the purchase money, though he must retain enough for a family home. But if his wife join in conveying all, she cannot claim a homestead in the property alienated after his death.³

The transfer of the title to the property itself, on which the homestead stands, if made by both, carries with it the homestead right when there is no express reservation. Even though the conveyance be afterwards set aside as fraudulent, the right of homestead would be lost.⁴

8. Sale by Husband in Bad Faith.—Not even to pay a balance of the purchase money can the husband alone convey the homestead in Texas, when there is no necessity for such sale, and his object is to deprive his wife of her legally protected home. He may sell, however, when his honest purpose is to satisfy the lien for the purchase money, and the conveyance, to that end, is a necessity.⁵

owned by him before the adoption of the constitution of 1868, the marriage being prior to that date, passes his estate free from the claim of dower and homestead. *Reeves v. Haynes*, 88 N. Car. 310; see *Sutton v. Askew*, 66 N. Car. 172; *Bruce v. Strickland*, 81 N. Car. 267; *Jenkins v. Jenkins*, 82 N. Car. 208; *O'Kelly v. Williams*, 84 N. Car. 281; *Williams v. Teachey*, 85 N. Car. 402; *Wittkowski v. Watkins*, 84 N. Car. 456; *Isler v. Koonce*, 81 N. Car. 378; *Davis v. Evans*, 5 Ired. (N. Car.) 525.

1. Power of Husband to Alienate.—The husband cannot alienate the homestead without the consent of the wife, nor can he deprive her of her right to its use by his wrongful act. The husband's conveyance is operative against himself alone and does not affect the rights of the wife. Since the act of 1879, the wife may assert her claim to homestead to any lands to which the right attaches under the act, unless she has divested herself of the right by joining the husband in the conveyance of it in mode prescribed by statute. *Rhea v. Rhea*, 15 Lea (Tenn.) 527.

2. Old Rule.—Previous to the Tennessee constitution of 1870, the husband could convey a valid title to the homestead without the concurrence of the wife, even where he declared his intention to claim the homestead, in the manner then provided by law, un-

less the homestead had been actually laid off. *Kincaid v. Burem*, 9 Lea (Tenn.) 553.

3. What may be Mortgaged.—The husband may mortgage the homestead for the purchase money. "A husband, the head of a family, may, without his wife joining in the conveyance, make a valid mortgage of a part of the farm on which he is living, provided he retains a sufficiency of land, with the improvements thereon in which he is living, to constitute a homestead exemption; and if the wife afterwards join the husband in mortgaging the homestead reserved, she cannot, after her husband's death, claim a homestead in the land mortgaged by her husband alone. *Hildebrand v. Taylor*, 6 Lea (Tenn.) 659.

4. Fraudulent Conveyance.—Homestead right is dependent upon, and attached to, some right in the property, and the transfer of property itself carries with it the right of homestead unless it is expressly reserved. A deed, therefore, by husband to wife, surrendered the homestead under the act of 1868; and if said deed, at the instance of creditors, was set aside as fraudulent by the chancery court, the right of homestead would not revert to him, but homestead would be lost by the fraudulent conveyance. *Nichol v. Davidson Co.*, 8 Lea (Tenn.) 389.

5. Alienation to pay the Vendor.—The husband has no power, directly or

(a) *By Unmarried Man.*—The constitutional inhibition of the alienation of the homestead without the wife's assent is inapplicable to an unmarried man who is a householder. He may either sell or mortgage it. He may even sell, with a stipulation included in the act under which he may re-acquire his title, notwithstanding the constitutional provision that "all pretended sales of the homestead involving any condition of defeasance shall be void," for the qualifying adjective prefixed to sales has no reference to *bona fide* conveyances.¹

indirectly, to alienate property, a portion of the purchase money of which has not been paid, and which is occupied by his wife and himself as a homestead, unless his wife joins in the conveyance, or the same is done in good faith by the husband in settlement of the lien for unpaid purchase money.

If the husband, who attempts without being joined by the wife to dispose of the homestead, under pretense of satisfying the claim for unpaid purchase money, acts in bad faith when no necessity for sale exists, and with the purpose to deprive his wife of her homestead right, his act conveys no title as against the wife to purchasers with notice. *Morris v. Geisecke*, 60 Tex. 633.

1. *Single Man Selling—Re-conveyance.*—A, an unmarried man, having a fee simple interest of one-third in the property on which he resided, acquired by purchase from one of his step-children, which at the time was incumbered with a trust deed executed by the vendor and the other heirs, and who had also a life estate in an undivided one-sixth of the property inherited from his wife, entered into a written contract with B, on March 15, 1877, by which he conveyed and released to B all his interest, in consideration that B should buy the property when sold under the trust deed, and then convey it to A for the same amount B might pay for it. B purchased at trust sale and took notes from A secured by trust deed for the amount he had bid and paid. The property was sold to a third party under that second deed of trust, A still residing on it. In a suit brought by the last purchaser against A for the property, *held*: The title of A passed by his contract with B stipulating for a conveyance to A for the amount B might be required to pay at the first trust sale. The agreement of March 15, 1877, the subsequent purchase by B, and his compliance with its terms, vested in A under the deed which he

received, a title which rendered the property subject to sale in satisfaction of the notes given by A, bereft of all homestead claim. The agreement of March 15, 1877, was not in violation of § 50, art. 16, of the state constitution. No mortgage or other lien was intended to be given by the instrument of March 15, 1877. Section 50, art. 16, of the constitution imposes a restriction on the power of the husband to sell the homestead only when he is a married man, and in such case a sale cannot be made without the wife's consent given in the manner prescribed by law. If the owner of a homestead be an unmarried man he may sell the homestead as he may any other property; and it is ordinarily true that he who has unrestricted power to sell may mortgage. The contract of March 15, 1877, was not in violation of the last clause of the constitution above referred to, which provides that "all *pretended* sales of the homestead involving any condition of defeasance shall be void." The word *pretended* has reference to feigned, and not to real, sales. The constitution does not prohibit a sale of the homestead, made with an agreement whereby the vendor may re-acquire the title. The purchase, at the second trust sale, the proceedings being regular, acquired title. *Astugueville v. Loustaunau*, 61 Tex. 233.

School Land Certificate.—A purchaser of school land, who, with his family, settles upon such land, receives the requisite legal certificate, and pays whatever sums of money are necessary when due, and afterwards assigns for value his certificate to another, not being joined by his wife, does not divest her of her homestead interest in the land. *Wheatley v. Griffin*, 60 Tex. 209.

Conditional Sale.—A homestead was conveyed by deed absolute on its face, based on the following proposition by the purchasers: "We will give you \$7,000 for your place, you to have the

9. Fraudulent Conveyance.—While the husband alone may mortgage the homestead property for the purchase money, in Vermont, as in most of the States, and it is there held that the wife must join in a deed of conveyance, such joint alienation is not impeachable for fraud. The husband only might convey his property interest, but the law would protect the wife in her continued occupancy of the homestead, unless her husband provided her with another.¹ In Virginia, a grantor, who has fraudulently conveyed his property, may claim homestead right in it after the sale has been set aside.²

deed made to us, same to be examined by some good attorney, and to give us your notes for the rent at \$50 per month. The insurance on the house to be transferred to us, but at present we could not promise to increase your salary or to extend your note for \$1,500. If at the end of twelve months you wish to purchase the house from us, you can do so on favorable terms. You will please answer promptly. Your year is out with us on the 15th of this month." *Held*, that there was nothing in the letter which, unaided by other fact, would constitute the transaction a conditional sale. *Hardie v. Campbell*, 63 Tex. 292.

The husband may, without being joined by his wife, grant a right of way to a railroad company across a tract of land belonging to himself and wife and occupied by them as a homestead, when the use of the right of way by the railway does not materially affect the right of the wife to the enjoyment of the use and occupancy of the land for homestead purposes. *Randall v. Tex. Cent. R. Co.*, 63 Tex. 586.

The homestead cannot be made the subject of an executory contract for its sale by the husband and wife. *Jones v. Goff*, 63 Tex. 248.

Joint Act of Sale.—Alienation of the homestead in Texas, must be by act of both husband and wife. *Sampson v. Williamson*, 6 Tex. 116; *Berlin v. Burns*, 17 Tex. 537; *Brewer v. Wall*, 23 Tex. 589; *Allison v. Shilling*, 27 Tex. 454; *Cross v. Everts*, 28 Tex. 523; *Houghton v. Marshall*, 31 Tex. 108; *Rogers v. Renshaw*, 37 Tex. 625. Or, by the husband, on the death of his wife, for the purpose of buying another home for the surviving children. *Morrill v. Hopkins*, 36 Tex. 685.

During her life, the wife's interest in the homestead would not be affected by his selling it, though they should live apart from each other. *Homestead Cases*, 31 Tex. 692. But he may sell

before occupancy by both. *Meyer v. Claus*, 15 Tex. 519.

It seems that a homestead mortgaged by the joint act of husband and wife, cannot be subjected to a forced, judicial sale. *Sampson v. Williamson*, 6 Tex. 102; *Stewart v. Mackay*, 16 Tex. 58; *Lee v. Kingsbury*, 13 Tex. 71.

Sale after Abandonment.—The husband alone may sell and convey real estate that has ceased to be used as a homestead so that that character has been lost; even if the abandonment be after the sale, the conveyance will hold, if the wife joined in the abandonment. *Jordan v. Goodman*, 19 Tex. 273.

Should they remove to another home and make it their homestead, the former one could be sold by the husband alone, or could be levied upon by creditors. *Stewart v. Mackay*, 16 Tex. 58; *Berlin v. Burns*, 17 Tex. 537. Should he give a deed for the homestead when not competent to do so alone, he could afterwards be held to it upon his acquiring a new homestead. *Brewer v. Wall*, 23 Tex. 585.

1. Purchase Money : Fraudulent Conveyance.—The wife need not join with the husband in executing a mortgage on the homestead to secure its purchase money. *Davenport v. Hicks*, 54 Vt. 23.

Wife and husband must join to convey a homestead in Vermont, if her rights are to be affected, though the husband alone may give a mortgage binding on it for the purchase price. It has been *held* that such joint conveyance is not impeachable for fraud. *Danforth v. Beattie*, 43 Vt. 138.

The family occupancy would not be disturbed by a deed of sale executed by the husband only (*Day v. Adams*, 41 Vt. 516), unless he provided them with a new homestead. *Howe v. Adams*, 28 Vt. 544; *Davis v. Andrews*, 30 Vt. 678; *Jewett v. Brock*, 32 Vt. 65; *Meech v. Meech*, 37 Vt. 414.

2. Fraudulent Conveyance.—Where there is a fraudulent conveyance of

VII. ABANDONMENT AND FORFEITURE: HOW HOMESTEAD RIGHTS MAY BE WAIVED AND LOST.

1. **In General.**—The prevalent provisions in most of the States are liberal to the homestead holder on all questions involving abandonment and forfeiture. The statutory rules and judicial expositions are favorable to the maintenance of the homestead right.

Permanent non-occupancy, quitting the premises with the admitted intention to abandon, making and filing a written declaration of abandonment (where that is required by law to effect the purpose,) and doing some act which effectually forfeits the right whether so designed or not, are the usual modes of yielding the exemption privilege (besides alienation by transfer, which has been already considered,) if done by both husband and wife. In some States both may lose the right by the action of the husband alone. One alone may forfeit his or her right without affecting that of the other in certain cases, which will be noticed hereafter.

Besides the prevailing rules, there are many of limited range, confined to a few States, to be pointed out further on.

2. **Waiver of Exemption.**—In a promissory note case there must be an averment of the waiver of exemption in the complaint. If the averment is controverted there must be a finding of the fact, under this special issue, to render the waiver susceptible of being made part of the decree.¹

The complainant would be entitled to such decree on the evidence of the debtor that he owned no land but the homestead when he made the mortgage, except the tract mortgaged; and that his personalty was worth less than a thousand dollars.²

property, which is subsequently annulled at the suit of the creditor, the grantor is not estopped as against the creditor to assert his right of homestead in the premises. *Marshall v. Sears*, 49 Va. 49.

Wife's Signature: Reservation of Homestead Right.—A mortgage or other alienation by a married man of his homestead, containing no reservation of the homestead right is absolutely void unless signed by the wife. A conveyance of a homestead reserving to the grantor "the sole, free, and absolute use and control" thereof, "so long as he and his wife, or either of them, may live," conveys only a future estate to be enjoyed after the homestead right shall cease, and is valid without the signature of the wife. *Ferguson v. Mason*, 60 Wis. 377.

Landlord and Tenant.—The owner of a building upon land held by him under a lease providing that such land

should be used and occupied exclusively as a site for a hotel, resided in such building with his family with the tacit consent of the lessor. *Held*, that the premises were not his homestead, and that an alienation of the building and leasehold interest in the land was valid without the signature of the wife. *Green v. Pierce*, 60 Wis. 372.

Alienation cannot be by the husband only, in Wisconsin. *McCabe v. Maz-zuchelli*, 18 Wis. 478; *Hart v. Houle*, 19 Wis. 472. The wife joining, the homestead may be conveyed without regard to existing debts; and it may be even done with the view of defrauding creditors, it is *held*, and for the purpose of having the grantee re-convey to the wife, with impunity—the residence of the family continuing in the homestead meanwhile. *Dreutzer v. Bell*, 11 Wis. 114.

1. *Taylor v. Cockrell*, 80 Ala. 236.

2. *Ordway v. White*, 80 Ala. 244.

An averment was held sufficient to authorize the incorporation of the waiver of exemption of personal property into the judgment, when made as follows in the complaint: "And, as part thereof [the note], defendants waived all right to claim any of their property as exempt from levy, execution, sale, or other legal process, under the constitution and laws of the State."¹

A wife waives her exemption right by failing to assert it before judgment, during the pendency of a suit against herself and her husband for family supplies, if the homestead lands are described in the complaint, and an order for their sale is embodied in the decree.²

3. Widow Cannot Sell.—Though a widow is entitled to the enjoyment and usufruct of her homestead, derived from her deceased husband, yet she cannot sell it without incurring forfeiture of her rights. The purchaser would get no title, and the land would be

1. *Neff v. Edwards*, 81 Ala. 246.

2. *Stanley v. Ehrman*, (Ala.) 3 So. Rep. 527.

Waiver of Exemption.—Under the statute approved March 4th, 1876, (Code, § 2848), a waiver of a right of homestead exemption is required to be made "by a separate instrument in writing;" consequently, a waiver embodied in an ordinary promissory note, though attested by one witness, is invalid and inoperative. *Baker v. Keith*, 72 Ala. 121.

When an execution from a justice's court is levied on land, in default of personal property, and the papers are thereupon transmitted by the justice to the next term of the circuit court, as required by the statute (Code, § 3638), a claim of homestead exemption, if not made before the justice, must be interposed before an order of sale is granted by the circuit court, (*Ib.* §§ 2830-38), or it will be held to have been waived. *Sherry v. Brown*, 66 Ala. 51.

Exemption of Proceeds of Sale.—When a debtor voluntarily sells his exempt homestead, the right of exemption is thereby waived and destroyed, and does not follow and adhere to the purchase money; but the rule may be different, when the sale is involuntary, or by compulsion under legal process. *Gibbens v. Williamson*, 65 Ala. 439.

Waiver of Exemption of Personalty. A stipulation in a promissory note, in these words, "As to the debt evidenced by this note, the maker and indorser each hereby waives all benefit of the homestead exemption laws on both real and personal property," though inoperative as a waiver of the right of homestead exemption (Code, §§ 2846-48), is

effectual as a waiver of the right of exemption in and to all personal property.

The note containing such waiver being signed by one partner in the partnership name, without authority from his copartner, the waiver is valid and effectual against him and his individual property, though it does not bind his copartner. *Vincent v. Hurst*, 76 Ala. 588.

Conveyance by Husband to Wife, not Fraudulent.—The conveyance by a husband to his wife of a homestead, even though voluntary, is not fraudulent. *Lehman v. Bryan*, 67 Ala. 558.

Abandonment: What Constitutes.—Temporary absence is not necessarily an abandonment. The *animus revertendi* of the owner is a material element in the determination of the question. The intention to return by circumstances and conditions attending the removal, including the declarations of the party accompanying the act. Where a husband left his home with his family, intending to return if his wife's health improved, *held*: The *animus revertendi* was not a present intention existing at the time of the removal, and the removal forfeits exemptions. *Lehman v. Bryan*, 67 Ala. 558.

Non-Occupancy.—Under the constitutional and statutory provisions which were of force in 1873-4, actual occupancy was necessary to support a claim of homestead exemption; if the owner removed from the premises, though under the advice of a physician, and with the declared intention of returning, and rented them out by the year, the exemption was forfeited and lost. *Stow v. Lillie*, 63 Ala. 257.

immediately liable for the debts of the husband's estate.¹

And the leasing of a homestead, held for life, is an abandonment of it, unless the lessor reserves the right to return to it and intends to resume it as a home.²

Sale on execution is suspended, in Arkansas, under the homestead act of 1852, only while the residence is occupied as such; and so it is held that a levy upon the property, under a judgment, creates a lien in favor of the judgment creditor of higher rank than that of a subsequent mortgage, provided the judgment creditor has been guilty of no laches in creating and vindicating his lien.³

4. Record of Abandonment.—The courts of California recognize no abandonment of homestead, unless made in accordance with the statutory mode. Once created according to law, the homestead continues, even though the owner should not continuously occupy it as a residence. Residence, though necessary in the initiation of a homestead, is not essential to its maintenance. The mode of abandonment is the making of a written declaration by the owner, executing and acknowledging it, and having it acknowledged by his wife (if he has one, resident within the State), and having the act recorded like his declaration of claim, in the office of the recorder.⁴

Though voluntary abandonment should be in conformity to statute, as above stated, yet the legal effect of permanent removal

1. Garabaldi v. Jones, 48 Ark. 230.

2. Gates & Bros. v. Steele, 48 Ark. 539.

3. Brandon v. Moore, (Ark.) 7 S. W. Rep. 36.

Not Lost by Death of Wife and Children.—A homestead estate when once acquired and still occupied by the owner is not lost by the death of his wife and arrival of his children at the age of maturity, or their removal from the premises. Stanley v. Snyder, 43 Ark. 429.

Infant cannot Waive.—A minor cannot waive his right to a homestead during minority, and being supposed to be under the control of others, does not perfect it by residence. The purchaser, at a probate sale, of the tract of land, to which the homestead of a deceased parent appertained, must take notice of the minor's right and, if he use the homestead for his profit, must account to the minor for the rents. Altheimer v. Davis, 37 Ark. 316.

Temporary Removal.—Continuous actual occupation is not necessary to preserve the homestead. A removal from it for a temporary purpose, or with the intention of re-occupying it, is not such an abandonment as will forfeit the homestead right. Euper v. Alkire, 37 Ark. 283.

Temporary removal from a homestead at the call of business or health, or any of the numberless exigencies which often require the absence of whole families from the roof-tree, however long, will not displace the homestead right where there is no actual intention to abandon it. Brown v. Watson, 41 Ark. 309.

Renting as a Hotel.—A husband with his wife occupying one room of his hotel as their residence, does not lose his homestead right in the premises by renting out the balance for use as a hotel. Gainus v. Cannon, 42 Ark. 503.

Owner may Prosecute his Business on Homestead.—The owner of an actual homestead may transact any business on it he may deem necessary for the support of his family—may erect conveniences proper for the business, and occasionally rent out such portions of the premises as may be temporarily spared; or, he may contract its area by cutting off a portion and appropriating it to other than family uses. Klenk v. Knoble, 37 Ark. 298.

Homestead right is not lost in Arkansas by a brief cessation of occupancy. Tumlinson v. Swinney, 22 Ark. 400.

4. Legal Abandonment.—Civil Code of Cal., §§ 1243, 1244; Porter v. Chap-

by both husband and wife, and sale by the husband thereafter has been held to be abandonment. Temporary absence, mortgaging the premises, etc., do not have the effect of abandonment.¹ The right, however, may be destroyed by selling an undivided interest,² or by motherless children reaching their majority.³

man, 65 Cal. 365; *Bull v. Coe*, (Cal.) 15 Pac. Rep. 123.

1. Temporary absence of the beneficiaries from the premises, and taking a home elsewhere for a limited time and for good cause, does not operate as an abandonment in California. *Holden v. Pinney*, 6 Cal. 234; *Dunn v. Tozer*, 10 Cal. 171; *Moss v. Warner*, 10 Cal. 206.

Mortgage Not Abandonment.—No mortgage can result in a valid abandonment, though executed by both husband and wife. *Cohen v. Davis*, 20 Cal. 187. Their separation, and the subsequent marriage of the husband, would not enable him to deprive the children of the homestead protection by mortgaging it away from them. *Lies v. De Diabler*, 12 Cal. 329.

Permanent removal from the premises by both, and sale by the husband, was held to be abandonment. *Taylor v. Hargous*, 4 Cal. 273.

2. **By Conveyance of Undivided Interest.**—In 1865, the defendant and his wife, who had filed a declaration of homestead upon certain premises, conveyed to third persons an undivided one-half thereof. *Held*, that as at that time a homestead right could not attach to lands held in common, or by joint tenancy, the homestead right became thereby destroyed. Such right is destroyed notwithstanding the undivided moiety was, at the same time, and as a part of the same transaction, reconveyed to the husband. There was a period of time, however short, during which the title to the undivided one-half was vested in the third persons. *Carroll v. Ellis*, 63 Cal. 440.

3. **Extinction.**—An unmarried person was not entitled to select or to hold a homestead unless such person had the care and maintenance of his or her minor child, or of some other of the relatives mentioned in that section, then residing on the homestead property with such person. *Held*, accordingly, where a widower with minor children, residing on a tract of land, declared a homestead thereon, that the homestead ceased upon their becoming of age. *Santa Cruz Bank v. Cooper*, 56 Cal. 339.

Abandonment.—The execution by the husband and wife of a deed of conveyance of the homestead, absolute in form, but intended as a mortgage, is not an abandonment of the homestead, except as against an innocent purchaser. *Mabury v. Ruiz*, 58 Cal. 11.

Not Lost by Wife's Death while Minor Grandchild Lived.—Where a homestead was taken by a man as head of a family including not only his wife but also a minor female grandchild who lived with him and was dependent on him, the death of the wife did not terminate the homestead estate, but it continued so long as the minor grandchild remained so dependent. A deed by the head of a family as an individual, purporting to convey land covered by a homestead, carried no title to the purchaser; nor could a recovery against the grantee as an individual be had thereon; pending the homestead estate to eject the head of the family would destroy the full enjoyment of the homestead by the members thereof. *Hall v. Matthews*, 68 Ga. 490.

Favored by law, homestead is, whilst usury is odious. Waiver of homestead cannot be effectual where consideration has any taint of usury. *Tribble v. Anderson*, 63 Ga. 31.

The fact that application had been made, but was still pending, the homestead not having been granted and set apart, will not affect the right to waive it, though such application may have been known to the mortgagees. No right adverse to the power of the head of the family over his own property, is vested in the family until the homestead is set apart. *Smith v. Shephard*, 63 Ga. 454.

In Georgia, a homestead may be given up and a new one acquired (*Dearing v. Thomas*, 25 Ga. 224), or the husband may waive the exemption right on behalf of his wife and children as well as of himself. *Taliaferro v. Pry*, 41 Ga. 622.

A general waiver of homestead would not operate to defeat a homestead under the constitution of 1868, but a general waiver is good under the constitution of 1877. Where a general

5. **Loss and Waiver.**—Though brief non-occupancy of the homestead is not abandonment, in Illinois,¹ and though the conveyance *in fee* of the property on which the homestead right rests does not necessarily destroy that right;² and though the sale, by a widow, of the homestead set apart to her, leaves the right still

waiver of homestead was made prior to 1877, though it would not have been good as against a homestead granted under the constitution of 1868, yet after the adoption of the constitution of 1877, such waiver would operate to defeat a homestead granted thereunder. A homestead granted under the constitution of 1877, on new grounds created thereby, and to persons not previously having such right, was not good as against a debt created prior to the adoption of the constitution. Where the debtor of a firm sought to obtain a homestead, but instead of naming the firm in his schedule, named one of the partners as an individual creditor and served him alone with notice, such statement and notice did not conclude the firm upon the grant of a homestead. *Boroughs v. White*, 69 Ga. 841.

Abandonment.—The homestead can be abandoned only by a declaration of abandonment, or by a conveyance, duly executed and acknowledged, by husband and wife, or by a single owner as the case may be. Rev. Stat. Idaho, (1887), §§ 3041-2.

The exemption right may be waived in Indiana, and is deemed to be waived when not asserted to prevent execution. *State v. Melogue*, 9 Ind. 196; *Sullivan v. Winslow*, 22 Ind. 154.

Temporary non-occupancy of a homestead is not abandonment. *Austin v. Swank*, 9 Ind. 109, 112; *Mark v. State*, 15 Ind. 100; *Norman v. Bellman*, 16 Ind. 157.

1. **Abandonment.**—Where a person leaves a place which is occupied as a homestead, for a temporary purpose, intending to return, it cannot be *held* an abandonment of the homestead. *Kenley v. Hudleson*, 99 Ill. 493.

Where the owner of a homestead of less value than \$1,000, after its sale under execution against him, and before the taking out of a sheriff's deed, let the assignee of the certificate of purchase into possession of one of the houses upon the premises, under an agreement the assignee should take care of and maintain him during his life and then have the property, which contract the assignee denied, and refused to maintain the occupant: *Held*, that

this was not such a surrender of the possession as to make the sheriff's deed valid, or prevent the occupant from having the sale and deed set aside. *Barrett v. Wilson*, 102 Ill. 302.

Enforcing in Equity, Party must do Equity.—Where the owner of land which had been sold on foreclosure of a mortgage which failed to release the homestead, induced another to purchase the land by taking up the certificate of purchase, the time of redemption having nearly expired, and pay him the balance of the purchase money, \$400, and accepted a lease from such purchaser, but learning of the defect in respect to the release of the homestead refused to surrender possession to the purchaser, and filed his bill to enjoin the recovery of possession by forcible detainer, without paying back the \$400 received by him, it was *held*, that under the maxim, he who seeks equity must do equity, and come with clean hands, the complainant was not entitled to the relief sought. *Winslow v. Noble*, 101 Ill. 194.

2. **Abandonment: Conveyance of in Fee.**—The owner of premises occupied by him as a homestead, devised the property to his wife during her life-time and the remainder, together with other real estate, to another. Upon the death of the testator, the widow renounced the will of her husband, electing to take her dower and legal share of the estate. Subsequently, upon petition for dower and homestead, the premises, which had continued in the occupancy of the widow, were set apart to her as her homestead. Thereupon the widow conveyed the premises, for value, to a third person, by warranty deed, in fee, the grantee going into possession. In ejectment by the residuary devisee, under the will, against the grantee of the widow, it was *held*, the alienation by the widow, of the premises so set apart to her as her homestead, did not of itself operate as an abandonment by her of her homestead right therein, or as an acceleration of the estate, in any such sense as would enable the plaintiff to recover. The conveyance in fee only passed the estate which the grantor had, and that she had a right to con-

existing (but in the grantee)¹ yet the right may be lost by an act of release or a permanent non-occupancy of the premises as a family home.² The loss of one's family does not itself operate to the destruction of the homestead right,³ but when the beneficiary himself ceases to use the residence as a home for himself, (and for his family, if still existing), the right is gone,⁴ excepting, however, the case of orphan children beneficiaries, who may be removed from the domicile by their guardian, and yet retain their right.⁵

Sale and family removal forfeit the right.⁶ Homestead is not

vey, without destroying such estate. *White v. Plummer*, 96 Ill. 394.

1. Former Adjudication.—Where in a suit in which the heirs and devisees of a deceased owner of land, occupied by him as a homestead, are parties, the premises are set off to the widow of the deceased as her homestead, this is an adjudication that up to that time she had not lost her homestead by abandonment. *Plummer v. White*, 101 Ill. 474.

Not Abandoned by a Sale.—The alienation of the homestead by a widow after it has been set off to her, does not constitute an abandonment of it, but her grantee may hold the same against the heir. *Plummer v. White*, 101 Ill. 474.

2. Widow Cannot Release After Abandonment.—After a widow has permanently abandoned the homestead of her deceased husband, and the children of her husband by a former wife, taking her own infant child with her, she will have no interest in the estate of the homestead to release, and any attempt on her part to do so will be void as to the minor step-children remaining upon the premises, and they will succeed to such estate. *Kingman v. Higgins*, 100 Ill. 319.

Right of Widow to Abandon or Release Children's Right.—The widow of a deceased householder being the natural guardian of her own infant child, may bind it by her abandonment or release of the homestead, but being under no obligation to support the minor children of her husband by a previous wife, and having no power or control over them, she has no power whatever to release or transfer their rights in the homestead. *Kingman v. Higgins*, 100 Ill. 319.

3. Ceasing to Have a Family Does not Forfeit the Estate of Homestead.—Although it is a necessary condition to the creation of the estate of homestead that the party be a householder having

a family, yet it is not necessary to its continuance that such person should be a householder having a family. The estate and exemption will continue to the owner during his life, unless he abandons or waives the same, as provided in the statute. Therefore, the death of his wife and all his children attaining their majority, will not subject his homestead to sale on execution, he remaining in the occupancy thereof. *Kimbrel v. Willis*, 97 Ill. 494.

4. The exemption right is lost in Illinois when the homestead is no longer occupied as a home by the beneficiary's family. *Green v. Marks*, 25 Ill. 221; *Tourville v. Pierson*, 39 Ill. 447. His personal removal would not have like effect, unless he should establish another home. *Moore v. Dunning*, 29 Ill. 135; *Best v. Allen*, 30 Ill. 30; *White v. Clark*, 36 Ill. 289. A widowed beneficiary may remove temporarily from the homestead without forfeiting the exemption right. *Walters v. People*, 18 Ill. 194; s. c., 21 Ill. 178. Abandonment by the owner, after an execution sale of the homestead, does not retroact so as to give the sale validity. *Wiggin v. Chance*, 54 Ill. 175.

5. Orphan children's right to homestead protection is not lost by their guardian's renting the home to another, and taking them to live with himself. *Brinkerhoff v. Everett*, 38 Ill. 265.

6. Sale by the husband, and removal of his family to another home, forfeits the exemption right. *Phillips v. Springfield*, 39 Ill. 86; *Tittman v. Moore*, 43 Ill. 174. It has been held that sale and delivery by the beneficiary of the homestead is an abandonment of it. *McDonald v. Crandall*, 43 Ill. 231. Permanent removal by him and his family, without sale, is an abandonment of the exemption right. *Tittman v. Moore*, 43 Ill. 169; *Cipperly v. Rhodes*, 53 Ill. 346; *Wiggin v. Chance*, 54 Ill. 175.

lost by the *laches* of the husband as a litigant;¹ but he and his wife together may voluntarily waive their right.²

6. Action and Intent.—When a beneficiary gains a home and citizenship in another State, he loses his homestead right in Iowa,³ but it is not lost, in such case, if his family remain in the occupancy of the homestead.⁴ Even without leaving the State, he loses his right in a country homestead by removing with his family to a town with the intention of remaining permanently from the homestead if successful in business in his new residence.⁵

One who requests his creditor to levy on the homestead which he has ceased to occupy as such, is estopped from claiming exemption right in it thereafter, as against the creditor.⁶

A wife does not lose her homestead by going to another State

1. The husband, by his *laches*, in a suit of ejectment against him, cannot lose his homestead protection. *Hubbell v. Canada*, 58 Ill. 427; *Vasey v. Board*, etc., 59 Ill. 191.

2. A waiver of homestead must be in writing, with express release, made, signed and acknowledged by husband and wife if both be living. *Hutchins v. Huggins*, 59 Ill. 33. This binds the children, too; so does abandonment by the parents of the premises. *Brown v. Coon*, 36 Ill. 248. A widow, it has been *held*, cannot deprive her minor children of the homestead right by purposely abandoning it. *Walters v. People*, 21 Ill. 179; *Vanzant v. Vanzant*, 23 Ill. 543; *Miller v. Marckle*, 27 Ill. 405; *Ives v. Mills*, 37 Ill. 73; *Cabeen v. Mulligan*, 37 Ill. 230. But it has been *held* later that she can, being the head of the household. *Wright v. Downing*, 46 Ill. 275; *Buck v. Conlogue*, 49 Ill. 395.

Except by the wife and husband joining in an act of release, or by abandonment, or by sale of the premises to satisfy the vendor's claim on the premises or other claims not exempt, there seems to be no way of depriving the wife of the benefit of the homestead. *Booker v. Anderson*, 35 Ill. 87; *White v. Clark*, 36 Ill. 289.

Must be Released in Mortgage.—A mortgage given upon a party's homestead to secure money borrowed from the school fund, which fails to release or waive the homestead right, is not effective and obligatory as against such right, although in the form prescribed by the statute in force at the time of its execution, and no forced sale can be had under the same. *Board of Trustees v. Beale*, 98 Ill. 248.

3. Abandonment: what Constitutes.—

Where a party removed from his homestead and actually resided for many years in another county, repeatedly exercising the right of suffrage there, and at different times offering his homestead for sale, and no definite and fixed purpose to return and occupy it as a home is shown, it will be regarded as an abandonment of the homestead. *Cotton v. Hamil*, 58 Iowa 594.

4. The fact that the head of the family went to another State for the purpose of establishing a new homestead, and became a resident of such State, will not operate as an abandonment of the original homestead, so long as the family remain in possession of the same. The homestead exemption is for the benefit of the family. *Decorah Savings Bank v. Kennedy*, 58 Iowa 454.

5. Where a person had a homestead in the country, but left the same and, with his family, moved to town to engage in the practice of law, intending to reside permanently in town if he succeeded in his practice, otherwise to return to his country home, *held*, that these facts showed an intention to abandon the homestead, qualified only by a contingency which the owner intended to avoid, and that the removal from the homestead, with such an intention constituted an abandonment in the contemplation of the law. *Kimball v. Wilson*, 59 Iowa 638.

6. Where a person who is not living upon the premises formerly occupied as a homestead, requests a creditor to levy an attachment upon the premises, such person will be deemed to have abandoned the right to set up any homestead claim as against the attach-

with her husband to live there temporarily;¹ nor by joining her husband in a conveyance of it, if her mental condition be such as to render legal assent impossible.² Intention to abandon and practical abandonment must unite to constitute legal, voluntary abandonment in the State.³

ment. *Parsons v. Cooley*, 60 Iowa 268.

1. Temporary Abandonment.—The owner of a homestead left the same for a temporary purpose, and went to the State of Kansas with her husband and kept house and abode there, but without any intention of permanently residing in Kansas. About a year later she died in Kansas, and her husband died there a few months later. *Held*, that her homestead rights still continued, notwithstanding the temporary abandonment; and that as her husband's distributive share in her estate was not set off to him during his lifetime the homestead was not liable for his debts, but descended to the children exempt from any antecedent debt of their parents or their own. *Bradshaw v. Hurst*, 57 Iowa 745.

2. Judgment Lien.—Where A obtained judgment against M, who owned a homestead, but who afterwards with his wife conveyed the homestead to defendant, and then removed to Nebraska; but the wife at the time of such conveyance was insane; *held*, that the conveyance of the homestead being void on account of the wife's insanity, and the homestead having been abandoned by M and wife, the judgment attached as a lien thereon, and a deed made to A, pursuant to a sale on execution on said judgment, vested the title in A, and his heirs, the plaintiffs, were entitled to recover the same from defendant. *Alexander v. Vennum*, 61 Iowa 160.

3. To constitute an abandonment of a homestead, there must exist an intention to abandon, and an abandonment in fact. A citizen and resident of another State cannot have a homestead in Iowa. Where there has been an abandonment of the homestead, the liens and judgments will attach thereto, and a subsequent conveyance of the homestead will not displace such liens. *Leonard v. Ingraham*, 58 Iowa 406.

Conveyance to Son Residing Elsewhere.—A husband and wife joined in a conveyance of their homestead, owned by the wife, to their son, subject to the right of either of the grantors to

occupy during life. The conveyance was without actual consideration, and was designed to take the place of a will. The wife died, and husband left the homestead and dwelt until his death with his son. There were other heirs who would have inherited an interest in the property, had the conveyance not been made and the wife not died intestate. *Held*, that the son could not hold the property exempt from liability for his prior debts, under § 2008 of the Code. *Moninger v. Ramsey*, 48 Iowa 368, distinguished. *Reifenstahl v. Osborne*, 65 Iowa 567.

Conveyance to Stranger and by Him to Wife.—The conveyance by a husband of his homestead to a stranger, who afterwards reconveys to the wife, must, in the absence of evidence that the purpose was simply to vest the title in the wife, be regarded as an abandonment of the homestead by the husband, although he does not cease to occupy it. *Jones v. Currier*, 65 Iowa 533.

Removal to Other State.—When the proceeds of an Iowa homestead are re-invested in a new homestead in another State, and afterwards the second homestead is sold and the proceeds invested in a third homestead in Iowa, the third homestead will be liable for a debt which was contracted before it was purchased. The fund loses its distinctive character upon being carried and invested beyond the jurisdiction of the laws of Iowa. *Rogers v. Raisor*, 60 Iowa 355.

Abandonment of homestead in Iowa may be effected by long absence, declaration of intent to remain away permanently, and offer of sale during the time, by the owner. *Dunton v. Woodbury*, 24 Iowa 76; *Size v. Size*, 24 Iowa 580; *Orman v. Orman*, 26 Iowa 361.

The owner, head of the family, may give up one and acquire another homestead at pleasure. *Floyd v. Mosier*, 1 Iowa 513. Removal from the former to the latter would be an abandonment of the former. *Williams v. Swetland*, 10 Iowa 51; *Christy v. Dyer*, 14 Iowa 438; *Morris v. Sargent*, 18 Iowa 90; *Fyffe v. Beers*, 18 Iowa 4; *Robb v. McBride*, 28 Iowa 386; *Marshall v. Ruddick*, 28 Iowa 490.

7. Losing the Right—Widow's Homestead.—While it has been held that one cannot give up his homestead in Massachusetts without first acquiring another, and that the right is not lost by the substitution of a new home for an old one, yet a widow, who sold her dower consisting of one-third of her deceased husband's estate, was held to have lost her homestead right. It has been held that she cannot lose her homestead (when it has been set apart to her) by selling or leasing it. She may end her right by permanent removal, even without the design of producing that effect, but, while she keeps her household goods in the house, she is not considered to have removed permanently.

The widow of a homestead holder occupied the family residence with his children, and had her dower assigned from the estate. After the children had come of age she moved into another house, not designing to forfeit her homestead right and ignorant of the existence of such right—but the removal was held a forfeiture of it.¹

A divorce granted to the wife, with the custody of the children, does not work the forfeiture of the husband's homestead right, nor render his home leviable. *Woods v. Davis*, 34 Iowa 264.

1. Forfeiture—Widow.—One cannot abandon a homestead in Massachusetts before acquiring another. *Woodbury v. Luddy*, 14 Allen (Mass.) 1.

Merely removing from it to another house or farm would not forfeit it. *Dulanty v. Pyncheon*, 6 Allen (Mass.) 510; *Lazell v. Lazell*, 8 Allen (Mass.) 575; *Silloway v. Brown*, 12 Allen (Mass.) 35.

A widow, by having one-third of her husband's estate assigned as dower, and by selling it, lost her homestead right (*Bates v. Bates*, 97 Mass. 396), though it seems that she could not have sold or leased the homestead so as to have lost right in it. *Mercier v. Chace*, 11 Allen (Mass.) 194. A married woman may release her homestead right, expressly, in a mortgage act made by her husband. *Swan v. Stephens*, 99 Mass. 9.

Removal by a widow from the homestead terminates it though she does not intend to abandon it. *Paul v. Paul*, 136 Mass. 286; *Foster v. Leland*, 141 Mass. 187. A deed of an undivided half of land may defeat homestead exemption. *Howes v. Burt*, 130 Mass. 368. A widow is considered the occupant of the homestead if she has her household furniture stored in the house; she cannot be said to have abandoned it. *Brettun v. Fox*, 100 Mass. 234. She is held to have waived her right upon conveying her dower in common in the

same land as that of the homestead. *Bates v. Bates*, 97 Mass. 392. An estate of homestead cannot be affected by the will of a householder to the detriment of any person having or inheriting rights therein. *Brettun v. Fox*, 100 Mass. 234.

Non-occupancy—Right Lost by Widow.

—A widow, who, in the life-time of her husband, voluntarily leaves, with him, and with no intention of returning thereto, premises owned by him, and occupied by them for three years as a homestead, under the St. of 1851, ch. 340, he having conveyed them by a deed in which she joins in the release of dower only, cannot maintain a writ of entry to recover the premises. *Foster v. Leland*, 141 Mass. 187.

The widow of a person who had acquired an estate of homestead, continued, with his minor children, to occupy the premises, in which an estate of dower was set off to her, for several years, when she built a house elsewhere and moved her household goods into it, and has since resided there. The children continued to live on the premises, and ceased to be minors before the widow moved therefrom. When the widow moved into the house built by her, she did not know that she had a right of homestead in the premises, and never intentionally abandoned such right. *Held*, that the widow had ceased to occupy the premises, and was not entitled to an estate of homestead therein. *Paul v. Paul*, 136 Mass. 286.

When Right Not Lost by Dower.—The assignment, as her dower, to the widow

of a person who acquired a homestead under the St. of 1855, ch. 238, which existed at his death, of certain specific rooms in the house and certain specific parcels of land, with rights of way over other parts of the house and over parts of the remaining land, does not make her a tenant in common of the servient estate with the heir at law of the deceased, so as to bar her of an estate of homestead in the premises. *Weller v. Weller*, 131 Mass. 446.

Abandonment.—Waiver cannot be by the husband alone. *Beecher v. Baldy*, 7 Mich. 488; *Dye v. Mann*, 10 Mich. 291; *King v. Moore*, 10 Mich. 538; *Snyder v. People*, 26 Mich. 106; *Comstock v. Comstock*, 27 Mich. 97; *Sherrid v. Southwick*, 43 Mich. 515.

Temporary absence is not abandonment. *Bunker v. Paquette*, 37 Mich. 79; *Showers v. Robinson*, 43 Mich. 502; *Karn v. Hanson*, 59 Mich. 380; *Earll v. Earll*, 60 Mich. 30, note.

A wife, by deserting her home and husband, cannot affect his homestead rights while he continues to occupy the home. *Pardo v. Bittorf*, 48 Mich. 275.

Exemption: Desertion of Wife: by Renting Part.—When a man has a homestead, if his wife leaves him without his consent to reside elsewhere, but he refuses to go with her and continues in the homestead, he is not by her leaving deprived of his exemption privilege. That he rents a part of the homestead, and is sometimes away from it, are circumstances that do not affect his right so long as he retains a possession and claims the homestead privilege. *Pardo v. Bittorf*, 48 Mich. 275.

A man's homestead exemption is not necessarily destroyed by the act of his wife in abandoning him, or in beginning proceedings against him for a divorce, if he continues to treat the place as his home, working upon it from time to time, and sometimes eating or sleeping there, even though he parts with his furniture; and admits other occupants. *Griffin v. Nichols*, 51 Mich. 575.

Abandonment.—G owned a homestead, and, while he and his wife (constituting the whole family) were residing thereon, in May, 1881, selected and made application for the entry of a tract of land under the United States homestead law, making the usual affidavit at the time of entry. In September he began to make improvements on the land, and in March, 1882, moved his office furniture and a bed into a house he had

erected thereon, and, except for temporary absences, remained there up to the time of the trial of this action, in April, 1883. His wife was never upon the land until after he and she had conveyed away the homestead, but up to that time continued to reside on the latter, refusing to leave it until after such conveyance. Both she and her husband, during the whole period of her residence upon the homestead, up to the time of the conveyance, constantly claimed the same as their statutory homestead. None of their furniture, except the office furniture and bed, was removed from it until after the conveyance. *Held*, that, until the conveyance, there was no abandonment of the homestead. *Robertson v. Sullivan*, 31 Minn. 197.

Exemption Loss by Sale, Taking Note, Etc.—Where the owner of an exempt homestead sells and removes from the same, and takes the purchaser's promissory note for the purchase-money, which he subsequently surrenders for a conveyance of the former homestead to his wife, such property may be subjected by a bill in chancery to a judgment against the former owner of the homestead, existing at the time of the sale of the property, just as the note, the consideration of the conveyance to the wife, might have been subjected by a garnishment proceeding. *Adams v. Dees*, 62 Miss. 354.

Ejectment: Waiver of Exemption.—A party entitled to a homestead exemption, and who has failed to assert it in a chancery proceeding in which his rights are fully adjudicated, and the land ordered to be sold in general term, cannot afterward claim the exemption so as to defeat a purchaser claiming under the decree of the chancery court who has brought ejectment to recover possession of the land. *Henderson v. Still*, 61 Miss. 391.

Abandonment: Head of Family.—A husband with his wife occupied 'premises in this State as a homestead, until forced to leave about the close of the war, by the disturbed condition of the country, when they removed to Iowa, where he shortly afterwards died. The wife who had no children then returned to the homestead and resided thereon, keeping house with her brother. *Held*, (1) There was no abandonment of the homestead, and (2) that she was the head of a family within the meaning of the homestead law. *Leake v. King*, 85 Mo. 413.

8. Fraudulent Transfer.—A defendant pleaded and admitted (in answer to an allegation that he had purchased the land in controversy and conveyed to his brother to defraud creditors), that his brother held the title and owned the property, but that he (the defendant) occupied it as a homestead before the plaintiff obtained judgment, and he prayed that his right of homestead be protected if the land should be adjudged to be his property, since the property was not susceptible of fraudulent transfer. The court held that there was no inconsistency in this defense.¹

An agreement to sell the title does not affect the right of exemption in an occupied homestead;² and a sale will not, made under execution, during family occupation.³ Temporary absence, with part of the premises rented to a tenant, is not such non-occupancy as to render the homestead liable to execution sale.⁴

The right of a homestead ceases to exist when the occupant, with a view to acquiring a residence elsewhere and with no fixed purpose of returning, ceases to occupy the premises as a residence. Intention to return, in order to preserve the right, must be formed at the time of removal; in order to restore it when once lost, must be executed by actual resumption of occupancy. *S.*, having lost his wife, broke up house-keeping, moved his household goods, leased his farm and went elsewhere to live. Several years after he remarried and within three weeks died. At the time of his death he was preparing to return to his former home, but had not done so, the tenant being still in possession. *Held*, that his widow was not entitled to homestead. *Smith v. Bunn*, 75 Mo. 559.

A homestead right acquired by the head of a family is not lost by the death of his wife or the removal of his children, if he continues to reside on the place. *Beckmann v. Meyer*, 75 Mo. 333.

Divorce.—Divorce obtained by the wife will not deprive her of her homestead rights acquired during coverture in her husband's land, where she continues to reside upon it with her minor children. *Blandy v. Asher*, 72 Mo. 27.

Abandonment by Husband of Family.—In the absence of evidence that a man who has abandoned his wife and children and has suffered a divorce from his wife, has since acquired a homestead elsewhere, a place which was his homestead at the time of the abandonment and continues to be the residence of his children and their mother, will still for the purpose of preserving the rights of the children, be treated as his

homestead. *Blandy v. Asher*, 72 Mo. 27.

Minor Children.—The rights of the minor children in the homestead are in no manner affected by its abandonment by the mother. Although they may accompany her to another home, their rights in the homestead continue. *Rhorer v. Brockhage*, 86 Mo. 544.

1. *Stubendorf v. Hoffman*, 23 Neb. 360.

2. **Occupancy.**—An agreement to transfer the title of the property from the husband to the wife will not destroy the right of homestead, if the premises continue to be occupied by the debtor and his family as their home. *McMahon v. Spielman*, 15 Neb. 653.

3. **Sale while Occupied.**—A party purchasing part of a homestead in the actual occupation of the family, at a sale under an ordinary execution, will not acquire a title if the property was exempt. *McHugh v. Smiley*, 17 Neb. 620.

Confirmation of Sale.—The *ex parte* confirmation of the sale upon execution of a part of the homestead is not such an adjudication as will deprive a party who actually owns and occupies the same of his right of homestead. On the facts presented by the record, *Held*, That there had been no sale and abandonment of the homestead, and sheriff's deeds for portions of the same were annulled, the sale set aside, and the lien of the judgments re-instated. *McHugh v. Smiley*, 17 Neb. 626.

4. D was the owner of a homestead consisting of two lots in the city of O, on which were situated the dwelling-house and a large horse barn. A judgment was rendered and docketed against D, October 28, 1874. In 1876, D left

The right is not lost in all the homestead by leasing or even selling a part of it;¹ nor is the right waived, lost or abandoned by the owner's removing temporarily from the State without an intention to give it up.²

9. How Rights are Lost.—Absence from the homestead for good cause, such as the inhabitability or destruction of the dwelling-house may continue for a year in New York without the forfeiture of the exemption right. Without good cause, non-occupancy is fatal.³

Voluntary relinquishment may be effected by the owner of the homestead. The method is the personal subscribing and acknowledging of a notice before an officer competent to acknowledge a deed, by which he cancels his exemption right to all his homestead property, or to some part of it, describing the property in either case. This act must be recorded, like the act of dedication. No other voluntary waiver is permitted. Prior to such an act the owner cannot make a valid mortgage upon his homestead, except for the price of the property.

Public policy is against the waiver of an exemption in favor of one creditor to the exclusion of all other creditors.⁴

10. Husband's Removal—Wife's Right.—The removal of a debtor from the State of North Carolina, and his desertion of his wife,

home and the State, for a temporary purpose, intending to return, leaving his wife and family occupying the homestead. Mrs. D leased the barn to a tenant for the term of one year, reserving certain privileges. Execution issued and levied on so much of the ground as was covered by the barn. On claim of exemption and injunction, *held*, that such leasing of the barn, and its use by the tenant was not inconsistent with the occupancy of the homestead by the debtor, and a decree making the injunction against the sale on execution perpetual affirmed. *Guy v. Downs*, 12 Neb. 532.

1. Leasing a Part.—The right of exemption is not lost by the leasing of a part of the premises of the homestead. *Guy v. Downs*, 12 Neb. 533. Nor by sale of part. *Bunz v. Cornelius*, 19 Neb. 108.

Waiver.—The right of homestead may be waived. *Rector v. Rotton*, 3 Neb. 176.

Wife's Right not Lost, under the state of facts given in *McMahon v. Spielman*, 15 Neb. 654.

2. Absence of the Owner.—A homestead beneficiary put a brother-in-law and his family upon the premises to occupy them and take care of his orphan child, after the death of his wife. He went to another State and

gained temporary citizenship there, but this was *held* not to be a forfeiture of his homestead under the circumstances. *Dennis v. The Omaha Nat. Bank*, 19 Neb. 675.

Forfeiture by Wife.—If a wife abandon her husband and purchase and occupy a home of her own, she has no homestead right in the property of her husband at his death. *Dickman v. Birkhauser*, 16 Neb. 686.

Permanent removal to a new home is an abandonment of homestead rights in the old one, in New Hampshire. *Wood v. Lord*, 51 N. H. 454. But a temporary non-occupancy, even for a year, has not this effect. *Locke v. Rowell*, 47 N. H. 46; *Fogg v. Fogg*, 40 N. H. 285.

The husband going to a foreign country for a temporary sojourn but dying there, did not thereby affect his widow's right to homestead exemption. *Meador v. Place*, 43 N. H. 308.

The remarriage of a widow is no abandonment of her previous homestead rights. *Miles v. Miles*, 46 N. H. 271.

3. N. Y. Code Civ. Proc., § 1401.

4. § 1404; *Harper v. Leal*, 10 How. Pr. (N. Y.) 276; *Kneettle v. Newcomb*, 31 Barb. (N. Y.) 169; s. c., 22 N. Y. 240; *Smith v. Brackett*, 36 Barb. (N. Y.) 571.

forfeits homestead right of exemption on his part; and it is held that his wife, remaining on the homestead, cannot hold it as exempt in her own right.¹

When, on the contrary, the wife deserted the husband, in Tennessee, taking their only child, and he then sold his homestead without her concurrence, he could not afterwards claim exemption right in it.² When both husband and wife have joined in the sale, she cannot afterwards claim homestead right in other land of his which he has previously mortgaged.³

The loss of the family is not the loss of the homestead to the surviving head, who still occupies the domicile.⁴ And temporary removal does not affect any beneficiaries' right.⁵

11. Waiver.—The securing of one creditor by the mortgage of the homestead is not a waiver of the homestead right in favor of other creditors. Their relation to the debtor is not affected by such voluntary act on the part of the homestead holder.⁶

12. Loss of Right.—The householder does not lose his homestead in Texas by the death, or departure otherwise, of his wife and children and all his dependent family. He may exchange one domicile for another and carry his right.⁷

1. *Finley v. Saunders*, 98 N. Car. 462.

2. **Abandonment.**—In 1873 A sold, without the concurrence of his wife, who had deserted him, taking their only child with her, and was at the time residing at her father's, a tract of land at the time under lease to a third party; A assigned the purchase notes and the assignees filed a bill to enforce the lien and obtained an order of sale, whereupon A filed a bill to obtain homestead in the land. *Held*, A is not entitled to homestead. *Quære*. Is the wife? *Riddick v. Turpin*, 11 Lea (Tenn.) 478.

3. **Mortgage.**—A wife, who joins her husband in conveying the land on which they have a homestead right of the value prescribed by law, cannot afterward claim a homestead in another part of the same tract of land previously mortgaged by the husband. *Enochs v. Wilson*, 11 Lea (Tenn.) 228.

4. **Death of Wife and Children.**—After the right of homestead has been once acquired by the head of the family, and the homestead occupation is still continued, the right will not be lost by the death or absence of wife and children. *Webb v. Cowley*, 5 Lea (Tenn.) 722.

5. Removal from homestead, by one appointed to the office of jailor during the will and pleasure of the sheriff, to the jail, and occupation of it for a resi-

dence for a year, is not an abandonment of homestead. *McInturf v. Woodruff*, 9 Lea (Tenn.) 671.

6. *Hall v. Fulghum*, (Tenn.) 7 S. W. Rep. 121.

7. **Husband and Wife—Abandonment.**—One who owned and occupied with his wife a rural homestead, left it and with his family removed to a place in town owned by himself and his wife, where he was residing when, in 1863, he sold the old home, receiving the purchase money and giving his individual bond for title. The land was occupied by the purchaser and his vendees until 1881, when the wife sued to recover it, claiming homestead rights; that she knew nothing of the sale; was not consulted, and never consented to abandon it as a homestead. At the time of bringing suit she was residing on a place quite as valuable, owned by her husband and herself. On the trial the court charged the jury, among other things, as follows: "If you believe from the evidence that James B. Slavin (the woman's husband), acting in good faith towards his wife, and with no intent to defraud his wife out of her homestead right, moved upon another place of his own, with a view of abandoning his old homestead and acquiring a new one, you will find for defendant." *Held*, There being evidence that the husband, who refused to join the wife in the suit, had changed his

A wife, by deserting both her husband and his home, forfeits her right in his homestead at his death.¹ So, if a husband desert both his wife and her home, he forfeits his right, and she may convey her own homestead property so that he cannot successfully claim any right therein at her death.²

Children have no interest in the homestead rights of their

homestead in good faith for what he believed was for the interest of his family, there was no error in the charge. The urban home place was in law and in fact the homestead at the time of sale, and this was not affected by the fact that the place in the country, formerly occupied by the family, may have been cultivated by the family after its removal to town. The most satisfactory evidence of the abandonment of one homestead is the acquisition of another. The doctrine that the right to determine where the homestead shall be depends on the arbitrary will of the wife has no sanction in law, and is opposed to the laws of nature, which makes the husband the head of the family, and whose will in selecting a home for its protection and support, when honestly exercised, ought not to be lightly disregarded. *Salvin v. Wheeler*, 61 Tex. 654.

When a homestead has been once acquired, the subsequent death, marriage or removal of all the individuals who composed the family, except the surviving husband, does not subject the homestead to forced sale under a judgment against him, he still occupying it as a home. *Blum v. Gaines*, 57 Tex. 119.

Sale.—Where land was sold by a mortgagee under a power to sell at public or private sale to satisfy the debt, pending administration on the estate of the deceased mortgagor, whose wife survived, and the estate of the mortgagor was insolvent the sale did not divest the homestead rights of the surviving wife and children. *Armstrong v. Moore*, 59 Tex. 646.

1. Abandonment by Wife—Forfeiture.—The abandonment of a husband by a wife, without cause, and continuing until his death, will cause her to forfeit all claim to the homestead which the husband owned at the time of his death. *Trawick v. Harris*, 8 Tex. 312; *Earle v. Earle*, 9 Tex. 630; *Sears v. Sears*, 45 Tex. 557; *Duke v. Reed*, 64 Tex. 705.

Urban Property.—The fact that a portion of the ground claimed as an urban

homestead is used for purposes of mere convenience or pleasure, and is intended to beautify or ornament the surroundings of the actual home residence, will not divest it of its homestead character. One may as absolutely and clearly abandon a portion of the ground which once constituted the homestead, if the same be done in good faith, by acts certainly evidencing such a purpose, as he may abandon the entire homestead by ceasing to use it, and never again intending to occupy it as such. This partial abandonment of homestead property occurs when, on a portion of an urban homestead, costly buildings are erected, solely to be rented to others for mercantile or other purposes, and which, when erected are so rented. To continue the constitutional protection to that portion of the former homestead thus abandoned and dedicated to other uses, would be a perversion of the spirit of that instrument. *Medlenka v. Downing*, 59 Tex. 32.

See opinion and statement of case for facts under which it was *held* that a portion of a town lot, separated by a fence from that part lived upon and occupied by the family for home purposes, lost its homestead character and became subject to forced sale. *Stringer v. Swenson*, 63 Tex. 7.

2. Conveyance by Married Woman.—The homestead was the separate property of the wife. The husband, not being able to induce the wife to compel her sister, who performed the menial labor for the family, to quit the premises, removed from the home and left the wife in 1877; and, though he lived near her for the greater part of four years, never visited her or questioned her physician during her last sickness as to her condition. Three days before the wife died (in May, 1881) she conveyed her homestead to her sister, the husband not joining. The husband sued the sister of the deceased wife to recover the home place. *Held*, the facts above stated were sufficient to show abandonment. The wife's deed conveyed title. *Hector v. Knox*, 63 Tex. 613.

deceased parents, though heirs to their estate.¹

Unless there is an intention to abandon the homestead, a brief period of non-occupancy forfeits no right. But continuous absence of the householder and his family, under circumstances from which permanent change of residence may be inferred, is an abandonment of it as a home.²

1. *Heirs.*—The heirs of the wife, who, at the time of her death, had a community interest in homestead property, which, after her death, was abandoned by the husband and afterwards sold in satisfaction of a trust deed made by the husband and wife, have no interests as against the purchaser at trust sale. The children have no interest in the homestead, as such, by virtue of the homestead rights of the deceased parent; following *Johnson v. Taylor*, 43 Tex. 121; *Shannon v. Gray*, 59 Tex. 251.

2. *Temporary Non-Occupancy.*—The lapse of eight days between a cessation of business and a sale of the premises on which the business was conducted will not destroy its exemption as a homestead, unless there has been an abandonment. No fixed rule can be laid down as to what lapse of time will work an abandonment, but each case must be decided on its merits. Exemption is intended as a substantial benefit, and when it has attached it will not be removed without good cause. *Scheuber v. Ballou*, 64 Tex. 166.

Forfeiture.—Husband and wife forfeit homestead protection by removal to another State. Evidence of expressions to the effect that they intended to return will not overcome that of their actual emigration and their settlement in another State. Though the wife may leave her home unwillingly she forfeits her right under such circumstances. *Reece v. Renfro*, 68 Tex. 192; (citing *Jordan v. Godman*, 19 Tex. 273; *Smith v. Uzzell*, 56 Tex. 315, and *Woolfalk v. Ricketts*, 48 Tex. 28;) *McElroy v. McGoffin*, 68 Tex. 208.

There is no forfeiture of the right, when the homestead consists of two lots, each containing a dwelling, though one of them be offered for sale, and meanwhile temporarily occupied by a lessee of the homestead holder. The lot thus unoccupied as a homestead retains its character as such if the owner means to hold it as part of his homestead in case he cannot effect a sale of it. *Newton v. Calhoun*, 68 Tex. 451.

Non-occupancy, with intent to abandon, is a forfeiture of homestead right,

in Texas, though, if no new homestead has been established meanwhile, the householder may resume occupancy and continue the right. *Shepherd v. Cassidy*, 20 Tex. 30. Acquiring a new residence in another State is a forfeiture of the right. *Trawick v. Harris*, 8 Tex. 312.

A wife was *held* to have lost the right by living apart from her husband during his life. *Earle v. Earle*, 9 Tex. 630.

She was denied the right, after her husband's death abroad—he having sold his homestead without her concurrence, and both together having removed from the State. *Jordan v. Godman*, 19 Tex. 273.

She may resume occupancy of, and have the exemption in, the homestead, when not provided with any other home for herself and children, after her husband's death, though he had abandoned it and removed his family therefrom. *Franklin v. Coffee*, 18 Tex. 417.

She, by joining in the conveyance of the homestead, releases her claim; but if she is not a party to it, the result is otherwise. If she is not in collusion with the owner in making false statements respecting the homestead, such as would forfeit his right, her interest would not be affected. *Eckhardt v. Schlecht*, 29 Tex. 129.

The wife's death would not deprive the childless husband of the homestead right. *Taylor v. Boulware*, 17 Tex. 77; *Pryor v. Stone*, 9 Tex. 374.

If the conveyance is merely to avoid creditors, and possession is given to the grantee, the exemption right becomes forfeited, and creditors may disregard the transfer and levy upon the homestead. *Cox v. Shropshire*, 25 Tex. 113; *Martel v. Somers*, 26 Tex. 559.

A wife, neglecting to appear in a Texas court with her husband when both had been sued in a matter imperiling the homestead interest, could not afterwards set up any right thereto against the judgment rendered. *Baxter v. Dear*, 24 Tex. 17.

When rural property becomes urban, the character of the homestead is

VIII. ENFORCEMENT OF THE RIGHT: AND HEREIN OF LEGAL PROCEDURE RELATIVE TO HOMESTEADS, AND THE EFFECT OF CHANGE IN THE CONDITION OF ESTATES.—1. **In General.**—The practice in the several States, in the vindication of homestead rights, necessarily varies as the statutory requirements concerning remedies differ. Illustrations from the decisions rendered on the subject, beginning with those of Alabama,¹ will serve to show that no uniform course of procedure prevails in all, and that changes in the condition of estates operate differently, as the policy and principles recognized with regard to homesteads are varied under different systems.

The insolvency of an estate with respect to the homestead rights of the decedent's children; the right of a wife to have a homestead conveyance set aside by a bill in equity; proceedings by such bill to quiet title to land, out of which a homestead has been carved, involving the rights of the widow of the deceased holder of the exemption right; the setting apart of the homestead for minor heirs, on the petition of an executor to the probate court, and contests concerning the right of homestead exemption, are among the subjects recently treated by the courts of Alabama.

changed as to be subject to the legal limitation prescribed to the latter. *Taylor v. Boulware*, 17 Tex. 77.

The city restriction to \$2,000 does not render the increased value, subsequently accrued, liable to forced sale for debt. *Bassett v. Messner*, 30 Tex. 604.

Absence on Business not Abandonment.—M long resided in Virginia, where he had a family and homestead. Embarrassed, he left his family here, took some personal property, and went to South Carolina and commenced business there. The family, except one daughter at school, followed him, because his creditors deprived them of the means of subsistence. The proof is, he went to South Carolina to raise money to pay his debts, without intention to give up his domicile in Virginia. On bill to subject house and lot duly set apart as M's homestead to the lien of a judgment, on the ground that the exemption had been forfeited by his removal. *Held*, M not having ceased to be a citizen of this State, did not lose or abandon his homestead exemption. *Lindsay v. Murphy*, 76 Va. 428.

Permanent non-occupancy—not temporary—is abandonment of homestead, in Wisconsin. *Estate of Phelan*, 16 Wis. 76; *Herrick v. Graves*, 16 Wis. 166.

Sale by parents to a son, if they continue to occupy the homestead with

him, would not forfeit the protection of the homestead right, though he be a single gentleman. *Murphy v. Crouch*, 24 Wis. 367.

A wife, driven from the homestead by the cruelty of her husband, does not lose her homestead right therein. *Barker v. Dayton*, 28 Wis. 367; *Keyes v. Scanlan*, 63 Wis. 345.

A widow who has lost her exemption right by remarriage, may yet recover the rents which accrued during her widowhood. *Anderson v. Coburn*, 27 Wis. 558.

1. Duress.—A bill in equity cannot be maintained by a married woman to vacate and set aside a conveyance of the homestead, on the ground of duress practiced upon her by the husband in obtaining her signature to the conveyance, when the vendee is a purchaser for value, and was not privy to, did not connive at, or participate in, or have any notice of the duress. The title to the property and the right of homestead being in the husband at the time of the conveyance, the wife has no such interest in the homestead, during the husband's life-time, as would authorize her alone to maintain such a bill, even were the interposition of equity otherwise justifiable. *Vanceleave v. Wilson*, 73 Ala. 387.

Exemption—Decedent's Minor Child—Insolvency.—Where a deceased debtor left no surviving widow, but a minor

child as the only member of his family, such child had a right to occupy the homestead during minority, and, if the estate was declared insolvent during such minority, the homestead estate vested absolutely in the child, under the provisions of the act approved April 23, 1873; but, if the child attained its majority before the estate was reported insolvent, the right of homestead terminated with its minority, and was not revived and enlarged into an absolute estate by the subsequent insolvency. *Baker v. Keith*, 72 Ala. 121.

Proceedings instituted by the widow of a decedent in the probate court to have set apart to her a homestead exemption under section 1738 of the Code of 1852, no part of which contains any description whatever of the lands sought to be set apart as exempt, but in which blanks are left for such description, are absolutely void. *Tanner v. Thomas*, 71 Ala. 233.

Exemption in Favor of Widow.—Where the widow was allotted a homestead exemption in the lands of her deceased husband, after his estate had been declared insolvent, on an *ex parte* proceeding before the judge of probate, without notice to any one, such allotment does not rise to the dignity of a judicial determination against the rights of creditors; nor does it preclude them from showing that, as against their claims, she was not entitled to the exemption. *Corr v. Shackelford*, 68 Ala. 241.

Creditor: Is Person in Adverse Interest.—When commissioners, appointed at the instance of the personal representative, by the probate court, to set apart property as exempt for the benefit of the minor children of a decedent, make their report, a creditor is a "person in adverse interest," and may file written exceptions to the allowance of the claim. When on the day that a petition was filed by an executor to set apart property as exempt for the benefit of the minor heirs of a decedent, commissioners were appointed for the purpose, who reported ten days thereafter, an order of the probate court confirming their report on the same day, is unauthorized and should be vacated on motion. As the statutes require the issue formed on exceptions to such a report to be certified to the circuit court for trial, and expressly prohibit the probate court from exercising jurisdiction to try the right of homestead, its proceedings on the trial

of such exceptions, are *coram non judice*, and absolutely void. *Kelly v. Garrett*, 67 Ala. 304.

Claimant Not Injured by Verdict.—Where, in ejectment for one hundred and sixty acres of land, lying in two sections, eighty in each, and both contiguous, the plaintiff claims under a mortgage executed by the defendant, a married man, in February, 1873, without the signature and assent of his wife, to secure a debt then contracted, and the defense is, that the whole tract being exempt to the defendant as a homestead, the mortgage is void, and the defendant refuses to select a smaller quantity as his homestead exemption, he cannot complain of the verdict of the jury allowing him, as exempt, the eighty acres on which are his dwelling and appurtenances, the question having been fairly submitted to the jury as to what particular eighty acres were occupied by him as a homestead. *De Graffenried v. Clark*, 75 Ala. 425.

Contest of Claim.—When an execution, issue on a judgment in the circuit court, is received by the sheriff during the life of the defendant, but is not levied until after his death (Code, § 3213) and a homestead is thereupon claimed by the widow; the execution and claim are properly returned into the circuit court, where a contest of the claim may be originated and tried; and it is not proper that the contest should be originated in the probate court, and certified to the circuit court for trial. *Keel v. Larkin*, 72 Ala. 493.

When an affidavit is duly and regularly filed by a judgment debtor, claiming a homestead exemption in lands on which an execution has been levied, the plaintiff in execution, desiring to contest the claim, must file his affidavit of contest within ten days after notice that the claim has been filed (Code, § 2834), or the right to contest it is waived and lost. *Block v. George*, 70 Ala. 409.

Who may Contest.—When a widow files her petition in the probate court, claiming and asking the allotment of a homestead in the lands of her deceased husband, her right may be contested by the personal representative of the husband, or by any person in adverse interest (Code, § 2841); but the object and purpose of the statutory contest is to separate the homestead lands from the lands subject to administration, and the title is not involved; nor can a mortgagee propound his interest, and try the validity and priority of his

The earlier decisions of the several States which have homestead laws are of comparatively little importance, owing to the frequent and radical changes in the constitutions and statutes of most of them (particularly in the western and southern States, which generally have more liberal exemption laws than the rest) since the close of the late war. Indeed, within the past ten years, the changes have been so numerous and important that it is hardly safe to rely upon any decision without reference to the statute under which it was rendered.

2. Sale—Defenses.—In an insolvency proceeding in California a sale of the homestead of the debtor is void.¹ A sale there by a widow does not estop her from having a homestead set out to her by the probate court out of some of the same land for which she had given the purchaser a quit claim deed.² When such court has set apart a homestead to the husband after his wife's death, the title is not affected, and, being in him, is liable for his debts.³

mortgage as against the widow's claim of homestead, either in the probate court, or in the circuit court on certificate from the probate court. *Coffey v. Joseph*, 74 Ala. 271.

If exceptions are not filed within the prescribed time, the court has no power to allow them to be filed afterwards; and an order of continuance, though made by consent, and stated in a subsequent entry to have been made "without prejudice," does not enlarge the time within which exceptions may be filed. *Farley v. Riordon*, 72 Ala. 128.

Flea of, Against Mortgage.—If in an action to enforce a mortgage executed during the life of the constitution of 1861, the defendant pleads that the mortgaged property was his homestead, the burden of proof is upon him. *Webb v. Davis*, 37 Ark. 551.

1. Insolvency Proceedings.—An order of the court in an insolvency proceeding for the sale of the homestead of the insolvent is without jurisdiction, and a sale thereunder passes no title. *Barrett v. Sims*, 62 Cal. 440.

2. Estate of Deceased Persons.—A quit-claim deed made by a widow after the death of her husband furnishes no ground for the refusal of the probate court to set apart to her as a homestead, from the separate property of the deceased, a portion of the same land conveyed by said deed. *Estate of Moore*, 57 Cal. 437.

3. Succession.—Under section 4 of the Homestead Act of 1862, the homestead selected by the husband and wife, or either of them, upon the death of either, vests absolutely in the sur-

vivor and is subject to his debt subsequently contracted. The fact that the probate court, after the death of the wife, sets the property apart as a homestead for the benefit of the surviving husband and children does not affect the question. The purpose and effect of the order is merely to relieve the property from administration, and it does not affect the title. *Watson v. Creditors*, 58 Cal. 556.

Foreclosure.—G mortgaged land to S for \$5,000 and afterwards filed a declaration of homestead on the mortgaged property and other property contiguous thereto (the whole property being of the value of \$16,000). Under a judgment in an action of foreclosure, subsequently commenced against G (his wife not being a party), S purchased the mortgaged premises and received a deed, and G delivered possession of the premises to him. In action of ejectment by G and wife, *held*, that it was clear, upon the face of the declaration of homestead, that it was not intended thereby to assert a title hostile to that held under the mortgage, but one in subordination to it, and that judgment was rightly entered for the defendant. *Graham v. Oviatt*, 58 Cal. 428.

Forced Sale.—The homestead (except in the cases enumerated in section 1241, Civil Code), no matter what may be its actual value, cannot be subjected to execution or forced sale, except in the manner pointed out in sections 1245 and 1259, Civil Code. *Barrett v. Sims*, 59 Cal. 615.

Setting Apart Homestead—Error.—After the probate court has set apart a

In Colorado, where the word "homestead" must be written on the margin of the title to the land thus selected as exempt (as it was shown under the first head of this article), it is necessary to the defense of the beneficiary in an action for the recovery of the property, that he aver that such inscription on the margin was duly made.¹

homestead for the use and benefit of the surviving wife and children of the testator, it ceases to have any control over the property set apart. *Held*, accordingly, that an order of the court in relation to a homestead after it is set apart, though it could not in any way affect the rights of the surviving widow, might, possibly, operate to her prejudice by raising a doubt as to her title, and was, therefore, erroneous. *Estate of Hardwick*, 59 Cal. 292.

Mortgage.—(1) In probate proceedings to set apart to a widow a homestead created by declaration during the lifetime of the husband, the court cannot pass upon the validity of mortgages upon the homestead property. That question must be tested by proceedings for foreclosure. (2) A decree declaring the homestead as set apart subject to the liens of the mortgages is unauthorized. *Chalmers v. Stockton Building, etc., Soc.*, 64 Cal. 77.

Probate Proceedings.—The setting apart of a homestead in the course of probate proceedings has no effect upon the title to the land, and an adverse claim of title cannot be interposed to defeat an application for that purpose. *Estate of Burton, deceased*, 63 Cal. 36.

Judgment Lien.—Action against the sheriff and a judgment creditor to enjoin the sale under execution of land claimed as a homestead. The plaintiff acquired the title to the property on November 3, 1880, in exchange for land previously occupied by himself and wife as a homestead. A declaration of homestead upon the property in dispute was drawn at the same time with the deeds of exchange, and the three instruments were at the same time in regular succession executed and acknowledged and filed for record—the deed from the plaintiff being recorded at four minutes, the deed to the plaintiff at six minutes, and the declaration of homestead at eight minutes past three P. M. of November 3, 1880. The judgment upon which the execution was issued was entered November 9, 1878, and was docketed, but the date of the entry in the docket did not appear

therefrom. The execution was issued November 6, 1880. *Held*, the land was not subject to the lien of the judgment. *Eby v. Foster*, 61 Cal. 282.

1. The separate plea of a married woman which sets up the homestead law of Colorado as a defense against an action for the recovery of real estate is bad if it fails to aver that the word "homestead" is written on the margin of the recorded title of the premises occupied as a homestead, as required by law, even if it also aver a defective acknowledgment by the wife. *Goodwin v. Colo. Mort. Inv. Co.*, 110 U. S. 1.

Wife's Rights After Sale Under Mortgage.—The wife having joined in the deed of mortgage of the husband conveying the homestead, and both parties in such deed having expressly waived all benefit of exemption and homestead, and stipulated that the land conveyed shall never be claimed to the prejudice of the grantees, she having also upon a separate examination acknowledged that she made herself a party to the deed for the purpose of conveying all of her estate *in esse* or *in futuro*, cannot, upon the death of her husband, either as heir-at-law or as executrix of his will, resist a sale under a decree based upon said mortgage upon the ground that it was a forced sale, or that the homestead had not been alienated with the joint consent of the husband and wife. *Quære*: whether in case of a testate estate the widow as heir has in any case an equity to claim the benefit of a homestead exemption enjoyed by the husband? *Hart v. Sanderson*, 18 Fla. 103.

A conveyance of land and other property in form, an absolute deed of bargain and sale in consideration of an indebtedness secured by a prior mortgage (held by the grantee, who is in possession under a lease), and of subsequent advances, said deed being executed under circumstances inducing the grantor to believe that it is intended as a security for the money named as the consideration, and the prior mortgage being foreclosed by the grantee for

3. Applications for Homestead, etc.—The head of a family is the proper applicant in Georgia. Where other beneficiaries filed a bill to recover the homestead, assigning no reason why he was not a party, it was held demurrable.

He may re-apply for homestead when the first application proves invalid because some creditor has been omitted in the notice.

Applications were passed upon by the ordinary (the probate judge) under the former constitution; and it was held that he could not act without a new notice, in case he let the appointed day pass without action or order of continuance.

When a married woman makes application, she must state whether the homestead is to be carved out of her own property, or that of her husband. It may be from real estate belonging to both, and, in such case, her application should show that fact.¹

the entire amount named as the consideration of the deed, the mortgagor, a married woman, consenting thereto, and the prayer of the bill asking for a decree of sale, and that the proceeds of the sale be applied to pay the complainant the amount of money named as the consideration of the deed and interest thereon, and the surplus, if any, to be paid to the grantors—such deed will be deemed a mortgage. *Shear v. Robinson*, 18 Fla. 379.

1. Application for Homestead, Etc.—Under the act of 1868, an applicant for homestead and exemption, under the constitution of that year, was required to make a schedule of the personalty which he wished exempted, and the ordinary was required to issue an order to the county surveyor to set apart under oath lands of the applicant not exceeding \$2,000 in specie, and to survey and plat the same, and when he returned this plat under oath, if objections were filed, the ordinary should approve the schedule of personalty and the return of the surveyor, which was then turned over to the clerk of the superior court for record; if objections were made by a creditor of the applicant, assessors were appointed, and from an approval of their return an appeal could be taken. There was no requirement of a petition, or that it should state that the applicant was the head of a family. *Hardin v. McCord*, 72 Ga. 239.

The head of a family was the proper party to sue for the recovery of a homestead under the act of 1876, in the absence of any good reason to the contrary; and a bill brought by certain

beneficiaries to recover the homestead, without any reason being shown why the head of the family was not a party complainant, was demurrable. A homestead having been sold in 1873, and suit brought by certain beneficiaries to recover it in July, 1876, it was too late in 1880 to amend by making the head of the family a party complainant. *Shattles v. Melton*, 65 Ga. 464.

Where a homestead has been set apart in certain property, but the proceeding is void as to a certain creditor for want of notice to him, the head of the family may re-apply, give him notice and have the property set apart as against him. The first proceeding not working an estoppel against the creditor without notice, does not estop the family from having a homestead set apart as against him. *Wheeler, etc., Co. v. Christopher*, 68 Ga. 635.

Where, upon application for a homestead under the constitution of 1868, the ordinary fixed a time and place for passing upon the same, and on that day he was absent from the county, and no provision for a continuance was made, he could not subsequently, without further notice or order, approve the application and grant the homestead. *Brady v. Brady*, 67 Ga. 368.

Married woman applying must show out of whose property asked. *Langford v. Driver*, 70 Ga. 588.

The limitation provided by the act of 1876 for the bringing of suit to recover homesteads previously sold made no exception in favor of minors and married women, and it operated upon their right of action as upon that of persons

visi juris. Pittman v. Matthews, 66 Ga. 600.

Trespass against an officer for wrongful levy on homestead property may be maintained by the wife or family of the debtor without making the debtor himself a party plaintiff. McWilliams v. Anderson, 68 Ga. 772.

A judgment debtor, with the consent of his wife, conveyed land to another creditor as a security for his debt, taking a bond for reconveyance on payment thereof; subsequently his wife had the land set apart as a homestead. The holder of the security recovered judgment, filed a deed, and had the land levied on and sold. Held, that the homestead was good as against the senior judgment, but not as against the junior; and in a contest over the fund arising from the sale, the latter would have precedence. Moore v. Frost, 63 Ga. 296.

Equity has exclusive jurisdiction of suits for recovery of exempted property voluntarily sold prior to act of 1876. Zellers v. Beckman, 64 Ga. 747.

Husband is head of family and is proper person to bring suit. Zellers v. Beckman, 64 Ga. 747.

Partnership and Tenancy in Common.—Partnership, debt due to, statement of one member as creditor, and notice to him, not bind firm. Boroughs v. White, 69 Ga. 841.

Where an undivided interest in land was sold at sheriff's sale, subject to the homestead right of the defendant in *fi. fa.*, the homestead could not be set apart until after partition was made and then the homestead could be laid off out of the part allotted to the purchaser. Where the undivided interest of a tenant in common was sold under a *fi. fa.* against him, subject to his right of homestead, he could not agree with the purchaser to include in his homestead the improvements on the place to the exclusion of his co-tenants, before partition. King v. Dillon, 66 Ga. 131.

A wife and children who were beneficiaries of a homestead set apart from the estate of the husband and father were not concluded by a judgment subsequently rendered by the ordinary against him on a settlement of an estate of which he was executor. In a claim case arising upon a levy under such judgment, the beneficiaries of the homestead could attack it,—certainly so as to defects on the face of it rendering it invalid in whole or in part. Merritt v. Merritt, 66 Ga. 324.

Deed void for usury, to establish homestead right in opposition to, neither payment nor tender of the debt which deed was made to secure, is necessary. Tribble *et al.* v. Anderson, 63 Ga. 31; see McCaskill v. Lathrop, 63 Ga. 96.

Receiver for excess of husband's property, where wife applies for exemption out of his property, with his consent. Receiver appointed, although application for homestead continued. Husband made party to application for receiver, cannot object to *pro hac vice* judge presiding. Landrum v. Chamberlin, 73 Ga. 727.

The homestead right cannot be defeated by a deed void for usury nor can a like result be accomplished under the same instrument by calling it an equitable mortgage. Anderson v. Tribble, 66 Ga. 584.

Where a homestead is set apart subject to a debt for purchase money, specified as being held by a certain creditor, the applicant could claim nothing as against such debt, either principal or interest, by virtue of such homestead. After a homestead had been thus set apart, if the wife subsequently applied for a supplemental homestead out of the same property, as being the property of her husband, she would be estopped by his admissions made *in judicio*, and could obtain no greater exemption from such claim than could her husband, had he applied himself. Palmer v. Simpson, 69 Ga. 792.

A mortgagee without notice, actual or constructive, of the homestead character of the property mortgaged, will be protected against a claim of the beneficiaries of the homestead. Roberts v. Robinson, 63 Ga. 666.

The making of a deed to homestead property by the head of a family as an individual, did not estop him from resisting, in his representative character on behalf of the beneficiaries of the homestead, an ejectment suit founded on such deed. Hall v. Matthews, 68 Ga. 490.

Under Art. IX, § VIII, par. 1 of the constitution of 1877, a deed conveying homestead which had been set apart under the constitution of 1868, and the acts passed thereunder, is not void. When the consideration of a deed conveying a homestead set apart under that constitution was to secure a debt which was superior to the homestead, the title passed. Gunn v. Wade, 65 Ga. 537.

4. Fraud, Etc.—In Illinois it is held that a homestead right is not affected by a fraudulent conveyance. Nor is it defeated by a failure to set apart a homestead before sale under execution as required by statute, for the law is held to be directory only. Not being inhibitory, a non-compliance with its provisions will not strike the sale with nullity, nor prevent a chancery court from adjusting the rights of the parties thereafter.¹

Where a party, in August, 1856, was arrested under a *ca. sa.*, filed his schedule of property liable to sale, and it was sold, and he discharged under the act for the relief of honest debtors, leaving him in possession of fifty acres of land, which he held until the death of his wife, and the arrival at age of his children, it was no longer under the operation of the exemption law of 1822 and the amendments thereto. A subsequent marriage of such a party would not re-establish the exemption so as to inure to the use and benefit of the second wife; to be enjoyed it must be renewed. Therefore, a deed by the husband and the wife of the same to secure a debt contracted in 1875, was a valid agreement, and the debt must be paid before any equitable rights therein can accrue to the grantors, and poverty and age alone, distressing as they are, cannot create an equity in such grantors sufficient to defeat their deed. *Wright v. James*, 64 Ga. 533.

1. Fraudulent Conveyance.—Neither fraud, nor even the commission of a criminal offence, can work a release or forfeiture of the right of homestead. Such release or forfeiture can only be accomplished in the manner provided by the statute. Pending a suit for the recovery of damages, the defendant and his wife, for the purpose of hindering and delaying the plaintiff in the collection of any judgment he might recover, conveyed certain premises occupied by them as a homestead to another, releasing the right of homestead. Thereupon that grantee, in furtherance of the fraudulent purpose of the first deed, conveyed the premises to the defendant's wife. The plaintiff recovered a judgment for a considerable sum, and sued out execution thereon, which was levied upon the premises so fraudulently conveyed; he became the purchaser at the sale, and in due time obtained a sheriff's deed. Subsequently he filed his bill in chancery to set aside these fraudulent conveyances, insisting whatever homestead right had existed was extinguished by the fraudulent conduct of

the parties. But it was *held*, the wife of the defendant in the suit at law, to whom the second conveyance was made, acquired by such conveyance a homestead right for herself and family, in the premises, to the value of \$1,000, which she could hold, notwithstanding the fraudulent character of the conveyances, free from the claims of complaint and all other creditors. *Leupold v. Krause*, 95 Ill. 440.

Same—Failure to set off on Sale under Execution.—Where premises occupied as a homestead are sold under execution, without a compliance with the requirements of the statute in regard to setting off the homestead, the irregularity will operate to defeat a recovery in ejectment in favor of the party claiming under such sale. But this statutory requirement is simply directory—not prohibitory. A non-compliance with it will not render the sale void. So, if the sale be brought in question in a suit in chancery the court, in the exercise of its equitable powers, may adjust the rights of the parties as the circumstances may seem to require. So, where a judgment creditor became the purchaser at a sale of premises occupied as a homestead, under an execution issued upon his judgment, the officer not having complied with the statutory requirement in the setting off of the homestead, and he subsequently filed his bill in chancery to set aside certain fraudulent conveyances made by the debtor and others, upon the question as to the right of homestead and the validity of the execution sale, it was *held*, that the sale would not be treated as void by reason of the irregularity, but the relief sought would only be granted upon equitable terms in respect of the homestead, and if, in consequence of the irregularity, the premises were sold at a sacrifice, the sale should be set aside upon payment of complainant's judgment, if the parties interested should be willing to pay the same. *Leupold v. Krause*, 95 Ill. 440.

Manner of Asserting Right.—Where a bill in chancery, in seeking relief

The fee being in the holder of a deed of trust, he brought ejectment against a widow who claimed homestead right in the property conveyed by the deed; and the court sustained her right, and held it continuous during the minority of her youngest child. This judgment was ineffectually pleaded in bar to her claim, when another action of ejectment had been brought against her, after that child had become of age.¹

5. Rights of Widow.—The heirs of a decedent filed a bill for partition and alleged that his widow was entitled to homestead, and prayed that the partition be made subject to her right. The court held the allegation sufficient to warrant the granting of the homestead to the widow, after default had been decreed.² But

against one who is occupying the premises involved, as a homestead, discloses the fact that the homestead right is involved in the litigation, it is not necessary the answer should allege the same facts. *Leupold v. Krause*, 95 Ill. 440.

1. Of Widow Not Terminated by Marriage.—The right of a widow to the homestead of her deceased husband as against deeds of trust given by her and her husband while the homestead acts of 1851-7 were in force, which deeds fail to release the homestead, is not defeated or lost by her subsequent marriage, but continues until her death, unless it is released under the statute or waived by abandonment. *Yeates v. Briggs*, 95 Ill. 79.

Former Adjudication.—In an action of ejectment by a party claiming under a deed of trust against a widow, for the recovery of premises claimed as a homestead, the court found in its judgment the fee to be in the plaintiff, subject to the right of homestead in the defendant until her youngest child should arrive at the age of twenty-one years. After the majority of such child another action of ejectment was brought against her and the former judgment was interposed as a bar to her right. *Held*, that such finding was no bar to the assertion of her right to the homestead in the second action. That part of the judgment fixing the duration of her right of homestead was a nullity, it being a finding as to a matter not involved in the prior action. *Yeates v. Briggs*, 95 Ill. 79.

Tenancy in Common.—Where a man dies in the occupancy of premises as his homestead, leaving a widow and heirs in possession, and the premises exceed the homestead estate in value, and the homestead is not set off and

specifically defined, the widow and the heirs, until severance of their interests, will hold as tenants in common, and on sale of the inheritance by the administrator for the payment of debts the purchaser will take the place of the heirs, and become a tenant in common with the widow as to her homestead estate. *Montague v. Selb*, 106 Ill. 49.

Purchase of Outstanding Title.—One co-tenant cannot take advantage of any defect in the common title by purchasing an outstanding title or incumbrance, and asserting it against his companions in interest; but in such case the purchase is, notwithstanding the design of the purchaser to the contrary, for the common benefit of all the co-tenants,—and this rule applies whether the several interests accrue under the same instrument or act of the law. It is founded on the duty which the connection of the parties as claimants of a common subject creates. *Montague v. Selb*, 106 Ill. 49.

A purchaser of land at administrator's sale, in which land the widow of the intestate has a homestead estate in the equity of redemption, cannot cut off the widow's right of homestead by the subsequent purchase of a certificate of purchase given on a sale under a decree foreclosing a mortgage given by the intestate and wife, in which the homestead is released, and taking out a master's deed for the land, such purchaser and the widow, in respect to her homestead estate, being tenants in common. The purchaser will hold such after-acquired title in trust for the common estate, and the widow will be entitled to avail of it upon making ratable contribution of the amount paid out for it. *Montague v. Selb*, 106 Ill. 49.

2. Schaefer v. Kienzel, (Ill.) 15 N. E. Rep. 164.

if partition cannot be made without proving injurious, and the widow consents to the sale of her homestead, including her dower, for a moneyed consideration, she is not absolutely entitled to a thousand dollars out of the proceeds as the measure of her homestead right. This was held where the homestead was a life estate with the remainder in the heirs of the deceased husband, and her interest was the right to occupy the land to the extent of the limitation of value (\$1,000) while she lived. The value of this interest must be estimated and paid, or a thousand dollars of the proceeds invested and the interest paid to her during her life.¹

1. Value of Widow's on Sale in Partition.—On bill for the partition of land, where partition cannot be made without injury, and the widow of the former owner of the premises consents, in writing, to the sale of her homestead and dower therein, and agrees to take a sum in gross for her interests, it is erroneous to give her \$1,000 of the proceeds of the sale absolutely. Her estate of homestead being only a life estate, with the remainder in the heirs of the deceased owner, the value of her life estate, or right to occupy land of the value of \$1,000 during her life, must be ascertained according to the usual mode of determining the value of life estates in similar cases, or the \$1,000 must be invested and the proceeds thereof paid over to her during her life, leaving the principal for the heirs at her death. *Merritt v. Merritt*, 97 Ill. 243.

Estoppel: Judicial Sale.—Where no special execution the sheriff (defendant) sold a quarter-section of land belonging to plaintiffs, forty acres of which was their homestead, and, after satisfying the special execution, he in good faith, without notice, claim, objection, or direction by plaintiffs to the contrary, applied the surplus on other executions in his hands, *held*, that by thus standing by and allowing the sheriff to so appropriate and pay over the surplus, plaintiffs must be regarded as having abandoned all claim to their homestead rights, if any they had, in the surplus, and cannot now recover such surplus from the sheriff. *Brumbaugh et al v. Zollinger*, 59 Iowa 384.

Change of.—Defendant sold his homestead in June, but did not give possession until the following February. About a month before giving possession he bought the house and lot in question, with the intention of making it his homestead, and he moved into the house, with his family, on the fifteenth of February. Prior to moving in, how-

ever, he contracted to sell and convey the property to plaintiff, but his wife did not concur in and sign the contract, and nothing was paid on it. *Held*, that the property was invested with the homestead character from the date of the purchase; that defendant had a reasonable time from that date to make the change and move his family into the new house; that the contract for the sale and conveyance was void, because not signed and concurred in by the wife; and that plaintiff was not entitled to a decree for the specific performance of the void contract, nor to damages for the breach thereof. *Cowgell v. Warrington*, 66 Iowa 666.

Partner in Firm Property.—One partner cannot acquire a homestead in real estate belonging to the firm of which he is a member, and hold the same exempt from judicial sale for the satisfaction of the debts of the partnership. So, where M, in his own name, but for the use of the firm of M & P, held a contract for a deed for the property in question, and, while he with his family was occupying the property, he assigned the contract to C, S & Co., to secure certain notes which the firm was owing them; and upon the maturity of the contract C, S & Co. procured a deed for the property, and afterwards conveyed it to plaintiff, *held* that, if plaintiff was not entitled to recover possession of the property (which M and family still occupied), he was at least entitled to a judgment against M for the amount of the notes (which remained unpaid) to C, S & Co., and to a special execution for the sale of the property to satisfy the judgment, notwithstanding M's wife did not join in the assignment of the contract to C, S & Co. *Drake v. Moore*, 66 Iowa 58.

Estates.—A widow may take her distributive share of the real estate owned by her husband, or she may occupy the homestead for and during her

life, but she cannot take both; and her occupancy of the homestead for more than ten years should be regarded as an election to take the homestead for life, instead of a distributive share or dower. *Conn v. Conn*, 58 Iowa 747.

Decree of Consent.—Where a decree is rendered by consent of all the parties, it is not void as between the parties because some other person not made a party should have been made a party, nor void because it did not give to the parties just what the petition of the plaintiff stated should be given to each of them, and what ought to have been given to each of them, nor void because it embraced causes of action which should not have been joined, nor void for fraud as against a party who was not guilty of committing any fraud and who did not get by the decree as much as he was entitled to, nor void as against an innocent party because some of the parties were minors, and their guardian *ad litem* was an attorney for still another party, who had an antagonistic interest. *Schermerhorn v. Mahaffie*, 34 Kan. 108.

Wife: When no Interest.—Where a trustee has merely the naked title to real estate, and the *cestui que trust* is in actual possession thereof, and the trustee, who is a married man, executes a conveyance to the *cestui que trust*, and the premises have never been occupied as a residence by the family of the trustee, the wife of the trustee can claim homestead interest in the premises so conveyed. *Osborn v. Strachan*, 32 Kan. 52.

Entire: Willed to Wife.—Where a husband and a wife occupy a piece of land as a homestead, the title being in the husband, the husband may execute a valid will giving the entire property to his wife. *Martindale v. Smith*, 31 Kan. 270.

When Wife may have Writ of Entry.—Under a deed of land to "S D, wife of A D," "to be held by said D as a homestead," *habendum* "to the said S D and her heirs and assigns, to her and their use and behoof forever," the wife acquires a homestead; and if, after she has ceased to live with her husband, and has obtained an absolute divorce from him, he continues to occupy the premises, no order having been made in regard to the land in the divorce proceedings, she may recover possession of them from him by a writ of entry. *Dunham v. Dunham*, 128 Mass. 34.

An estate of homestead, under the St.

of 1855, ch. 238, does not exist in land held in common and undivided. While the St. of 1855, ch. 238, was in force, a parcel of land was purchased by a firm with a view to its occupancy by one member as his home. Immediately after the purchase, the amount was charged to this member on the books of the firm, and he took possession of it and occupied it. After the repeal of the St. of 1855, the other partner released his interest to the one in possession. *Held*, that no estate of homestead was acquired under the statute. *Holmes v. Winchester*, 138 Mass. 542.

Whether lands can rightfully be sold to pay debts of a decedent, subject to a homestead right, *quære*. If such sale is ordered and made, however, it is not absolutely void, and cannot be attacked collaterally, but is only voidable on appeal. A widow may have dower set off in lands which are subject to a homestead right, and this will not estop her from claiming the homestead afterwards. A widow is not estopped from claiming a homestead in lands by the fact that she desired its sale for the payment of debts, and requested a party to buy the land, and received from the proceeds the amount of a claim allowed in her favor. *Estoppel in pais* has no application to interests in lands. Moreover, it must be presumed that the sale the widow desired was a sale subject to the homestead. The acts of the widow in moving away from the homestead for a time, or in neglecting to claim it, cannot deprive the minor children of the right to claim it. If she neglects or refuses to assert their claim, it may be done by some other proper representative. Minor children are not necessary parties to a suit brought by the widow, their mother, to recover the homestead, though it is proper to join them. *Showers v. Robinson*, 43 Mich. 502.

The claim of a widow to a homestead right, in behalf of herself and her children, does not bring in question the validity of an administrator's sale of the same land to pay debts of the intestate, since the sale must be deemed made subject to the homestead right. *Showers v. Robinson*, 43 Mich. 502.

A wife has no equity to interpose her homestead right against a chattel mortgage which she has not signed, where it is given for moneys advanced for the purpose of establishing the homestead. *Fournier v. Chisholm*, 45 Mich.

6. Attachment Lien—Husband and Wife.—In an attachment suit the homestead of the defendant was sold to effectuate the attachment lien. The defendant and his wife claimed that the sale was

A grantee cannot set up and rely upon a homestead right which his grantor had not made specific for his own benefit. *Constantine Bank v. Jacobs*, 50 Mich. 340.

Sale—Sunday Contracts.—A man agreed to sell a piece of land on which he lived and which exceeded a statutory homestead. The family moved to another place and the purchaser made payments after the removal, which were accepted, the last being made after the vendor's death to his widow. *Held*, that the vendor's devisees could not contest the contract on the ground that it was for the sale of the homestead. *Lamore v. Frisbe*, 42 Mich. 186.

Proceedings to Recover Possession.—Questions of title are not triable in mere summary proceedings before a circuit court commissioner to recover possession of real estate; and a homestead right, though not strictly an estate, sufficiently involves the question of title to fall within this rule. *Riggs v. Sterling*, 51 Mich. 157.

Estate of Surviving Husband or Wife.—Under the provisions of Laws 1876, ch. 37, § 2, the estate or interest of the surviving husband or wife in the exempt homestead is not subject to be divested by the will of the deceased owner; *held*, that the interest acquired by the survivor in such homestead is an estate for life, with no limitation upon the manner of its enjoyment; but the homestead premises are transmitted to the survivor by operation of law, and may thereafter continue to be occupied as a homestead or not, as the interest and convenience of such survivor may require. *Holbrook v. Wightman*, 31 Minn. 168; *Eaton v. Robbins*, 29 Minn. 327.

Unascertained—Mortgage by Husband.—Y (a married man) owning a block of twelve city lots, in which he had an unselected and unascertained homestead, executed a mortgage of the entire block. *Held*, that the holder of the mortgage (overdue) may properly maintain an action for foreclosure, in which he may have the homestead ascertained and set off, and the remainder of the block sold to satisfy the mortgage. *Coles v. Yorks*, 31 Minn. 213.

Separate Estate and Insurance Money.—A widow, whose separate estate

owned by her at the time of her husband's death, together with an amount collected upon a policy of insurance on her husband's life taken out by him for her benefit, equals in value the interest which she would be entitled to in her husband's estate if left without any property, has no right under the Code of 1880 to share in a homestead devised to another by her deceased husband. *Osburn v. Sims*, 62 Miss. 429.

Estoppel: Attornment.—The fact that A, the vendee of homestead property which was afterward sold under execution against the vendor, recognized the validity of the latter sale so far as to attorn to the purchaser at the sheriff's sale, does not estop him from asserting his rights by a proceeding to set aside the sheriff's deed. *Beckmann v. Meyer*, 75 Mo. 333.

Minor: Ejectment.—A mother of a minor child cannot by her conveyance dispose of their homestead, and if she convey it and dies, ejectment will lie on behalf of the minor to recover its possession. *Rogers v. Mayes*, 84 Mo. 520.

Under the statute of 1865 the husband could not dispose of his homestead by will, and where there were no children the widow took an absolute title, which would go to her heirs. *Schneider v. Hoffmann*, 9 Mo. App. 280.

Administrator's Sale.—An administrator's sale will not divest the homestead right of the widow and minor children of the decedent, unless it is made to pay debts contracted before the filing of the deed under which they claim. The burden of proving that it was so made rests upon one denying their right. *Rogers v. March*, 73 Mo. 64.

The report of appraisers, made in a proceeding under the statute to subject the residue of real estate claimed as a homestead to the satisfaction of an execution, is not conclusive as to the value of the realty, but may be set aside in a direct proceeding for that purpose. To prevent a sale of the homestead, a severance may be effected by setting out the homestead, subject to a perpetual easement of way over it, where this can be done without greatly depreciating the value of the premises or greatly inconveniencing the parties. *Schaeffer v. Beldsmeier*, 9 Mo. App. 438.

void under the laws of Nebraska, which exempt homesteads, and moved to set it aside, but were overruled. Resulting from these proceedings the following question was evolved in the circuit court (U. S.), sitting in the district of Nebraska: Was the judgment overruling the motion and confirming the sale a final adjudication of the homestead question? The court held that the question whether the premises were exempt as the homestead of the defendant and his wife, arose under the act of 1877, which vests the homestead right in the husband and wife jointly, and expressly provided that no conveyance or incumbrance of the homestead should be of any validity unless executed by both; and, therefore, it held that the wife was a necessary party to any proceeding to subject property claimed as a homestead to judicial sale. But, upon rehearing, it was found that the case was governable by a prior statute which did not require the wife's appearance as a party, and the sale was held valid.¹

7. Proceedings against Excess of Homestead Value.—When a designated and recorded homestead is worth more than a thousand dollars, in New York, there may be judgment creating a lien upon the excess; but the homestead cannot be sold under execution in the ordinary way. The judgment creditor may maintain a "judgment creditor's action" to obtain an order directing a sale of the property to enforce his lien upon the surplus. The court marshals the proceeds of such sale so that the homestead holder gets his thousand dollars, which sum is exempt for a year, unless he designate a new homestead meanwhile. Should he die before receiving the money the court may order its investment for the benefit of his widow and minor children as his succeeding beneficiaries.²

1. *Spitley v. Frost*, (Neb.) 15 Fed. Rep. 299, citing *Rector v. Bottom*, 3 Neb. 171; *State Bank v. Carson*, 4 Neb. 501. That the homestead law, in force when the contract was made, is to govern. *Dorrington v. Meyers*, 11 Neb. 388. "The practice in Nebraska seems to be to determine questions of this character upon the hearing of motions to confirm sales, made by sheriffs, under execution; and the rulings of the inferior courts of the State upon such questions have been regarded as final judgments, reviewable upon appeal or writ of error by the supreme court of the State. *Spitley v. Frost*, (Neb.) 15 Fed. Rep. 299; *Rector v. Bottom*, 3 Neb. 171; *Bawker v. Collins*, 4 Neb. 494; *Eaton v. Ryan*, 5 Neb. 47.

2. N. Y. Code Civ. Proc., §§ 1402-3. The validity of a homestead allotment cannot be impeached by evidence of matter *in pais*, but the aggrieved party, creditor or debtor, must make a direct application to the court to which the

execution and allotment are returned. *Burton v. Spiers*, 87 N. Car. 87.

In 1869, the plaintiff's intestate obtained judgments against the ancestor of the defendants, on debts contracted in 1866, and a homestead was allotted to the defendant, which, at his death, was re-allotted to his infant children, the present defendants. A petition was filed by the debtor's administrator to sell the homestead to make assets to pay the judgments; *held*, 1st, that by assenting for so long a time to the homestead allotment, and by availing themselves of the provision of the statute, which prevented their judgments from being barred, the creditors were precluded from denying the right of the infants to the homestead; 2d, that the creditors were entitled to have the reversion after the determination of the homestead, not the absolute estate in the land, sold to pay their debts. *Cobb v. Halyburton*, 92 N. Car. 652. See *McDonald v. Dickson*, 85 N. Car. 248; *Albright v. Albright*,

8. Exemption in Pennsylvania.—When real estate had been executed for its purchase money, in Pennsylvania, by mortgage foreclosure, and the debtor had notified the sheriff that he claimed his right of exemption under the act of 1849, and claimed an appraisal, he was held entitled to the proceeds, less the judgment and costs (which did not exceed \$300) in preference to judgment creditors on debts contracted subsequently to July 4, 1849. While the sheriff had no authority, under the writ of *levari facias*, to hold the appraisal, it was held that the omission of it did not debar the debtor's exemption claim upon the proceeds of the sale as against the judgments and liens other than that on the mortgage given for the price of the homestead; and that the failure of the legislature to prescribe any form for making such claim, did not affect the claimant's right itself, as conferred by statute.¹

88 N. Car. 238; *Markham v. Hicks*, 90 N. Car. 204.

A mortgagor is entitled to a homestead in an equity of redemption, and if the land is certainly of greater value than the mortgage debt, the homestead may be assigned by metes and bounds, but if by doing so the value of the homestead would be impaired, it is competent to order a sale, and assign the homestead in the money arising therefrom. *Hinson v. Adrian*, 92 N. Car. 121.

The equity to have the securities embraced in a trust for the benefit of creditors of different classes, marshalled and appropriated in exoneration of the liens of the less preferred class is an equity against the debtor, and not against the doubly secured creditor. The right of the debtor to a homestead is superior to that of all creditors except so far as it may be impaired by the voluntary act of the claimant. *Pope v. Harris*, 94 N. Car. 62.

1. *Hill v. Johnston*, 29 Pa. St. 362. See *Peddle v. Hollinshead*, 6 S. & R. (Pa.) 277. The return of appraisers to lay off a homestead was handed to the sheriff, who retained it in his possession for sixteen days, until he received the surveyor's plat, without which the return was imperfect, when he filed both papers with the clerk of court for record, and within thirty days thereafter the creditors served exceptions. *Held*, that the exceptions were taken within the time allowed by law. Where an assignment of four hundred acres of land as a homestead had been, after trial, set aside as excessive, and new appraisers appointed, who assigned the same land and fifty-four acres additional, without affixing any valuation to

such homestead tract, the circuit judge determined that there was good cause shown against this second return, and ordered a new assignment. *Held*, that this court could not disturb this conclusion of the circuit judge. An order of the circuit court setting aside a return of homestead appraisers and directing a new appraisal, does not exhaust the power given to the court by the statute; this power may properly be exercised more than once when necessary to correct erroneous assignments. *Kerchner v. Singletary*, 15 S. Car. 535.

A debtor's land was sold under execution, and \$1,000 of the purchase money was reserved as a homestead exemption under an order of court requiring the sheriff to apply such money to the "purchase of a homestead for defendant, under his direction, and that he have leave to take title for the same in the name of his wife and in trust for his children." Subsequently the sheriff, by defendant's direction, paid the money to the purchaser of this land (who was the execution plaintiff), who made deed to such defendant as trustee for his wife and children, and at the same time took mortgage for a credit portion of the purchase-money. *Held*, that there was no trust created prior to the execution of this deed and contemporary mortgage; that the transaction was unobjectionable, and that the mortgage was entitled to payment before any application of the proceeds of sale to the purposes of the trust. *Elliot v. Mackorell*, 19 S. C. 238.

The homestead laws do not affect the statute of distributions. The title to property is not changed by its being designated as a homestead for the fam-

9. Rights of Widow.—Petitioners may show, when applying to restrain the execution of a judgment on a community debt of a decedent who was insolvent, that their grantor derived title to the land in litigation, through a partition proceeding, from the widow, and that he did not acquire his title as heir of the deceased insolvent.¹

When the widow had an allowance made her in lieu of homestead, from the estate of her husband, deceased, and when her claim for a balance of the allowance was met by the plea, on the part of creditors of his estate, that she had agreed with them and the administrator to accept certain assets in her hands in lieu of the allowance, the court sustained the defense, and held her claim to be stale.²

10. Widow's Rights Relative to a Trust Deed.—Two persons gave a trust deed to secure their obligation on land jointly owned by them. One afterwards purchased the interest of the other; and, at the purchaser's death, his widow claimed homestead in the land. It was decided that she could claim only to the amount of interest her husband had when the deed of trust was made, in the suit of the creditor to enforce the trust deed. The children of the deceased were held to be necessary parties. The land must be equally divided to effect partition between the widow and the creditor. Her homestead right might be satisfied out of her late

ily of one deceased, but such property remains subject to division under the statute of distributions. *Ex parte Ray*, 20 S. C. 246.

Where an appraisal of homestead is set aside by the court, and a new appraisal ordered, it is the circuit judge who must appoint the new appraisers, and it is no error of law in him to appoint those suggested by one of the parties in interest, without notice to the other party. Notice of exception filed by creditors to an appraisal of homestead, need not be served upon the judgment-debtor. *Ex parte Ellis*, 20 S. Car. 344.

The question of right of homestead may be determined under proceedings by rule against the sheriff. *Charles v. Charles*, 13 S. C. 385.

1. Widow's Title Transferred.—*Watson v. Rainy*, (Tex.) 6 S. W. Rep. 840.

Equitable Title.—The fact that parties establish a homestead on property which they hold by mere equitable title cannot subordinate the legal title to their equitable right; the homestead right is dependent on their title, and must stand or fall with it. *Pepper v. Smith*, 54 Tex. 115.

Pleading.—In a suit to foreclose a mortgage on land, an undivided interest

in which is claimed by the defendant, who asserts homestead rights, his plea setting up such interest, and stating facts showing his inability to designate before partition his homestead boundaries, presents a valid defense. *Jenkins v. Volz*, 54 Tex. 636.

Equity.—Where land claimed as a homestead is charged with equities and incumbrances antedating the purchase, the husband, acting in good faith, has the right to adjust such equities and incumbrances by substituting for them a new lien on the land. *Gillum v. Collier*, 53 Tex. 592.

2. Abandonment by Widow of Allowance.—An allowance was made to a widow from the estate of the deceased husband in 1855 in lieu of homestead. In 1880 her claim to an unpaid balance of such allowance was resisted by creditors of the estate, who pleaded an agreement between the creditors, the administrator and the widow, that she should be permitted to retain and appropriate assets in her hands, which she did appropriate, in lieu of the allowance, and that she abandoned all claim to the unpaid balance. *Held*, that the facts stated constituted a good defense to the claim; that the claim was a stale demand. *Tiebout v. Millican*, 61 Tex. 514.

husband's interest at the time the deed was executed. If this should prove impracticable, the part of the land subsequently improved by the erection of a dwelling should be assigned to her as a homestead for her and her husband's children, leaving them to adjust their conflicting rights among themselves thereafter.¹

1. A deed of trust was executed by two persons to secure a debt for which both were bound. The land conveyed was, at the time of the execution of the trust deed, owned jointly by the debtors. Afterwards, one purchased the interest of the other, and died, when his widow claimed homestead rights in the entire property. *Held*, that such rights attached only to the interest owned by her deceased husband at the time when the trust deed was executed. Improvements made by the deceased party with the separate funds of his wife upon the property, entitled her to protection *pro tanto*. All the children of the deceased party were necessary parties to an action by the creditor seeking an enforcement of the trust on the property. In effecting partition between the creditor and the wife of the deceased party claiming homestead rights, the property should be divided into two equal parts, if it can be done without reference to increased value created by improvements made with the wife's separate money. If this cannot be done, then that part on which her dwelling-house stands should be set aside to her and the children of the deceased husband, without prejudice to the rights of herself and children thereafter to adjust their respective rights therein, and the other half should be subjected to sale through the probate court to satisfy the debt. *Griffie v. Maxcy*, 58 Tex. 210.

The surviving wife, though without children, is entitled to the protection afforded the homestead from forced sale after the husband's death, so long as she uses it as homestead, or she may exchange it for another homestead, which will receive like protection. And it would seem that if the old homestead is sold with the intention of reinvesting the money in another, the unpaid purchase money cannot be reached by garnishment, or subjected by other process to the payment of debts. *Watkins v. Davis*, 61 Tex. 414.

When the statutory bar, as affecting the homestead property, is complete as against the husband and the children who inherited the fee from the deceased father, the surviving widow cannot enforce a homestead right which has no

estate to support it. *Smith v. Uzzell*, 61 Tex. 220.

Trust Sale.—The owners of a homestead made an absolute conveyance thereof with full warranty, taking from the apparent purchaser a promissory note for the deferred payment, with a trust deed on the property to secure its payment. Afterwards, the original vendors transferred and indorsed the note to H for value, who, in default of payment, procured the trustee to advertise and sell the property at public sale, at which H became the purchaser, receiving a deed from the trustee. In a suit by H to recover a balance still due on the note, from the original owners of the homestead and their apparent vendees, the latter set up homestead rights, and, among other defenses, that the conveyance by them was not real, but colorable, being resorted to as an expedient to raise money by negotiating the note for the deferred payment and that H caused this course to be resorted to, and knew the real character of the transaction. *Held*, If H had notice that the conveyance was made to the apparent vendee by the owners of the homestead, not on a real consideration, but that it was accepted by him for their accommodation and as a means of enabling the owners to procure money, then the deed to the apparent purchaser divested as to him no homestead rights of the original owners. If H had no such notice he could rely on the deed from those claiming the homestead, as having been sufficient to divest them of all interest in the property, and this even though the vendors had remained in possession of the property after executing the deed. *Hurt v. Cooper*, 63 Tex. 362.

The surviving widow occupying with her children a homestead in which she had at least a community interest, executed a deed of trust thereon in 1874 to secure her creditor. In trespass to try title brought against her by the purchaser at trust sale, *held*: If the property was the separate estate of the surviving widow, the deed by the trustee to the purchaser at trust sale passed the title. If the widow owned

but a community interest in the homestead, the purchaser at trust sale acquired that interest, and had equal estate and possessory right with the children of the marriage. *Grothaus v. De Lopez*, 57 Tex. 670.

Collusion between Husband and Wife.

—When collusion was charged by the wife between her husband and his vendee of land, on which she claimed homestead rights, it was not error to exclude evidence of the husband's declarations as to where his homestead was, when the time and circumstances under which they were made were not specifically stated, and when it was not shown that they were made in her presence. *Newman v. Farquhar*, 60 Tex. 640.

Fraud.—A deed absolute in form as a conveyance of the fee, was procured from a married woman, who signed and acknowledged the same with her husband, and which purported to convey her homestead. She was unable to read. The husband was at the time in debt to the purchaser, and there was evidence showing that the wife believed the instrument she signed was to secure its payment, of which fact the grantee had actual and constructive notice, he designing to treat it as a deed absolute to himself. *Held*, that no estate was conveyed by the deed. *Ragland v. Wisrock*, 61 Tex. 391.

Equity, Secret Trust.—One embarrassed by debt conveyed by deed his homestead on a secret trust that it should be reconveyed, and continued to occupy it as a homestead, until after it was sold under execution against the vendor on a judgment rendered after the deed was made and under which appellee, the execution purchaser, claimed. The judgment was rendered on a debt contracted after the execution of the deed. When the deed was made the ostensible purchaser, who was to hold the property in trust to reconvey it, executed to the vendor his promissory notes, which were to be surrendered on a reconveyance, but which were after maturity transferred by such vendor to the appellant. These notes were by appellant afterwards surrendered to the secret trustee in consideration of a deed to the property which he made to appellant. In a suit by appellee, claiming under the execution sale, *held*: By the assignment of the notes, the original owner of the homestead evidenced his consent that the agreement between himself and the

secret trustee, and the assignee, should be carried out for the benefit of the assignee, and the original vendor was thereby estopped from denying the rights of the assignee, under the deed made to him by the secret trustee. The property being the homestead, the transaction was not one of which the creditors of the original vendor could complain, as to the secret trust, and notice of such secret trust on the part of the assignee of the notes could not affect the title conveyed to him by deed on their surrender. No title passed to the appellee who purchased at execution sale, the property remaining the homestead of the judgment debtor. Nor did that judgment against him which ordered a sale of the property operate as a bar to the assertion of homestead rights of the vendor, by any one claiming it under him. The transfer of the notes, and the subsequent deed made to the assignee on their cancellation, vested in the assignee all the title legal and equitable, held by the original vendor or the secret trustee. *Beard v. Blum*, 64 Tex. 59.

Vendor's Lien.—The cancellation, by agreement of parties, of a deed made by husband and wife, which had conveyed the absolute title to the homestead, and had declared the amount of unpaid purchase money, without express reservation of a vendor's lien, cannot reinvest the husband and wife with such homestead rights in the land as will prevent it from being subjected to forced sale to satisfy notes for the unpaid purchase money in the hands of one who acquired them before cancellation of the deed. The vendor's lien having once attached, the land can be subjected to sale to satisfy it, at the suit of such owner of the claim for purchase money, though new notes may be taken for the amount, without regard to the wife's assent to such change. *Brooks v. Young*, 60 Tex. 32.

Partition of Homestead.—The children of the father by a first marriage, who after his death ceased to be members of the family of his wife by second marriage, cannot enforce partition of a homestead acquired by the separate means of their father, and which was set aside as homestead by the county court for the widow and children of the second marriage, who afterwards left it and removed to another county, with the intention on the part of the widow and a second husband, whom she had married, never to return to it unless

compelled by poverty or unavoidable circumstances. Title to no other home had been acquired. *Foreman v. Mcronney*, 62 Tex. 723.

Mechanic's Lien.—A mechanic claimed a lien for labor on a house, performed under a verbal contract, and the owner set up that the contract was not in writing and that the property was his homestead. *Held*, that if at the time the contract was made the property was not the homestead of the owner, no subsequent act of his in having lumber on the ground to build and having the mechanic to construct him a house, could impress on the property the homestead character. *Swope v. Stantzberger*, 59 Tex. 387.

Intent—Fraud.—To impress the character of a homestead upon property where there has been no previous occupancy, there should at least be a present *bona fide* intention to dedicate it as a home coupled with such acts of preparation and subsequent early use as a homestead as would reasonably amount to notice of dedication, and thus prevent that from being used as an instrument of fraud which was designed as a shield of protection. *Barnes v. White*, 53 Tex. 628.

The use of property as a home must co-exist with the intention that it shall be the home to invest it with the homestead character. A man owned property for eight years, during which time he remained on it with his family three days. A considerable portion of the eight years he resided on a farm owned by his wife, but claimed that he intended to make the property owned eight years his home, if he did not sell it, and offered it for sale. In a suit between the purchaser under judgment against the owner, and the claimant, *held*, that a verdict and judgment against the claimant, which in effect determined that no homestead right existed, was proper. *Fort v. Powell*, 59 Tex. 321.

A lot on which stood a dwelling-house was purchased nearly three months before the expiration of a lease to a third party, who continued to occupy it until the expiration of the lease. The purchaser declared his intention to his wife and to no one else, to make the property his homestead, and it appeared that he could not obtain possession before the expiration of the lease. On the expiration of the lease he removed to and occupied the dwelling-house. An injunction was

obtained to restrain the sale of the property under execution issued on a judgment which was rendered against the purchaser before the date of his purchase. *Held*: That the property was protected by the statute exempting the homestead from forced sale. That the injunction should have been perpetuated. *Gardner v. Douglass*, 64 Tex. 76.

Judgment—Equity.—In a suit to recover property claimed as homestead by plaintiffs, the defendant alleged and proved the payment of money for the property by him as a purchaser thereof at execution sale, under a judgment against plaintiffs, and prayed that in the event the plaintiffs should be adjudged the owners of the property, that defendant recover judgment for the amount of money so paid, with interest. *Held*, that the refusal of a charge covering the relief so sought was error, requiring a reversal of the judgment in favor of the plaintiffs for the land. *Cline v. Upton*, 59 Tex. 27.

Order of Sale—Injunction—Return.—S sued C and procured the issuance of an attachment which was levied upon land situated in another county. A judgment by default was rendered for the debt, the attachment lien foreclosed, and by virtue of that attachment an order of sale was issued. C claimed the property as a homestead, and brought suit in the county where the land was located, to enjoin the sale. *Held*, that C was not concluded as to his homestead rights by the decree foreclosing the attachment lien upon the land, as no such issue was made or adjudicated in that case; that since the order of sale commanded the sheriff to sell specific property, the effect of the injunction was to suspend the operation of the process until such time as the questions raised by the injunction suit might be determined. In this case the injunction not only suspended the process but questioned its validity and regularity, the statute being imperative, the writ of injunction should have been returned to the court from which the order of sale issued. *Seligson v. Collins*, 64 Tex. 314.

Homestead: Attachment of.—The master found that the owner of a homestead abandoned it on the 1st day of July; that the plaintiff attached it on the 7th day of July; and that it was deeded to the defendant on the 2d day of September, all in the same year. *Held*, in ejectment, that the attachment

IX. CONSTITUTIONALITY AND CONSTRUCTION OF HOMESTEAD LAWS.

—1. **In General.**—Several of the States make provision for homestead protection in their organic law. In the absence of express constitutional warrant, the statutes giving debtors, who are heads of families, this extraordinary favor, are sustained by the courts under the implications of constitutions (when there is nothing inhibitory), so far as the legislative power to grant it is drawn in question. The right of the creditor is held to remain intact—the restriction upon execution and sale having reference only to his remedy. His remedy itself may be said to remain unaffected. So far as liens existed before the dedication of the homestead of the debtor, they are enforceable thereafter. So far as ordinary debts are concerned, those pre-existing ought to still look to the debtor's real estate as liable therefor, if real estate, with other property, were "the common pledge of creditors;" and were the creditors possessed of a common law right to make their money, after judgment, out of the debtor's lands. But it will be seen hereafter, that both these contingencies are commonly denied by the States granting land exemption, except in the case of Louisiana.

Debts, created after the dedication, may be presumed to have been contracted in view of the exemption law, so that the creditor did not look to the homestead as security for his pay. He knew that, however, the title of the property might be eventually liable, the right of family occupancy could not be disturbed.

No doubt some of the provisions of the several homestead statutes go to the very outer rim of constitutionality, and are saved only by the liberal rule of construction which almost universally prevails throughout the Union.¹

prevailed over the deed. *Labaree v. Wood*, 54 Vt. 452.

Where a mortgage of a homestead has been given as additional and collateral security to a chattel mortgage, the property embraced in the latter must first be applied to the *precise* debt secured by the mortgage of the homestead before that is resorted to, and upon a sale of the mortgaged chattels the mortgage of the homestead is paid and satisfied to the extent of the proceeds of the sale. *Dunn v. Buckley*, 56 Wis. 190.

Presumptive Notice.—Where the judgment creditors are the purchasers at an execution sale of land, they are presumed to know what the debtor has done and is doing on the land indicating an intention to make it his homestead, and, if such intention is manifest, no notice to them that he claims the premises as a homestead is necessary to prevent a waiver of the exemption. *Scofield v. Hopkins*, 61 Wis. 370.

1. **Alienation—Acknowledgment.**—Under § 2 of Article 10 of the Ala.

Constitution, providing that "a mortgage or other alienation of [the] homestead by the owner thereof, if a married man, shall not be valid, without the voluntary signature and assent of the wife to the same," the wife is not required to unite in the conveyance of the title; but she must assent thereto, and such assent must be evidenced by her voluntary signature. The statute has provided the mode and form by which it shall be shown that such assent and signature were voluntarily given; and without that evidence the conveyance is a nullity. The acknowledgment by the wife of her voluntary signature and assent to a conveyance of the homestead, and the certificate thereto, required by the statute, may be made after the execution of the deed, becoming valid and binding from that time. The sworn clerk of a probate judge is authorized to take and certify the acknowledgment of the wife to a conveyance of the homestead; and a certificate of acknowledgment, made by him for and in the name of his

principal, is sufficient. *Hood v. Powell*, 73 Ala. 171.

Where two tenants in common, entitled to homestead exemptions under the constitution of 1868, owned an undivided one-eighth interest each in a tract of land containing four hundred acres, and resided on the land, each on a separate eighty acre subdivision, their homesteads cannot exceed an undivided one-eighth interest in eighty acres of the land each, to be so selected as to include their actual places of residence; and hence, neither of them can claim an exemption of his entire interest in the whole tract, although it amounted to less than eighty acres. *Snedecor v. Freeman*, 71 Ala. 140.

Mortgage Without Signature of Wife.

—As the homestead of the two tenants could not collectively embrace more than their interests in one hundred and sixty acres of the land, a mortgage jointly executed by them, purporting to convey the entire tract, is not void as to their interests in the balance of the tract, because it did not receive the voluntary signatures and assents of their wives. *Snedecor v. Freeman*, 71 Ala. 140.

Exemption.—The right to a homestead exemption, and its quantity and extent, as against creditors, are to be determined by the law which was of force when their debts were created; and where the debt was created in 1860, the value of the homestead then allowed being \$500, a homestead cannot be claimed under the law of 1867, which allowed \$1,700. *Peevey v. Cabaniss*, 70 Ala. 253.

Under the laws which were of force in 1859, a homestead exemption was only reserved to a debtor who was the head of a family (Rev. Code, § 2880); and an unmarried man, having no inmate of his house dependent on him, was not the head of a family, although he had hired servants or laborers in his employment. *Cochran v. Miller*, 74 Ala. 50.

As against creditors, the right to a homestead or other exemption, its value and extent, must be determined by the law which was of force when the debt was contracted; and when the creditor is a surety, by the law which was of force when his liability was assumed. *Keel v. Larkin*, 72 Ala. 493; *Cochran v. Miller*, 74 Ala. 50.

What Lands Claimed.—The right to a homestead exemption, in favor of the widow of a deceased debtor, must be de-

termined by the law which was of force when the debts were contracted against which it is asserted, and can only be claimed in lands in which the decedent had such an interest as might be sold for the payment of debts by his administrator. *Bolling v. Jones*, 67 Ala. 508.

Widow Against Purchaser With Warranty.—A purchaser of lands, with full covenants of warranty, who is afterwards evicted by a title paramount and outstanding at the time the covenant of warranty was entered into, is regarded as a creditor of the vendor from the date of the execution of the deed, and not from the date of the eviction; and hence, the widow of the deceased vendor is not entitled to a homestead exemption as against the purchaser's claim for damages for the breach of the warranty, under a statute enacted after the execution of the deed, although of force at the time of eviction. *Corr v. Shackelford*, 68 Ala. 241.

Widow and Minor Children.—The widow and minor children of a decedent who, a resident of this State, died intestate in 1878, owning no homestead, but occupying at the time of his death a rented dwelling, are entitled, under the provisions of section 2840 of the Code of 1876, to a homestead exemption in a lot and storehouse in a town, the only real estate of which the decedent died seized and possessed, and which was worth less than \$1,000, although the storehouse had never been occupied as a dwelling.

Same; when Estate Insolvent, Vests Absolutely.—In such case, the estate of the decedent being insolvent, the exemption vests absolutely in the widow and minor children under the provisions of section 2827 of the Code. *Hartsfield v. Harvooley*, 71 Ala. 231.

What Property Claimed.—The constitutional and statutory provisions, securing homestead exemptions to debtors, are intended to preserve the home or dwelling-place of the debtor and his family, rather than any particular estate or interest in land; and when a debtor has erected a house on leased lands, having reserved, by the terms or the lease, the privilege of removing it at the termination of his lease, he may claim it as his homestead, if it is used and occupied by himself and his family as their home; and while so used and claimed, it cannot be mortgaged without the voluntary signature and assent of the wife, manifested in the

2. Allotment to Widow.—The probate court having appointed an administrator, assigned a homestead to the widow, which was proved to be of the value of \$5,000, but it was done on her application without notice to the heirs. An action was brought to set the decree aside; and it was now proved that the value of the homestead was \$10,000, though no fraud in the first estimate was charged. The court sustained the decree and held that the probate judge had had jurisdiction of the matter under the provision

mode required by the statute. *Watts v. Gordon*, 65 Ala. 546.

As to contracts made before the adoption of the constitution of 1868, the homestead exemption act of 1852 (*Gould's Digest*, p. 504), with its old construction by this court was revived by section 1, schedule to the constitution of 1874, and made irrevocable by legislative action, although it had been dormant during the existence of the constitution of 1868. *Lindsay v. Norrill*, 36 Ark. 545.

Husband's Right to Sell or Waive Exemption.—In this State a husband may sell the homestead without any assent of his wife, except for the purpose of relinquishing her dower; but the policy of the exemption laws precludes him from making any agreement to waive his exemption at the time of contracting a debt. Nor could he, under the act of 1852, waive his exemption after the levy of an execution. But this would not apply to the constitutional exemption of 1868. *Lindsay v. Norrill*, 36 Ark. 545.

Mortgage.—Under the constitution of 1868 a mortgage, or other incumbrance of the homestead, except for the excepted debts in that constitution, was void, and the owner might abandon the homestead the next day and sell it and make good title to it. It is not a question of good faith or sound morals, but of State policy. *Brown v. Watson*, 41 Ark. 309.

Advances.—A mortgage of the homestead in the life of the constitution of 1868 for future advances, is void for the advances made after the adoption of the constitution of 1874 as well as for those made before them. *Brown v. Watson*, 41 Ark. 309.

Mortgage.—The mortgagor's sale of the equity of redemption to the mortgagee, does not merge the mortgage so as to let in an intervening lien upon the mortgaged property. The mortgagee's title dates from its inception, and the effect is to extinguish

the equity of redemption. *Cohn v. Hoffman*, 45 Ark. 376.

A judgment upon a note executed since the adoption of the constitution of 1874, for a debt contracted prior thereto, is a lien on the debtor's homestead. *Cohn v. Hoffman*, 45 Ark. 376.

Tenant in Common.—A tenant in common has such a right of homestead in the estate in common, that he might, after executing a mortgage on his interest in it while the constitution of 1868 was in force, have it partitioned, and by fixing his dwelling on the part allotted to him, have it exempted from the foreclosure of the mortgage, unless the mortgage was for some of the excepted debts specified in that constitution. *Sentell v. Armor*, 35 Ark. 49.

A tenant in common is entitled to a homestead in the estate in common, and during the life of the constitution of 1868, which prohibited a mortgage upon the homestead except for the purchase-price and other specified debts, a tenant in common purchasing his co-tenant's interest, could not, for the purchase-price, mortgage the whole tract on which was his homestead, but only the interest purchased. *Sims v. Thompson*, 39 Ark. 301; *Ward v. Mayfield*, 41 Ark. 94.

Mortgage.—Where, during the life of the constitution of 1868, a party has declared, in a mortgage of property, which he might claim as part of his homestead, that it was "no part or parcel of his homestead," he is estopped to afterwards assert to the contrary and avoid the mortgage, unless such estoppel would contravene the policy of the law by allowing him to denude himself, by the mortgage, of a necessary part of his homestead. *Klenk v. Knobke*, 37 Ark. 298.

In a suit to enforce a mortgage executed under the constitution of Arkansas of 1868, the burden of proof is on the defendant to show his homestead rights in the mortgaged property. *Webb v. Davis*, 37 Ark. 251.

of the code of procedure, which authorizes and requires the probate court to set apart a homestead for the widow, if none has been selected, in value not exceeding \$5,000.¹

3. Sale for Re-investment.—The Georgia statute providing for the alienation of homesteads and the substitution of new ones by re-investment, vests in the purchaser the interest of the homestead claimant during the statutory period.² This provision was held applicable to homesteads set apart before the act. Debt being created prior to the passage of the statute gives the creditor no right to levy upon the property in the possession of the purchaser.³

4. Constitutional Change of Homestead Limitation.—The former constitution of Georgia (1868), provided for a homestead of \$2,000 value to a head of family, exempting it from all debts except for taxes, labor and material applied to the premises, purchase money and removal of incumbrances; and it required legislation for its preservation to the family.

The constitution of 1877 provides that holders of homesteads under the former constitution may alienate them under leave of

1. *Kearney v. Kearney*, 72 Cal. 591. Cal. Civil Code Proc. §, 1465.

Construction of Statute.—The provisions of section 1263 of the Civil Code, prescribing what shall be contained in a declaration of homestead, are *mandatory*, and a compliance with them is essential to the validity of the homestead. *Held*, accordingly—in an action to foreclose a mortgage executed by the husband on community property—that a declaration of homestead made by the wife prior to the mortgage, which failed to contain an estimate of the actual cash value of the land, was void. *Ashley v. Olmstead*, 54 Cal. 616.

The homestead was declared by the defendant and her husband in August, 1860; and the later having died in April, 1865, the homestead was set apart by the probate court for the benefit of the defendant and her children, and afterwards the defendant executed a mortgage upon the premises. *Held*, That under the fourth section of the act of 1862, the homestead property vested absolutely in the defendant, and that her mortgage was valid; *held, further*, that it was a serious question whether, if the law were otherwise, the defendant ought to be allowed to set up the defense offered in this case. *Herrold v. Reen*, 58 Cal. 443.

Under the constitution of *Florida* the right of a wife as to the homestead is confined to a power to prevent alienation by her husband, the head of

the family, without her consent made jointly with him. But the constitution does not, however, repeal the statute allowing dower in the estate of the husband, and this right exists as to the homestead. The exemption is from the debts of the head of the family, the owner of the homestead. It accrues to the heirs of the party having taken or enjoyed the benefit of it. Where such owner dies, leaving surviving him a widow and children, the right of the widow, if the estate is an intestate estate, is restricted to dower, and the benefit of the exemption as to the remainder of the estate in the homestead after allowing dower, enures to the benefit of the children. *Wilson v. Fridenburg*, 19 Fla. 461.

A widow, not an heir of her husband and who has elected to take dower, cannot claim a homestead in the lands of her husband under the homestead clauses of the constitution. Her right is that of dower only, which is not affected by the homestead provisions. The homestead of a testator residing in this State, who dies leaving a wife and children, is not the subject of testamentary disposition. Such property remains as though no will had been made and descends to the heirs subject to the right of dower. *Brokaw v. McDougall*, 20 Fla. 212.

2. Ga. Code, § 2055.

3. *Van Horn v. McNeill*, (Ga.) 4 S. E. Rep. 111.

the superior court, and grants a homestead with an exemption to the value of \$1,000 dollars, which the married head of the family cannot sell or mortgage; but, under leave of that court, he and his wife together may sell the homestead. It was held that a sale by both was void when not authorized by that court, though all their children were of age.¹

5. Conveying Right of Way.—Under the constitution of Kansas, which inhibits the alienation of the homestead by the husband alone, he cannot even grant right of way over it to a railroad company without his wife's assent. It is held, however, that her assent may be verbal, and may be proved as a fact. There must be consent, not necessarily a joining in the written conveyance of the right, on the part of the wife.²

1. *Hart v. Evans*, (Ga.) 5 S. E. Rep. 99.

Under the *Georgia* constitution of 1868 and the Code, § 2016, cash must be invested before it is finally set apart as an exemption by the ordinary. An exemption of money is void as against a debt prior to 1877. *Jones v. Ehrlich*, 65 Ga. 546.

One entitled to a homestead, may take the statutory or the constitutional homestead, at option, but cannot take both. The two are distinct, and where one has been taken, it cannot be supplemented by the other. *Johnson v. Roberts*, 63 Ga. 167.

The widow of a debtor who died in October, 1877, applied in December, 1878, for a homestead of realty, to the value of \$2,000, in the estate of her husband: Held, that the homestead provision in the constitution of 1868 was applicable to the case, and that said provision was kept of force by the constitution of 1877, in respect to debts incurred under the former. *Gerding v. Beall*, 63 Ga. 561.

The act of 1874 making the specific exemption of the code liable for purchase money does not affect exemption which had been set apart before the act was passed. The facts of the present case entitle the family of the debtor to protection against the judgment for purchase money of the land in question. *Hawks v. Hawks*, 64 Ga. 239.

The setting apart of a homestead under the constitution and act of 1868, even though subsequently confirmed in the bankrupt court, does not protect property from a judgment rendered prior both to the adoption of the constitution of 1868 providing for such homestead and the passage of the bank-

rupt law of the United States. *Dixon v. Lawson*, 65 Ga. 661.

Personal Property.—Under the constitution of 1868 there was no provision for supplementing a homestead or exemption; and where one obtained an exemption of personalty in 1874, he could not afterwards increase it by having other personalty set apart; nor did the constitution of 1877 and the act of 1878 confer the right to add to such previously granted exemption. Were the meaning of the act doubtful it would not be so construed as to impair rights growing out of contracts prior to its passage. *Mitchell v. Wolfe*, 70 Ga. 625.

Order of Sale.—Where a mortgage is executed on the homestead and other real estate, and, before foreclosure, the mortgagor sells and conveys the other real estate and a part of the homestead to others, he cannot under section 1993 of the *Iowa* Code, insist, in a foreclosure proceeding, that the property so sold and conveyed by him shall first be exhausted before that part of the homestead which he retains shall be sold to pay the mortgage debt. The words "other property" in said section must be limited to property which belongs to the mortgagor at the time of foreclosure. *Dilger v. Palmer*, 60 Iowa 117.

Wife's Land.—A husband's homestead rights in the lands of his wife are determined by the law in force at the death of the wife, and not by any different law in force at any time prior thereto. Under the law in force since 1874, a wife has no power to devise her homestead to another, and thus deprive her husband of that estate. *Henson v. Moore*, 104 Ill. 403.

2. *Const. Kansas, Art. XV, § 9.*
Pilcher v. Atkinson, T. & S. F. R. Co., 38 Kan. 516.

6. Principal and Agent in Louisiana.—Since, under article 220 of the constitution, an agent is a fiduciary, the supreme court have held that he is not protected by the homestead law from judgment and forced sale for liability to his principal because of his misappropriation of funds. He cannot plead homestead exemption against such a judgment.¹

7. Jurisdiction.—Exclusive jurisdiction is given to the Louisiana supreme court, when right to a homestead is claimed, by an amendment of the 81st article of the present constitution, and this is held to refer to the homestead mentioned in articles 219 and 223 of that instrument.²

8. Construction of Statutes.—The supreme court of *Louisiana* has repeatedly decided that exemption laws must be strictly construed. Under the three constitutions that have been successively in force there within a few years, this rule has been maintained. It is based upon the ground that homestead exemption is derogatory to common right. It is there often repeated in the decisions that the property of the debtor is the common pledge of his creditors. Upon the general principle that exceptions to a rule should be restricted to the express terms of the statute making them, the court holds that exemption laws create such exceptions to a general rule, and, therefore, they are not entitled to favor or extension.³

Minnesota, too, has held somewhat similar doctrine. Her supreme court, setting forth as a general rule that all the property of a debtor is applicable to the payment of his debts, declared that the effect of exemption laws is to create exceptions to this rule, and concluded that if he claims that any portion of his property is not thus applicable, he must bring himself strictly within the terms of the statute granting him exemption. Yet the rule of strict construction was not broadly laid down, as in *Louisiana*. On the contrary, the court, in the very case under consideration, said: "The homestead law should be fairly, perhaps liberally interpreted, but it must not be strained."⁴

The other States generally hold the doctrine of liberal construction. None of them has more strongly and clearly stated it than *Michigan*, through her supreme court. There it is emphatically denied that homestead exemption is in derogation of creditor's rights, or contrary to the letter and spirit of the common law. It is denied that real estate was ever liable to execution

1. *Bridewell v. Halliday*, 37 La. Ann. 410.

2. *State ex rel Davidson v. The Judges, etc.*, 37 La. Ann. 109. Compare *Succession of Durkin*, 30 La. Ann. 670.

3. *Louisiana Rule of Construction Strict.*—*Guillory v. Deville*, 21 La. Ann. 686; *Fuselier v. Buckner*, 28 La. Ann. 594; *Todd v. Gordy*, 28 La. Ann. 666; *Briant v. Lyons*, 29

La. Ann. 65; *Gilmer v. O'Neal*, 32 La. Ann. 980; *Poole v. Clark*, 34 La. Ann. 331; *Succession of Furniss*, 34 La. Ann. 1013; *Galligan v. Payne*, 34 La. Ann. 1057; *Thomas v. Guilbeau*, 35 La. Ann. 927; *Bossier v. Raines*, 37 La. Ann. 263; *Kinder v. Lyons*, 38 La. Ann. 713.

4. *Minnesota Decisions.*—*Ward v. Huhn*, 16 Minn. 161.

under judgment for debt, under the operation of the common law of England.¹

This statement of the supreme court of Michigan finds support in Blackstone: "By the common law a man could only have satisfaction of goods, chattels and the present profits of lands by the . . . writs of *fiery facias* or *levari facias*, but not the possession of the lands themselves, which was a natural consequence of the feudal principles which prohibited the alienation, and, of course, the incumbering of the fief with the debts of the owner. And when the restriction of alienation began to wear away, the consequence still continued, and no creditor could take possession of lands, but only levy on the growing profits; so that, if the defendant alienated his lands, the plaintiff was ousted of his remedy."²

1. **Liberal Construction.**—*Riggs v. Sterling*, 60 Mich. 643; *Bouchard v. Bourassa*, 57 Mich. 8.

2. *Blacks. B. III*, 418.

Liberal Construction in Mississippi.—*Campbell v. Adair*, 45 Miss. 178.

Exemption—Right of Wife.—The act of 1873, p. 78, which provides that no conveyance of his homestead by the husband shall be valid unless the wife joins in the conveyance, confers no right of property upon the wife in the homestead exemption in lands belonging to the husband, but gives her a mere veto power upon his right to sell or incumber it. *Smith v. Scherck*, 60 Miss. 491; *Billingsley v. Neblett*, 56 Miss. 537.

Conveyance by Widow: Minor Children.—Under section 5, *Wagner's Missouri Statutes*, page 698, notwithstanding the sale and conveyance of the homestead by the widow, the minor children, until they attain their majority, are entitled to its exclusive possession as against her vendee. *Roberts v. Ware*, 80 Mo. 363.

It is no defense to an action of ejectment by the minor children for the recovery of the possession of the homestead, that the defendant claims title from a purchaser at a foreclosure sale under a mortgage given by the widow. Under *Wagner's Missouri Statutes*, page 698, section 5, the minor children, until they attain their majority, are entitled to the exclusive possession of the homestead as against the widow's vendee. *Kochling v. Daniel*, 82 Mo. 54.

Death of Widow Leaving Minor Children.—Under the *Missouri* homestead act of 1865, the right of the minor children to hold and enjoy the estate, is not affected by the death of the mother. *Canole v. Hurt*, 78 Mo. 649.

Children by Second Husband.—Upon the death of J a homestead was set off to M, his widow, and R, their child, a minor. M afterward married H, and died leaving a minor son by H. *Held*, that the death of M did not interrupt the homestead right of R as long as he remained a minor. But on R attaining his majority, he and the son by H would inherit the estate from M as tenants in common. *Canole v. Hurt*, 78 Mo. 649.

Widow's Allowance.—When a widow is entitled under her husband's will to precisely the same amount of personal property that she would take under the administration law, (*Wag. Missouri Stat.*, § 35, p. 88), and she actually receives it, the fact that upon subsequently renouncing the provisions of the will, she does not surrender the property to the administrator, will not invalidate the renunciation. As soon as the renunciation is made, her right to the property becomes absolute under the law. *Register v. Hensley*, 70 Mo. 189.

Estates of Decedents.—Full power and jurisdiction exist in our probate courts to afford a complete and final administration of estates of deceased persons. If a creditor, after administration is closed, seeks a remedy through the courts of chancery, very strong and satisfactory reasons must be shown therefor. *French v. Stratton*, 79 Mo. 560.

Act of 1874.—It is only where the homestead was owned by the husband that it was transmitted by succession, before the passage of the *Missouri* act of 1874—not where it was owned by the wife. *Keyte v. Perry*, 25 Mo. App. 394.

Construction in Nebraska.—Liberal construction is the rule in this State. *Bowker v. Collins*, 4 Neb. 496. The governing law is that which was in

The illustrations given herein, of the construction of statutes, from the several States beginning with Alabama, and those to follow, show that liberal construction is the general rule, and the Louisiana interpretation exceptional.

(a) *Nevada*.—The statute of Nevada prescribes the manner of recording the written declaration of homestead claim, and the beneficiary must comply with it in order to secure his homestead right. The recording has immediate effect; the property becomes exempt from the date of record, except from the liabilities which the constitution and statute leave unaffected.¹

(b) *Constitutional Exposition*.—The constitution, statutes and judicial decisions of a State with reference to homestead were held to have no application to the late bankrupt law of the United States, except in regard to the measure of the exemption. That law itself allows the same homestead protection as that given by the State of the debtor's domicile, so far as concerns the measure of exemption; and only in respect to that can courts be governed by the State law when administering the federal statute above mentioned.²

It is unconstitutional for the legislature to increase or diminish homestead property with reference to value or duration, when the exemption is fixed by the constitution itself.³ Its act is in violation of that instrument, so far as it gives a lien on the homestead for materials furnished and used in improving the homestead land.⁴ Nor can the legislature divest a judgment creditor's lien on land by enacting a homestead law.⁵

force at the time contract affecting homesteads was made. *Dorrington v. Myers*, 11 Neb. 389; *Dewitt v. Sewing Machine Co.*, 17 Neb. 533. *McHugh v. Smiley*, 17 Neb. 620.

1. *Nevada Bank v. Treadway*, 17 (Nev.) Fed. Rep. 887; s. c., 8 Saw. (U. S.) 456; *Lachman v. Walker*, 15 Nev. 425, reaffirming *Hawthorne v. Smith*, 3 Nev. 182, on the question of construction. *Estate of Walley*, 11 Nev. 264.

2. U. S. Rev. Stat., § 5045; *Murray v. Hazell*, (N. C.) 5 S. E. Rep. 428.

3. *Exemption*.—The homestead and personal property exemption are fixed by the constitution, and neither the value nor duration thereof can be increased or diminished by the legislature; therefore, the *North Carolina* act of 1876-77, ch. 253, in so far as it undertakes to change the same, is unconstitutional. The land in dispute in this case may be sold, subject to the widow's dower, to pay the intestate's debt. *Martin v. Hughes*, 67 N. Car. 293, overruled; *Wharton v. Taylor*, 88 N. Car. 230.

4. *Lien For Materials Furnished*.—The homestead right is not affected by

a lien for materials furnished and used in improvements upon land covered by homestead, and the act of assembly (Bat N. Car. Rev., ch. 65, § 1), in so far as it gives such lien is unconstitutional. *Cumming v. Bloodworth*, 87 N. Car. 83.

5. The lien of a judgment creditor on his debtor's land cannot be divested by a homestead law enacted subsequently. *Lowdermilk v. Corpening*, 92 N. Car. 333.

Allowance in Lieu of Homestead.—Under *Ohio* Rev. Stats., § 5441, it is to be determined by the state of facts at the time the surplus arising from sale was finally disposed of by the court. *Niehaus v. Faul*, 43 Ohio St. 63; *Bills v. Bills*, 41 Ohio St. 206; *Bartram v. McCracken*, 41 Ohio St. 377; *Jackson v. Reid*, 32 Ohio St. 443; *Kelly v. Duffy*, 31 Ohio St. 437; *Cooper v. Cooper*, 24 Ohio St. 488.

Under the *Ohio* act of 1878, a widow may hold exempt from execution a homestead not exceeding \$1,000 in value, although she is not "living with an unmarried daughter or unmarried minor son." *Allen v. Russell*, 39 Ohio 336.

9. Wife Conveying—Attorney in Fact.—The statutory requirement of Texas that the sale of a homestead must be by consent of the wife when her husband is the vendor; and that such consent must be evidenced by the act of conveyance showing that she joined therein and separately acknowledged the act is held to be observed though she act through an attorney in fact duly empowered.¹

South Carolina.—A trustee named in a deed executed in 1867 declined to accept and the land remained in the possession of the grantor, who received the rents and profits from 1868 to 1870, when the property reverted to the grantor; afterwards, judgment was rendered against him for such rents and profits, and against an execution thereon he claimed a homestead exemption. *Held*, that he received the rents and profits as acting trustee under the deed, and that therefore the obligation arose at the date of the deed, which being prior to the adoption of the *South Carolina* constitution of 1868, the claim of homestead could not be allowed. *Withers v. Jenkins*, 21 S. Car. 365.

Under the language of the constitution of *South Carolina* providing for securing a homestead to "the person entitled thereto, or to the head of any family," the legislature may extend to a wife, living with her husband who owns no property, the protection of a homestead exemption against her own debts. *Norton v. Bradham*, 21 S. Car. 375.

1. Rev. Stat. Tex., Art. 560; Warren v. Jones, (Tex.) 6 S. W. Rep. 775.

Texas Constitution.—The Texas constitutional provisions concerning homestead do not interfere with, nor could they constitutionally abridge existing rights of creditors. *Wright v. Straub*, 64 Tex. 64.

A homestead law should not receive a construction which would make it retroactive, and thereby invalid as impairing the obligation of contracts. *McLane v. Paschal*, 62 Tex. 102.

Place of Business.—A man owned and occupied with his family an urban homestead in 1876, and carried on the business of a merchant in the lower story of his dwelling-house. After ceasing to do business as a merchant in 1877, he removed his family to a new home, owned by him in a different portion of the same town, and rented out the old home place for mercantile and other purposes, using the rents to aid in supporting his family, and in-

tending to again use it as a place to carry on his business as a merchant if he should recover from financial embarrassments. In trespass to try title brought by the purchaser at sheriff's sale, under a judgment against the husband and wife in 1878, *held*, while the constitution protects from forced sale the place of business of the head of the family in a city, town or village, though situate in a different locality from the home place, this protection exists only so long as it is used for the purposes contemplated by the constitution. The fact that he contemplated resuming business in the store-house, if able to do so at some future time, was immaterial. The law no more protects a man in a place for business which he is not using, and which he is making no preparation to use, than it does in a place for a home which is in fact not a home, and in reference to which no steps have been taken to make it a home for the family. *Shryock v. Latimer*, 57 Tex. 674.

Constitution Construed.—Article 16, section 50, of the State constitution, simply declares that the homestead of the *family* shall be exempt from forced sale for the payment of debts, and that clause, as well as the statutes (Rev. Stats. 2335), indicates what persons may be considered as constituting the family after the death of husband and wife. Such family cannot be constituted by adult descendants other than "unmarried daughters" remaining with the family of the deceased. *Givens v. Hudson*, 64 Tex. 471.

It is not necessary to the existence of the homestead right that the family should remain on the land. "To use and occupy" the homestead, within the meaning of article 16, section 52, of the constitution, does not require a residence upon it. When left, either from necessity or convenience, by the family, no matter for how long a time, so long as it contributes to the support of the family it remains the homestead until title is acquired to another home, and which is used and occupied as such.

10. Constitutional and Statutory Provisions Reconciled in Virginia.—

The eleventh article of the constitution of *Virginia* declares that the householder or head of a family "shall be entitled to hold," exempt from forced sale, property to be selected by him. The Virginia code provides that if the householder when giving a written obligation waives exemption either before or after his homestead is set apart, he thus renders his homestead liable to forced sale. It is decided that the constitution does not confer the right, but provides that the householder shall be entitled to it upon his selecting a homestead. The code is held to be reconcilable with the article; and that if a party executing his bond or note before or after the selection of homestead, waives his right of exemption with respect to the bond or note, he is estopped from setting up homestead exemption against the debt ever afterwards. Nor can his wife set it up, either during his life or after his death. Nor can his children.¹

11. Trust Deed.—Under the constitution of *West Virginia* a husband may hold his homestead exempt from forced sale, subject to subsequent legislation. A statute there prescribes that a husband may waive in writing his right to the homestead with respect to a debt at the time his obligation to pay it is contracted.² This statute is construed as not depriving the owner of a homestead under the act of the right of executing a deed of trust on the homestead.³

This case distinguished from *Pressley v. Robinson*, 57 Tex. 453; *Foreman v. Meroney*, 62 Tex. 723.

Where a party, on receiving an absolute deed, covenants with his grantor to reconvey the lands, when the money which it was given to secure shall be paid, both instruments must be taken together as constituting a mortgage. The mortgagee of a homestead in Texas cannot maintain ejectment therefor, if the "forced sale" thereof be prohibited by the constitution of the State which was in force at the date of the mortgage. *Lanahan v. Sears*, 102 U. S. 318.

Judgment Lien.—A judgment lien takes precedence of a subsequently acquired homestead right. It was not the intention of the convention, in extending homestead exemption, to divest or interfere with previously existing rights. Even if such an intention had been clearly declared by that body, the supreme court of the United States has held that an existing judgment lien is such a vested right as is beyond the power of a State constitutional convention to divest or destroy. *Wright v. Straub*, 64 Tex. 64.

1. *Linkenhoker v. Detrick*, 81 Va. 44; Const. Va. Art. 11; Va. Code

(1873), ch. 183, § 3; *Reed v. Union Bank of Winchester*, 29 Gratt. (Va.) 719; *White v. Owen*, 30 Gratt. (Va.) 43.

The *Virginia* Code of 1873, ch. 183, providing that in order to secure the benefit of homestead, there must be a recorded deed or an inventory under oath, is held not to impair the constitutional right of homestead. *Wray v. Davenport*, 79 Va. 19.

2. Const. *West Virginia* (1872) Art. 6, ch. 48; Acts of 1872-3, ch. 193, § 11.

3. *Moran v. Clark*, (*W. Va.*) 4 S. E. Rep. 303.

Construction in Wisconsin.—Although the statute, in defining a homestead, speaks of land "used for agricultural purposes," this phrase is to be disregarded in determining whether the homestead exists; otherwise, the statute would be inequitable and unconstitutional. *Binzel v. Grogan*, 67 Wis. 147.

To Whom Exemption of Proceeds Applies.—The statute (R. S., § 2983) which provides that the exemption of a debtor's homestead shall not be impaired by a sale thereof, but "shall extend to proceeds derived from such sale while held with the intention to procure another homestead therewith,

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Authorities.—Thompson on Homestead and Exemption; Smyth on Homestead and Exemptions; Washburn on Real Property, Vol. 1 (5th ed.); Freeman on Executions, ch. XV; Tiedeman on Real Property, § 158-164; Am. Law Reg., Vol. X, pp. 1, 137.

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I. DEFINITION.—Homicide is the killing of a human being by the act of himself or another.¹ The killing may be by an act either

1. See Stephen's Dig. Cr. L. 154; 4 Bl. Com. 177.

Infanticide.—A child becomes a human being within the meaning of this definition when it has completely proceeded in a living state from the body of its mother (*Rex v. Poulton*, 5 Car. & P. 329), whether it has or has not breathed (*Rex v. Brain*, 6 Car. & P. 349), and whether the naval string has or has not been divided (*Reg v. Trilloe*, Car. & M. 650), and the killing of such a child is homicide, whether it is killed

by injuries inflicted before, during, or after birth. See 1 Russ. on Cr. (5th Eng. ed.) 646; 3 Co. Inst. 50; 1 Hawk. P. C. ch. 31, § 16; 1 East P. C. ch. 5, § 14, p. 228; 4 Bl. Com. 198. Compare 1 Hale 432, and Saund. 21. The reason upon which the opinions of the two last writers seems to be founded,—the difficulty of ascertaining the fact,—cannot be considered as satisfactory unless it be supposed that such fact can never be clearly ascertained. See Exod. ch. xxi, v. 22, 23.

direct or indirect, which results in death.¹

Killing is causing the death of a person by an act or omission, but for which the person killed would not have died when he did, and which is immediately and directly connected with his death.² The question, whether a given act or omission is directly or impliedly connected with the death of any person, is a question of degree dependent upon the circumstances of each particular case.³

II. WHAT CONSTITUTES CRIMINAL HOMICIDE.—Criminal homicide consists in the unlawful taking by one human being of the life of another by any such a wound that he dies within a year and a day from the time of the giving of the mortal wound. If committed with malice expressed or implied by law it is murder; if without malice it is manslaughter. No personal injury, however grave, which does not destroy life, will constitute either of these

But it has been said that an infant cannot be the subject of homicide until after its complete expulsion, alive, from the body of its mother. *Wallace v. State*, 10 Tex. App. 255.

A Living Child in its Mother's Womb, or a child in the act of birth, even though such child may have breathed, is not a human being within the meaning of this definition, and the killing of such a child is not homicide. *Rex v. Enoch*, 5 Car. & P. 539, and see note to the case; *Reg. v. Wright*, 9 Car. & P. 754; *Rex v. Sellis*, 7 Car. & P. 850.

Taking Life Before Birth.—Where the jury might have concluded from the evidence that the defendant took her infant's life before its birth was complete, or that she caused its death by means which she used merely to assist her delivery, *held*, that the court should have instructed for an acquittal in the event the jury should so find. *Wallace v. State*, 7 Tex. App. 570.

In an Indictment for Infanticide, although convenient and advisable when it can safely be done, it is not indispensable that the sex of the murdered child be stated, even though its name be unknown or it has no name. *State v. Morrissey*, 70 Me. 401.

1. *Com. v. York*, 50 Mass. (9 Metc.) 93; *State v. Hoover*, 4 Dev. & B. (N. C.) L. 365.

2. *Stephen's Dig. Cr. L.* 155.

3. **Substituting Poison for Medicine.**—Where A substitutes poison for medicine, which is to be administered to C. by B, and B innocently administers the poison to C, who dies therefrom, A has killed C. See *Donnelland's Case*, *Stephens' Gen. View Cr. L.* 338.

Where a husband gave a poisoned apple to his wife intending to poison her, and she in his presence and with his knowledge, gave the apple to C, their child, whom the husband did not intend to poison, but he did not interfere with the child's eating the apple, the child having died, the father was *held* to have killed it. *Saunders' Case*, 1 Hale P. C. 436.

If an iron founder who is ordered to melt down a bursted cannon, repairs it with lead, which afterwards on being fired with an ordinary charge, bursts and kills a person, the founder kills him. *Rex v. Carr*, 8 Car. & P. 163.

A, B, and C, road trustees under an act of parliament, and as such under an obligation to make contracts for the repairs of the road, neglect to make any such contract, whereby the road gets out of repair, and D passing along it is killed. A, B, and C have not killed D. *Reg. v. Pocock*, 17 Q. B. 34.

A, by his servants, makes fire-works in a house in London contrary to the provisions of an act of parliament (9 & 10 Wm. 3, ch. 77). Through the negligence of his servants, and without any act of his, a rocket explodes and sets fire to another house, whereby B is killed. A has not killed B. *Reg. v. Bennett*, Bell C. C. 1.

A tells B facts about C in the hope that the knowledge of those facts will induce B to murder C, and in order that C may be murdered; but A does not advise B to murder C; B murders C accordingly. A has not caused C's death within the meaning of this definition. *Stephen's Dig. Cr. L.* 156.

crimes. The injury must continue to affect the body of the victim until his death. If it ceases to operate and death ensues from another cause no murder or manslaughter has been committed; but if the bullet remains in the body so as to press upon or disturb the vital organs and ultimately produces death, or the wound or the poison causes a decline of health ending in death, the injury and death are as much the continuous portion and effect of the unlawful act as if the shot, the stab or the poison appears intentionally fatal. The unlawful intent with which the wound is made or the poison administered attends and qualifies the act until its final result. No repentance or change of purpose after inflicting the injury, or setting in motion the force by means of which it is inflicted, will excuse the criminal. If his unlawful act is the efficient cause of the mortal injury, his personal presence at the time of its beginning is continuous, or its result is not essential. He may be guilty of homicide by shooting, even if he stands afar off, out of sight, or in another jurisdiction.¹ If he knowingly lets loose a dangerous beast, which runs any distance and then kills a man; or incites a madman or a child not of years of discretion to commit murder in his absence, whereby any one is killed; or with intent to murder, leaves poison with another person to be administered to a third, and the poison is administered by the same to another by an innocent agent, and causes the death of the person intended or any other, he is responsible as principal to the same extent as if personally present at the actual killing.²

But, to constitute homicide, the party killed must have been living at the time the blow was struck.³ The death must be imputed to the act of the defendant,⁴ and the death must occur within a year and a day from the time the blow is struck or the injury received.⁵

It is not essential that the violence inflicted by the defendant should be the sole or immediate cause of the death;⁶ it is sufficient if it is the immediate cause.⁷ And if a person, by a wrongful

1. See *People v. Adams*, 3 Den. (N. Y.) 207; s. c., 1 N. Y. 176, 179; 1 Hale P. C. 475.

2. *Com. v. Macloon*, 101 Mass. 1; *People v. Adams*, 3 Den. 207; s. c., 1 N. Y. 176; *Reg. v. Michael*, 9 Car. & P. 356; s. c., 2 Mod. 120; 1 Hale P. C. 430, 431, 615, 617.

3. *United States v. Hewson*, 7 Leg. Rep. 361.

4. *Com. Costley*, 118 Mass. 1; *Tabler v. State*, 34 Ohio St. 127, 137; *Rex v. Webb*, 2 Lew. C. C. 196; *Rex v. Tye, Russ. & R. C. C.* 345.

5. *People v. Kelly*, 6 Cal. 210; *People v. Aro*, 6 Cal. 207; *State v. Mayfield*, 66 Mo. 125; *State v. Orrell*, 1 Dev. (N. C.) L. 139; *Edmondson v. State*,

41 Tex. 496; 1 Arch. C. P. 751; 3 Co. Inst. 53; 1 Hale P. C. 424.

Time—How Reckoned.—The day on which the blow is struck or the injury is inflicted is to be reckoned as the first day. *People v. Gill*, 6 Cal. 137; 1 Hale P. C. 426.

6. *State v. Matthews*, 38 La. An. 795; *State v. Smith*, 10 Nev. 106.

7. *State v. Smith*, 10 Nev. 106. See *People v. Moan*, 65 Cal. 523; *Williams v. State*, 2 Tex. App. 171.

If a Wound was so Inflicted as to Render the Inflictor Criminal and death follows, he is amenable for homicide, though the person wounded would have died from other causes, or from the wound irrespective of such other cause,

act, accelerates the death of another, which would necessarily have soon occurred from an incurable disease, he is guilty of homicide,¹ because a person is deemed to have committed homicide although his act is not the immediate or not the sole cause of death, in those cases where (1) he inflicts a fatal injury on another which causes surgical or medical treatment from which death results;² (2) inflicts a fatal injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment, or had obeyed his attending physician, or

provided the wound really contributed, mediately or immediately, to the death. *Williams v. State*, 2 Tex. App. 271.

And when wounds have been inflicted by one person upon another, and the latter afterwards dies, it is not indispensable to a conviction of the former of murder or manslaughter, under an indictment based upon the infliction of such wounds, that they were necessarily fatal, and were the direct cause of the death; but if they caused the death indirectly, through a chain of natural causes, unchanged by human action, it is sufficient in this regard. *Kelley v. State*, 53 Ind. 311.

1. *People v. Moan*, 65 Cal. 532; *State v. Morea*, 2 Ala. 275.

Death Accelerated by Accused.—In an indictment for murder, if it appear that the death of the deceased was accelerated by the violence of the prisoner, his guilt is not extenuated because death might and probably would have been the result of the disease with which the deceased was afflicted at the time of the violence. *State v. Morea*, 2 Ala. 275.

Where a person has inflicted wounds upon another, which are fatal and of which the latter dies, or which are dangerous in themselves, though not necessarily fatal, and cause congestion of the brain, of which the wounded person dies, or where congestion of the brain, so induced, causes the exposure of the injured person to the inclemencies of the weather, by which he dies, it must be deemed that the person who gave the wound caused the death by the infliction of them. *Kelley v. State*, 53 Ind. 311.

Where A, with felonious intent inflicted a wound upon B, and within a year and a day death resulted, not from the wound immediately, but mediately, as from inflammation caused by the wound and occasioned by improper treatment on the part of the attendants. *Held*, that this may be murder in the

first or second degree, or manslaughter, as the case may be. *Kee v. State*, 28 Ark. 155.

2. See *McAllister v. State*, 17 Ala. 434; *State v. Corbett*, 1 Jones (N. C.) L. 264; 1 Hale P. C. 418.

Proper Medical Treatment.—Stephen says that in those cases it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith, and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was the immediate cause was not employed in good faith, or was so employed without common knowledge or skill. Stephen's Dig. Cr. L. 156.

Where the Wound is Adequate and Calculated to Produce Death, it has no excuse to show that had proper caution and attention been given a recovery might have ensued. Neglect or mal-treatment will not excuse, except in cases where doubt exists as to the character of the wound. *State v. Corbett*, 1 Jones (N. C.) L. 265; *McAllister v. State*, 17 Ala. 434.

Erroneous Medical Treatment.—But the person causing the original wound is not responsible for death resulting for grossly erroneous medical or surgical treatment. *Distinguishing Com. v. McPike*, 57 Mass. (3 Cush.) 181; and *Parson v. State*, 21 Ala. 300; *Coffman v. Com.*, 10 Bush (Ky.) 495.

Death from Subsequently Contracted Disease.—And where it appears in a case of homicide that a wound or beating was inflicted on deceased which was not mortal, and that the deceased, while laboring under the effects of the violence, became sick of a disease not caused by such violence, from which disease death ensued within a year and a day, the party charged with the homicide is not criminally responsible for the death, although it should appear that the symptoms of the disease were aggravated, and its fatal progress quickened by the enfeebled or irritated

had observed proper precautions as to his mode of living;¹ (3) where, by actual violence or threats of violence, a person causes another to do an act which causes his own death, such act being a mode of avoiding such violence, or threats, which, under the circumstances, would appear fatal to the injured person;² (4) where, by wrongful act, a person hastens the death of another who is suffering under any disease or injury, which, apart from his act, would have caused death;³ (5) where his act or omission would not have caused death unless accompanied by the acts or omissions of the person killed, or some other person.⁴

Where a defendant inflicts a fatal blow he cannot escape liability for his wrongful act from the fact that other blows were subsequently inflicted by other persons which hastened the death.⁵ But if one inflicts a mortal wound, and, before death ensues, another kills the same person by an independent act, without concert or procurement of the one who caused his first wound, the first person cannot be convicted of murder or manslaughter, or assault with intent to kill, on an indictment charging both with murder.⁶

But a person is not deemed to have committed homicide, although his conduct may have caused death, (1) where the death does not take place within a year and a day from the time the injury was inflicted;⁷ (2) where the death is caused by the act of a third person, although such act was caused by the defendant's conduct;⁸ (3) where the death is caused without any definite fatal

condition of the deceased, caused by the violence. *Livingston's Case*, 14 Gratt. (Va.) 592.

1. *Bowles v. State*, 58 Ala. 335; *State v. Bantley*, 44 Conn. 537; *People v. Cook*, 39 Mich. 236; *State v. Langford*, (Mo.) 8 S. W. Rep. 237; *Williams v. State*, 2 Tex. App. 171.

Failure to Procure Medical Aid.—It has been said that a person who criminally gives another a wound which is not necessarily fatal, and who willfully neglects to procure aid and surgical attendance, in consequence of which the injured person dies, is guilty of homicide, the same as if the wound had been in itself a fatal one. And the fact that the friends and family of the deceased were present at the occurrence makes no difference. *Williams v. State*, 2 Tex. App. 271.

2. *Reg. v. Pym*, 1 Cox C. C. 339.

3. See *State v. Morea*, 2 Ala. 275; *People v. Moan*, 65 Cal. 532; *People v. Ah Fat*, 48 Cal. 61; *Kelley v. State*, 53 Ind. 311; *Rex v. Webb*, 1 Moo. & R. 405; 1 Hale P. C. 428.

4. See *Reg. v. Swindall*, 2 Car. & K. 230; *Reg. v. Longbottom*, 3 Cox C. C. 439; s. c., 1 Russ. on Cr. (5th Eng. ed.) 830; *Reg. v. Ledger*, 2 Fost. & F. 857;

Reg. v. Fletcher (Mss.), 1 Russ. on Cr. (5th Eng. ed.) 676.

Where Death Ensues in Consequence of the Unlawful act of Another, it is not necessary that the fatal result should have sprung from an act of commission; but if defendant omitted any act incumbent on him, from which death resulted to the deceased, if there was no malice it is manslaughter, if there was malice it is murder. *State v. Shelledy*, 8 Iowa 477.

5. *Tidwell v. State*, 70 Ala. 33.

6. *State v. Wood*, 53 Vt. 560.

7. 1 East P. C. 343, 344; 1 Russ. on Cr. (5th. Eng. ed.) 673; 4 Bl. Com. 197; 1 Hawk P. C. 31, § 9.

8. Thus rioters are not responsible for a homicide committed by those attempting to suppress the riot. *Butler v. People*, (Ill.) 18 N. E. Rep. 338; *Com. v. Campbell*, 89 Mass. (7 Allen) 541; *Rex v. Murphy*, 6 Car. & P. 103; 1 Whart. Cr. L. (8th. ed.) 398.

Liability for Killing by third Person.—**Rioters.**—While defendants were acting in a noisy and disorderly manner, the town marshal attempted to arrest one of them, whereupon defendants attacked and knocked him down. The marshal then fired his pistol, and killed

injury to the person killed,¹ and (4) where death is caused by false testimony given in a court of justice.²

III. KINDS OF HOMICIDE.—Homicide may be divided into two kinds: (1) non-felonious homicide and (2) felonious homicide. The first class is divisible into (a) justifiable homicide and (b) excusable homicide. The second class may be divided into (a) suicide, (b) murder and (c) manslaughter.

1. Justifiable Homicide.—Justifiable homicide is where the killing is in consequence of an imperative duty prescribed by law, or is owing to some unavoidable necessity induced by the act of the party killed, without any manner of fault in the party killing.³

a by-stander. *Held*, that defendants were not guilty of the homicide. *Butler v. People*, (Ill.) 18 N. E. Rep. 338.

1. *Rex v. Self*, 1 Leach C. C. 137; s. c., 1 East P. C. 226, 227; 1 Russ. on Cr. (5th Eng. ed.) 652; *Rex v. Squire*, 1 Russ. on Cr. (5th Eng. ed.) 653; 1 Hale P. C. 429.

But this does not extend to the case of a person whose death is caused not by any one fatal injury but by repeatedly causing the body which collectively caused death, though no one of them by itself would have caused death. *Com. v. Stafford*, 66 Mass. (12 Cush.) 619; *Stephen's Dig. Cr. L.* 159.

Lord Hale's reason is that "secret things belong to God; and hence it was that before 1 Ja. 1, c. 12, witchcraft or fascination was not felony, because it wanted a trial" (*i. e.*, I suppose because of the difficulty of proof). I suspect that the fear of encouraging prosecution for witchcraft was the real reason of this rule. Dr. Wharton rationalizes the rule thus: "Death from nervous causes does not involve penal consequences. This appears to me to substitute an arbitrary *quasi*-scientific rule for a bad rule founded on ignorance now dispelled. Suppose a man were intentionally killed by being kept awake till the nervous irritation of sleeplessness killed him; might not this be murder? Suppose a man kills a sick man, intentionally, by making a loud noise which wakes him when sleep gives him a chance of life; or suppose, knowing that a man has aneurism of the heart, his heir rushes into his room and roars in his ear, 'Your wife is dead!' intending to kill and killing him; why are not these acts murder?"

They are no more 'secret things belonging to God' than the operation of arsenic. As to the fear that by admitting that such acts are murder, people might be rendered liable to prosecution

for breaking the hearts of their fathers or wives by bad conduct, the answer is that such an event could never be proved. A long course of conduct gradually 'breaking a man's heart,' could never be the 'direct or immediate' cause of death. If it was, and it was intended to have that effect, why should it not be murder? In *Reg. v. Towers*, 12 Cox. C. C. 530, a man was convicted before Denman, J., of manslaughter, for frightening a child to death." See Whart. on Hom. (2nd ed.), § 372, on this case.

Lord Hale doubts whether voluntarily and maliciously infecting a person of the plague, and so causing his death, would be murder. 1 Hale P. C. 432. It is hard to see why. He says that "infection is God's arrow." A different view was taken in the analogous case of *Reg. v. Greenwood*, 1 Russ. on Cr. (5th Eng. ed.) 100; s. c., 7 Cox C. C. 404.

In one case it is said: "The court are of the opinion, that murder may be committed in the manner set forth in this indictment. It is unusual, but we cannot say it is impossible, or that the evidence will not sustain it. Take the case of poisoning referred to in *Hawkin's Pleas of the Crown*, where poison is administered at different times. Murder is the result, and it is proper to set forth in the indictment that it was committed by poison administered at various times. Take a case of starvation; a person may be deprived of food at various times, and so reduced as to produce death; the proper mode of setting forth the offence would be, that the person came to his death by being deprived of food at various times." *Reg. v. Bird*, T. & M. 437; s. c., 2 Eng. L. & Eq. 448; 3 Chit. Cr. L. 777; 3 Co. Inst. 50.

2. *Rex v. McDaniel*, 19 St. Tri. 806, and note 810-814; *Fost.* 131.

3. See *Roscoe's Cr. Ev.* (9th ed.) 634; 1 East P. C. 219; *Hawk. P. C. b. l.*

There are three classes of justifiable homicide, as follows:

a. EXECUTION OF CRIMINAL.—Where the proper officer executes a criminal in the discharge of his official duty, and in strict conformity with a legal sentence, this is a justifiable homicide. But where a person other than the proper officer,—such as a sheriff or his deputy,—performs the office of executioner, he is guilty of murder. But the criminal must have been found guilty by a competent tribunal; so that it would be murder otherwise to kill the greatest of malefactors. The sentence must have been legally given; that is, by a court or judge having authority to deal with the crime. If judgment of death is given by a judge who has not authority, and the accused is executed, the judge is guilty of murder. The sentence must be strictly carried out by the officer (*i. e.*, the sentence as it stands after the remission of any part which the sovereign thinks fit), so that if he beheads a criminal whose sentence is hanging or *vice versa*, he is guilty of murder. Though the sovereign may remit a part of the sentence, he may not change it.¹

b. HOMICIDE BY AN OFFICER RESISTED IN THE EXECUTION OF HIS DUTY.—Where an officer of justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it, this is a justifiable homicide.²

Homicide is justifiable on this ground in the following cases: (1) When a peace officer or his assistant, in the due execution of his office, whether in a civil or criminal case, kills one who is resisting his arrest or attempt to arrest. (2) When the prisoners in jail, or going to jail, assault the jailer or officer, and he, in his defence, to prevent an escape, kills any of them. (3) When an officer, or private person, having legal authority to arrest, attempts to do so, and the other flies, and is killed in the pursuit. But here the ground of the arrest must be either a felony or the infliction of a dangerous wound. (4) When an officer, in endeavoring to disperse a mob in a riotous or rebellious assembly, kills one or more of them, he not being able otherwise to suppress the riot.³

c. HOMICIDE TO PREVENT A CRIME.—Where the homicide is committed in the prevention of a forcible and atrocious crime it is justifiable.⁴ Thus a woman is justified in killing one who attempts to ravish her; and so, too, the husband or father may kill a man who attempts a rape on his wife or daughter, if she do not consent.

c. 28, §§ 1, 22; Harris' Cr. L. 155; 1 Russ. on Cr. (5th Eng. ed.) 843.

1. Harris' Cr. L. 155.

2. 4 Bl. Com. 179; Harris' Cr. L. 156.

3. Harris' Cr. L. 155.

4. 1 Russ. on Cr. (5th Eng. ed. 849); Fost. 273; Cal. 128, 129; 1 Hale P. C. 445, 481, 484, *et seq.*; 1 Hawk. P. C. ch. 28, §§ 21, 24; Reg. v. Ball, 9 Car. & P. 922.

But it has been held, that a homicide committed in the prevention of a crime unaccompanied with force is not within the protection of the rule; such as picking pockets. 1 Hal. 488; 4 Bl. Com. 180. "If one pick my pocket and I cannot otherwise take him than by killing him, this falls under the general rule concerning the resisting of felons." 1 East P. C. ch. 4, §§ 45, 273.

And even if the adultery is by the consent of the wife, the husband, taking the offender in the act and killing him, is guilty of manslaughter only.¹

2. Excusable Homicide.—An excusable homicide is one where the party killing is not altogether free from blame, but the necessity which renders it excusable may be said to be partly induced by his own act.² Excusable homicide is divided into two classes: (1) homicide in self-defence, and (2) homicide by accident or misadventure.

a. HOMICIDE IN SELF-DEFENCE—Is a sort of homicide committed *se et sua defendendo*, in defense of a man's person or property, upon some sudden affray, said by the law to be in some measure blamable and bearably excusable.³

To bring the killing within this excuse, the accused must show that he endeavored to avoid any further struggle, and retreated as far as he could, until no possible or at least probable, means of escaping remained; that then, and not until then, he killed the other in order to escape destruction. It matters not that the defendant gave the first blow, if he has terminated his connection with the affray by declining further struggle before the mortal wound is given. Of course the defence must be made by the person assaulted, while the danger is imminent; for if the struggle is over, or the other is running away, this is revenge and not self-defence; nor will a retreat of the nature indicated avail if the blow is the result of a concerted design; as in the case of a duel, where the two parties have agreed to meet each other, and

1. Harris' Cr. L. 157.

2. Roscoe's Cr. Ev. 634; Harris' Cr. L. 158; 1 Russ. on Cr. (5th Eng. ed.) 844.

Distinction Between Justifiable and Excusable Homicide.—Harris says (Cr. L. 158.): that there is little if any ground for the distinction between justifiable and excusable homicide. Perhaps there may be something in this, that in the first case, the killer is engaged in an act which the law enjoins or allows positively, while in the latter he is about something which the law negatively does not prohibit. The reason usually given is that in both the forms of excusable homicide, there may be some degree of blame attributed in the first case, *i. e.*, self-defence in as much as in quarrels both parties are to some extent in fault; the second, *i. e.*, extent, the party may not have used sufficient caution. But to visit the act under all circumstances with a punishment due to what may have happened is obviously unjust. In neither case is there any malice, which is always an essential of a crime. In former times a very marked

distinction was made in the two kinds of homicide. That styled "excusable" did not imply that the party was altogether excused; so much so that Coke says that the penalty is death (2 Co. Inst. 148, 315). But the earliest information which the records specially shows that the defendant was entitled to a complete pardon on the restitution of his cause; but he had to pay a certain sum of money to procure its award. Formerly in this case it was the practice for the jury to find the fact specially, and upon certifying the record into chancery, a pardon issued, of course, under the statute of Gloucester, ch. 9, and the forfeiture was thereby saved. But latterly it was usual for the jury to find the prisoner not guilty. 1 East P. C. 220. And now by the 24 & 25 Vict. ch. 100, §. 7, "no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony."

See Roscoe's Cr. Ev. 634.

3. 1 Russ. on Cr. (5th Eng. ed.) 844; Harris' Cr. L. 159.

one, having retreated as far as he can, kills the other in of himself. Nor will it avail if there has been a blow of *prepnse*, and the striker has retreated and then killed t his own defence.¹

b. HOMICIDE BY MISADVENTURE.—Homicide by m is where a man, doing a lawful act without an intention harm, and after using proper precautions to prevent injury unintentionally, happens to kill another person. must be lawful; if it be unlawful the homicide will murder or manslaughter;³ and it must not be done wit of great bodily harm; for if it is then the legality of t sidered abstractly would be no more than a mere ca tense, and, consequently, would avail nothing. The ac be done in the proper manner and with due caution danger.⁴

1. Harris' Cr. L. 159.

"I take the rule to be settled, that the killing of one who is an assailant must be under a reasonable apprehension of loss of life or great bodily harm; and the danger must appear so imminent, at the moment of the assault, as to prevent no alternative of escaping its consequences, but by resistance. Then, the killing may be excusable, even if it turn out afterward that there was no actual danger." Logue v. Com., 2 Wright (Pa.) 265. "The guilt of the accused must depend on the circumstances as they appear to him." Regina v. Thurborn, 1 Den. C. C. 387.

2. 1 Russ. on Cr. (5th Eng. ed.) 844; Roscoe's Cr. Ev. (9th Eng. ed.) 634; Harris' Cr. L. 160; 1 Hawk. P. C. ch. 29, § 1; 1 East P. C. ch. 5, § 8, 221; Id. § 36, P. C. 260; Fost 258.

3. 1 Russ. on Cr. (5th Eng. ed.) 759, 812.

4. 1 Russ. on Cr. (5th Eng. ed.) 844; 1 East P. C. ch. 5, §§ 36, 261.

Act Must be Lawful.—The act upon which the death ensues must be lawful in itself, for if it be *malum in se*, the case will amount to felony, either murder or manslaughter, according to the circumstances. If it be merely *malum prohibitum*, as (formerly) the shooting at game by an unqualified person, that will not vary the degree of the offence. The usual examples under this head are: (1) Where death ensues from innocent recreations; (2) from moderate and lawful correction *in foro domestico*; and (3) from acts lawful or indifferent in themselves, done with proper and ordinary caution. Homicide by *chance-medley* is strictly where death ensues from a combat between the parties

upon a sudden quarrel; frequently confounded with or accident. 1 East P. C.

To bring the slaying within the protection of the excuse, to which the slayer is engaged, it must be a lawful one. For, if the slaying be in the performance of an act which is manslaughter, at least, if such act is a felony. Reg. 1 Leach C. C. 6. It must be done in a proper manner. Thus, a violent act for a parent to chastise a child, and, therefore, if the parent occasion the death of the child, the punishment will be moderate, and will be innocent, as *per se*. But if the correction exceed the bounds of moderation, either in the instrument, or the quantity of punishment, and death ensues, it is manslaughter, at the least, if the instrument be dangerous, murder. Thus, it will be murder, if the instrument be one likely to cause death; but, if the instrument is not dangerous in character, though an injury, it will be manslaughter. The act must also be done with caution to prevent danger, and with more caution by the use of dangerous instruments or weapons, if caution is such as to make it probable that any danger or injury will result from the act to others. Thus, if a stone be thrown from a house, whereof some one is caused, manslaughter, or homicide, if the act be murder, if the act be such that people were passing, notice; manslaughter, if a person was not likely that any person passing; excusable homicide, if the place where persons

IV. SUICIDE.—A person who kills himself in a manner which, in the case of another person, would amount to murder, is guilty of murder, and every person who aids and abets any person in killing himself is an accessory before the fact, or a principal in the second degree in such murder.¹

V. MURDER.—1. **Definition.**—Murder is unlawful homicide with malice aforethought.² At common law it is defined as the unlawful killing, by a person of sound mind and discretion, of any reasonable creature in being and under the king's peace, with malice aforethought, either express or implied by law.³ In the United States the offence is generally defined as the willful killing of a human being in the peace of the state, or of the people, with malice aforethought, either express or implied.⁴ The term "in

the habit of passing or likely to pass. (Fost. 262.) It has been said that to be criminal, the negligence must be so gross as to be reckless (Reg. v. Noakes, 4 F. & F. 921, n.), but it is impossible to define culpable or criminal negligence. Harris' Cr. L. 160, 161.

1. Stephen's Dig. Cr. L. 169; 1 Hale P. C. 111-419; Reg. v. Tretwell, L. & C. 161; Rex v. Russell, 1 Moo. C. C. 356.

For a full discussion of the subject of suicide, see *post* that title in this work.

Counseling a Man to Commit Suicide although not present when the act is done, is murder. Com. v. Bowen, 13 Mass. 359. So if one procures another to commit suicide but is absent when the act is done, he is an accessory before the fact. Rex v. Russell, 1 Moo. C. C. 356; Reg. v. Leddington, 9 C. & P. 79.

On the trial of an indictment under Mo. Rev. Stat., § 1239, making guilty of manslaughter any person who shall "deliberately assist" another in committing self-murder, an instruction that the defendant was guilty if he was "deliberately present, assisting" the deceased in the act. *Held*, not to be erroneous. State v. Ludwig, 70 Mo. 412.

2. See Desty Am. Cr. L. § 129; Stephen's Cr. L. Art. 225.

3. 4 Bl. Com. 195; 2 Chit. Cr. L. 724; Coke 3d Inst. 47; Harris' Cr. L. (3rd ed.) 164. See Perry v. State, 43 Ala. 21; People v. Doyell, 48 Cal. 85; People v. Martin, 47 Cal. 102; People v. Haun, 44 Cal. 60; People v. Cronin, 34 Cal. 200; People v. Pool, 27 Cal. 572; People v. Belencia, 21 Cal. 544; People v. Steventon, 9 Cal. 273; People v. Moore, 8 Cal. 90; People v. Gill, 6 Cal. 637; Smith v. People, 1 Colo. 137; Bohannon v. Com., 8 Bush (Ky.) 481;

Com. v. York, 40 Mass. (9 Metc.) 93; Com. v. Webster, 50 Mass. (5 Cush.) 295; State v. Zellers, 6 N. J. Eq. (2 Halst.) 220; U. S. v. Magill, 1 Wash. C. C. 463; Desty Cr. L. § 129, a; 1 Hale P. C. 424; 1 Hawk P. C. ch. 13, § 3; Fost. 256; 2 Ld. Raym. 1487; 1 Russ. on Cr. (5th Eng. ed.) 641; Washb. Cr. L. 74.

4. See People v. Aro, 6 Cal. 207; Spies v. People, 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829; U. S. v. King, 34 Fed. Rep. 302.

The Distinction Between Murder and Manslaughter is not altered by the statute of Arkansas, nor is the nature or definition of murder, both remaining as at common law. Bivens v. State, 11 Ark. 455.

In Louisiana.—The definition of the offence of murder as known under the common law of England, is the true definition of willful murder, the punishment of which is provided for by the act of the legislature of 1855, § 1, relative to crimes and offences. State v. Mullen, 14 La. An. 577.

"Premeditated Design."—The phrase "premeditated design," used, in the statute of Mississippi in its definition of murder, is the same, in its legal effect, as are the words "malice aforethought," in the common law definition. McDaniel v. State, 16 Miss. (8 Smed. & M.) 401.

In Federal Jurisdiction—What Killing is Murder.—U. S. Rev. Stat., § 5339, provides that "every person who commits murder within any fort . . . under the conclusive jurisdiction of the United States . . . shall suffer death." *Held*, the statute not defining the offence of murder, that the common law, as interpreted in our courts, governs, and murder is where a

the king's peace," or "in the peace of the state," or "of the sovereign," or "of the people," refers exclusively to the state and condition of the person killed, and a person not in a state of actual war against a state or sovereign, whether an alien enemy or a traitor in arms, is within its meaning;¹ therefore, the killing, even in time of war, of an enemy's subject not in arms, prisoners of war, persons with safe conduct, or deserters, is unlawful, and, if with malice aforethought, is murder.²

2. What Homicide Constitutes Murder.—*a. KILLING WITH A SPECIFIC MALICIOUS INTENT.*—(1) *What Constitutes the Requisite Malice.*—(a) *Nature of the Intent.*—Malice is an essential element in the crime of murder, either at common law or under the statutes. But the term, in and of itself, is not necessarily confined to a specific intention to take the life of the person killed, but it may include an intention to do an unlawful act whose result will probably be to deprive another person of life.³ As a general rule, however, and in most cases, a specific, deliberately formed intention unlawfully to take life, either as expressly shown by the evidence, or as implied by law, is a constituent element of the crime of murder; and this intent is commonly spoken of as "malice aforethought," or "malice prepense."⁴ To constitute this malice there is no necessity of any ill-will, spite or hatred towards the deceased personally;⁵ but the term may be defined approximately

person of sound memory and discretion unlawfully and feloniously kills any human being in the peace of the sovereign, with malice prepense or aforethought, express or implied. U. S. v. King, 34 Fed. Rep. 302.

1. See *State v. Gut*, 13 Minn. 341; *People v. McLeod*, 1 Hill (N. Y.) 377; *State v. Dunkley*, 3 Ired. (N. C.) L. 116; 4 Bl. Com. 108; 3 Co. Inst. 50; 1 Hale P. C. 433; Whart. Conf. of L. 911.

2. *State v. Gut*, 13 Minn. 341; *People v. McLeod*, 1 Hill (N. Y.) 377.

"Under the King's Peace."—Blackstone says: "The person killed must be a reasonable creature in being and under the king's peace at the time of the killing. Therefore, to kill an alien, a Jew, or an outlaw, who are all under the king's peace and protection, is as much murder as to kill the most regular born Englishman, except he be an alien enemy in time of war." 4 Bl. Com. 107.

3. See *Lewis v. State*, 72 Ga. 164; *Dozier v. State*, 26 Ga. 156; *State v. Decklotts*, 19 Iowa 447; *State v. Walker*, 77 Me. 488; *Weilar v. People*, 30 Mich. 16; *Ex parte Wray*, 30 Miss. 673; *State v. Partlow*, 90 Mo. 608; *State v. Jones*, 79 Mo. 441; *State v.*

Schoenwald, 31 Mo. 147; *Warren v. State*, 4 Coldw. (Tenn.) 130; *State v. Anderson*, 2 Overt. (Tenn.) 6. *Compare People v. Austin*, 1 Park. Cr. Cas. (N. Y.) 154; *State v. Turner*, Wright (Pa.) 30; *In re Anderson*, 11 Up. Can. C. P. 62.

Express Malice.—Express malice is defined as "where one, with deliberate mind and formed design, doth kill another." But it also exists, without a previous design to kill, where there is an intent to do an unlawful act, which will probably deprive another of life. *Ex parte Wray*, 30 Miss. 673.

Willful Omission of Duty.—Death in consequence of the "willful" omission of the duty to provide for a child is murder, although there was no intent to kill. *Lewis v. State*, 72 Ga. 164; s. c., 53 Am. Rep. 835.

4. See *Territory v. Egan*, 3 Dak. 119; *Dozier v. State*, 26 Ga. 156; *Ex parte Wray*, 30 Miss. 673; *State v. Schoenwald*, 31 Mo. 147; *State v. Anderson*, 2 Overt. (Tenn.) 6.

5. *McAdams v. State*, 25 Ark. 405; *People v. Taylor*, 36 Cal. 255; *Stiles v. State*, 57 Ga. 183; *Revel v. State*, 26 Ga. 275; *State v. Decklotts*, 19 Iowa 447; *State v. Hays*, 23 Mo. 287; *Com. v. Drum*, 58 Pa. St. 9; *State v. Doug-*

as that condition of the mind which shows "the heart regardless of duty and fatally bent on mischief" toward another person.¹

It is imperative that this malice exist at the time of the homicide, or at the time of the beginning of the quarrel, scuffle or affray, during which the killing occurs; for, if the killing, or the act which leads to it or causes it, be not committed out of present malice, it is not murder.²

(b) *Time for Deliberation*.—It is not necessary that the deliberate intent to kill should have been formed for any specific length of time; it is enough that it exists at the moment of the killing, if it was deliberate; that is, if it was formed when the mind was in its normal state, under the control of the slayer, and not in the heat of passion caused by adequate provocation. A pre-determined intention to kill, fixed in the mind after mature reflection, is not necessary to the crime of murder.³

(c) *Passion After Intent Formed*.—While a killing committed in the heat of passion caused by adequate provocation is not murder, the reason is because there is no malice, the intent to kill being first formed when the slayer is in the heat of passion; but the fact that the defendant was in a state of passion at the moment of the killing cannot avail him, either as a mitigation or as a defence, if the killing was deliberately intended and designed before provocation was given or passion excited.⁴

lass, 28 W. Va. 297; United States v. Ross, 1 Gall. C. C. 624. See State v. Jarrott, 1 Ired. (N. C.) L. 76.

1. State v. Chavis, 80 N. C. 353; Com. v. Drum, 58 Pa. St. 9; McKinney v. State, 8 Tex. App. 626; Harris v. State, 8 Tex. App. 90; State v. Douglass, 28 W. Va. 297.

2. Clements v. State, 50 Ala. 117; Hill v. People, 1 Colo. 436; McMillen v. State, 35 Ga. 54; Com. v. Webster, 59 Mass. (5 Cush.) 316; People v. Divine, 1 Edm. Sel. Cas. (N. Y.) 594; State v. Anderson, 2 Overt. (Tenn.) 6; Bristow v. Com., 15 Gratt. (Va.) 634.

3. See McAdams v. State, 25 Ark. 405; McKenzie v. State, 26 Ark. 334; Jones v. State, 29 Ga. 594; Peri v. People, 65 Ill. 17; State v. Decklotts, 19 Iowa 447; Nichols v. Com. 11 Bush (Ky.) 575; Green v. State, 13 Mo. 382; Leighton v. People, 88 N. Y. 117; s. c., 10 Abb. (N. Y.) N. C. 261; People v. Clark, 7 N. Y. 385; Lanergan v. People, 50 Barb. (N. Y.) 266; State v. Moore, 69 N. C. 267; Shoemaker v. State, 12 Ohio 43; Com. v. Drum, 58 Pa. St. 9; Kilpatrick v. Com., 31 Pa. St. 108; Herin v. State, 33 Tex. 638; Jordan v. State, 10 Tex. 479; State v. McDonnell, 32 Vt. 491; United States v. Cornell, 2 Mason C. C. 91.

"Cooling Time."—What is sufficient

cooling time after the provocation, to constitute the offence murder, is to be judged of by the circumstances attending each particular case. The time in which an ordinary man, under, or in like circumstances, would have cooled, is a reasonable time. Kilpatrick v. Com., 31 Pa. St. 108.

Flat-Fight.—The separation of two persons engaged in fist-fight, which eventually terminates in a homicide, to justify a verdict of murder, must be for a time sufficient for the passions excited by the fight to have subsided, and reason to have resumed its sway. Where one witness testified that the prisoner was "absent no time," and another, that after the first fight he started to go home, and looking back the parties were again fighting. *Held*, there was not sufficient cooling time as to justify a verdict of murder. State v. Moore, 69 N. C. 267.

4. State v. Shippey, 10 Minn. 223; State v. Hill, 69 Mo. 451; People v. Sullivan, 7 N. Y. 396; State v. Hensley, 94 N. C. 1021; State v. Gooch, 94 N. C. 987; State v. Lane, 4 Ired. (N. C.) L. 113; State v. Martin, 2 Ired. (N. C.) L. 101.

Pretense of Fighting.—Where one person seeks another, with the purpose, under the pretence of fighting, to stab him,

(2) *Malice Implied.*—(a) *By the Act of Killing.*—Malice is always presumed where the unlawful homicide is shown to have been committed by defendant and no circumstances in mitigation or justification appear.¹ But where facts or circumstances in

and a homicide ensues, it will be clearly murder in the assailant, no matter what provocation was apparently then given, or how high the assailant's passion rose during the combat, for the malice is express. *State v. Lane*, 4 Ired. (N. C.) L. 113.

Inducing Deceased to Draw a Weapon.—If A, from previous angry feelings, on meeting with B, strikes him with a whip, with the view of inducing B to draw a pistol, or believing he will do so, in resentment of the insult, and determines, if he does so, to shoot B as soon as he draws, and B does draw, and A immediately shoots and kills B, this is murder. *State v. Martin*, 2 Ired. (N. C.) L. 101.

1. *Clements v. State*, 50 Ala. 117; *People v. Rush*, 71 (Cal.) 602; *People v. Belencia*, 21 Cal. 544; *People v. Gibson*, 17 Cal. 283; *Dukes v. State*, 14 Fla. 199; *Phelps v. State*, 76 Mo. 571; *Freeman v. State*, 70 Ga. 736; *Wilson v. State*, 69 Ga. 224; *Clarke v. State*, 35 Ga. 75; *Conn v. People*, 116 Ill. 458; *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 129; *Mayes v. People*, 106 Ill. 306; s. c., 46 Am. Rep. 698; *Davison v. People*, 90 Ill. 221; *Murphy v. People*, 37 Ill. 447; *Boyle v. State*, 105 Ind. 469; *State v. Castello*, 62 Iowa 404; *State v. Knight*, 43 Me. 11; *Com. v. York*, 50 Mass. (9 Metc.) 93; *Com. v. Drew*, 4 Mass. 391; *State v. Brown*, 12 Minn. 538; *State v. Shippey*, 10 Minn. 223; *Hague v. State*, 34 Miss. 616; *Green v. State*, 28 Miss. 687; *McDaniel v. State*, 16 Miss. (8 Smed. & M.) 402; *State v. Lane*, 64 Mo. 319; *State v. Mitchell*, 64 Mo. 191; *State v. Holme*, 54 Mo. 153; *Milton v. State*, 6 Neb. 136; *Pruyt v. People*, 5 Neb. 377; *Stokes v. People*, 53 N. Y. 164; *People v. Curby*, 2 Park. Cr. Cas. (N. Y.) 28; *State v. Ta-chi-na-tah*, 64 N. C. 614; *State v. Smith*, 3 Dev. & B. (N. C.) L. 117; *State v. Johnson*, 3 Jones (N. C.) L. 266; *Davis v. State*, 25 Ohio St. 369; *Huling v. State*, 17 Ohio St. 583; *State v. Town*, *Wright* (Ohio) 75; *State v. Turner*, *Wright* (Ohio) 20; *Cathcart v. Com.*, 37 Pa. St. 108; *State v. Ferguson*, 2 Hill (S. C.) L. 619; *State v. Smith*, 2 Strobb. (S. C.) L. 77; *Quarles v. State*, 1 Sneed (Tenn.) 407; *Mitchell*

v. State, 5 Yerg. (Tenn.) 340; *Conner v. State*, 4 Yerg. (Tenn.) 137; *Hamby v. State*, 36 Tex. 523; *McCoy v. State*, 25 Tex. 37; *Turner v. State*, 16 Tex. App. 318; *Sharp v. State*, 6 Tex. App. 650; *Brown v. State*, 4 Tex. App. 275; *Johnson's Case*, 5 Gratt. (Va.) 660; *State v. Douglass*, 28 W. Va. 297; *United States v. Armstrong*, 2 Curt. C. C. 446. Compare *Kent v. People*, 8 Colo. 563; *State v. Trivas*, 32 La. An. 1086; s. c., 36 Am. Rep. 283; *State v. Swayze*, 30 La. An. pt. II, 1323; *Goodall v. State*, 1 Ore. 333.

In *Spies v. People* (The Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 89, the court in speaking of the presumption of malice from the making of the dynamite bombs with which the killing was done, say: "Here is a man, connected with a certain organization, engaged in arming and drilling for a conflict with the police. He is experimenting with dynamite, and in the construction of bombs under the direction of armed members of that organization. He makes bomb-shells, fills them with dynamite, takes them to the meeting-place of armed members of that organization, puts them where access to them can easily be had, using such precautions as such dangerous explosives naturally require. At once, certain of these armed members, such as the two large men of the Lehr and Wehr Verein already spoken of, come forward and take bombs and go their several ways. In a little more than an hour afterwards, one of these very bombs is thrown into a crowd of policemen and kills one of them. Was not the conduct of this man, who thus coolly and carefully prepared the weapons for one definite class of men to use in the murder of another definite class of men, marked by 'deliberation,' as that term is defined in the authorities? It was a fair conclusion, from the evidence, that Lingg knew that the bombs he was making would be thrown among the police. It was a fair conclusion, from the evidence, that he intended the bombs to be placed in the hall-way to be used by the members of the International groups, not only in the interest of the general movement against the police, with which he was con-

mitigation or justification appear, there is no implication of malice.¹

(b) *By the Means Used.*—(b') *Deadly Weapon.*—Where the homicide was committed by the use of a dangerous weapon likely to produce death, the law presumes malice, in the absence

nected, but in the interests of the particular conspiracy that was concocted on Monday night. Even if he did not know the particular individual who was to throw the bomb, he knew that it would be thrown by some one belonging to the sections or groups already described, and this was sufficient to affect him with the guilt of advising, encouraging, aiding or abetting the crime charged in the indictment. He may not have known what particular policeman would have been killed, whether Matthias J. Degan or another. But when he opened the loaded satchel at Neff's Hall on Tuesday night, that act, viewed in the light of all the antecedent, attendant and subsequent occurrences, was virtually a designation of the body or class of men who were to be attacked. When one of such class was killed, the guilt was the same as though a person bearing a particular name had been pointed out as the victim. Even if he did not know that one of the bombs would be thrown on that evening at a particular place called the Haymarket, it was sufficient that he knew it was to be used at that point in the city where the collision should occur between the workmen and the police. Such a collision did occur at the Haymarket."

Throwing a Glass.—M, when angry and excited, threw a beer-glass at his wife, which broke a lamp she was carrying, and she was fatally burned. Held, immaterial whether he intended to strike her or others who were present, or whether he had any specific intent, but the act showing "an abandoned and malignant heart," malice was implied, and he was guilty of murder. *Mayes v. People*, 106 Ill. 306; s. c. 46 Am. Rep. 698.

Interfering Between Combatants.—A person who is neither assaulted nor threatened and who gets down from his horse, arms himself with a club, interposes between two others about to engage in a fight, and kills one of them, is guilty of murder. *Johnson's Case*, 5 Gratt. (Va.) 660.

Where two persons are fighting, and a third, unconnected with either, without any apparent provocation, stabs

one of the parties, the law will imply malice. *Conner v. State*, 4 Yerg. (Tenn.) 137.

Reckless Acts.—The law attributes malice to reckless acts of homicide, when no particular motive can be traced. *Conn v. People*, 116 Ill. 458.

The Rule in Colorado is Otherwise.—There malice is to be found from the evidence, not inferred from the fact of the killing. And this is so, where the conviction is of murder in the second degree. Nor does anything in Col. Cr. Code, § 36, imply the contrary, when that section is construed in connection with other provisions of the statute. *Kent v. People*, 8 Colo. 563.

In Louisiana also, the jury are to infer malice only from the surrounding circumstances; it is not an implication of law from the act of killing. *State v. Swayze*, 30 La. An. pt. II, 1323.

Antecedent Quarrel.—The question whether, where the parties to an antecedent quarrel meet, and an affray ensues, and one is killed, malice in such killing is inferable from the previous quarrel, is to be determined by the jury under the circumstances of the case. It is error to instruct the jury that if there was malice on the part of the accused he is guilty of murder, even though he committed the homicide in self-defence. *State v. Ta-cha-na-tah*, 64 N. C. 614.

Same—Presumption Against Malice Therefrom.—In a case wherein some of the facts tend to establish that the killing was upon express, others upon implied malice, and where fresh provocation intervenes between the pre-conceived malice and the death, it will not be presumed that the killing was upon the antecedent malice; but though such malice will not be presumed, it may by the circumstances and facts in the case, be proved to have actuated the person in the killing, notwithstanding the fresh provocation. *McCoy v. State*, 25 Tex. 37.

1. See *People v. March*, 6 Cal. 543; *People v. Milgate*, 5 Cal. 127; *Murphy v. People*, 37 Ill. 448; *Graham v. Com.*, 16 B. Mon. (Ky.) 587; *State v. Knight*, 43 Me. 11; *Grear v. State*, 28 Minn.

of a showing to the contrary;¹ and this is the case even though the defendant habitually carried the deadly weapon, and used it in mutual combat, if with intent to kill, unless he was injured without fault, and its use was necessary to prevent great bodily

426; *State v. Johnson*, 3 Jones (N. C.) L. 266; *State v. Stark*, 1 Strobb. (S. C.) L. 479; *Quarles v. State*, 1 Sneed (Tenn.) 407; *Turner v. State*, 16 Tex. App. 318.

1. See *Jackson v. State*, 81 Ala. 33; *Sylvester v. State*, 71 Ala. 17; *Washington v. State*, 60 Ala. 10; *Commander v. State*, 60 Ala. 1; *Hadley v. State*, 55 Ala. 31; *Eiland v. State*, 52 Ala. 322; *Clements v. State*, 50 Ala. 117; *Murphy v. State*, 37 Ala. 142; *Dill v. State*, 25 Ala. 15; *Oliver v. State*, 17 Ala. 587; *Palmore v. State*, 29 Ark. 248; *McAdams v. State*, 25 Ark. 405; *Atkins v. State*, 16 Ark. 568; *Bivens v. State*, 11 Ark. 455; *People v. Barry*, 31 Cal. 357; *People v. March*, 6 Cal. 543; *Murphy v. People*, 9 Colo. 439; *U. S. v. Crow Dog*, 3 Dak. 106; *State v. Ward*, 5 Harr. (Del.) 406; *Moon v. State*, 68 Ga. 687; *Hill v. State*, 41 Ga. 482; *Clarke v. State*, 35 Ga. 75; *Henry v. State*, 33 Ga. 441; *Choice v. State*, 31 Ga. 424; *Lyon v. State*, 22 Ga. 399; *Ray v. State*, 15 Ga. 223; *Mitchum v. State*, 11 Ga. 615; *Davison v. People*, 90 Ill. 221; *Boyle v. State*, 105 Ind. 469; *Miller v. State*, 37 Ind. 432; *Murphy v. State*, 31 Ind. 511; *Brabley v. State*, 31 Ind. 492; *Clem v. State*, 31 Ind. 480; *Ex parte Moore*, 30 Ind. 197; *Beauchamp v. State*, 6 Blackf. (Ind.) 300; *State v. Rainsbarger*, 71 Iowa 746; *State v. Perigo*, 70 Iowa 657; *State v. Hockett*, 70 Iowa 442; *State v. Decklotts*, 19 Iowa 447; *State v. Gillick*, 7 Clarke (Iowa) 287; *Donnellan v. Com.*, 7 Bush (Ky.) 676; *State v. Mullen*, 14 La. An. 577; *Com. v. York*, 50 Mass. (9 Metc.) 93; *Hurd v. People*, 25 Mich. 405; *State v. Hoyt*, 13 Minn. 132; *Hawthorne v. State*, 58 Miss. 778; *Cannon v. State*, 57 Miss. 147; *Evens v. State*, 44 Miss. 762; *Head v. State*, 44 Miss. 731; *Ex parte Wray*, 30 Miss. 673; *Green v. State*, 28 Miss. 687; *Woodslides v. State*, (3 Miss.) 2 How. 655; *State v. Alexander*, 66 Mo. 148; *State v. Christian*, 66 Mo. 138; *State v. Evans*, 65 Mo. 574; *State v. Underwood*, 57 Mo. 40; s. c., 1 Am. Cr. Rep. 251; *State v. Hays*, 23 Mo. 287; *Jones v. State*, 14 Mo. 409; *Roberts v. State*, 14 Mo. 138; *State v. Byers*, (N. C.) 6 S. E. Rep. 420; *State v. Thomas*, 98 N. C. 599; s. c., 2 Am. St. Rep. 551;

10 Cr. L. Mag. 443; *State v. Willis*, 63 N. C. 26; *State v. Merrill*, 2 Dev. (N. C.) L. 269; *State v. Hildreth*, 9 Ired. (N. C.) L. 429; *State v. Collins*, 8 Ired. (N. C.) L. 407; *State v. West*, 6 Jones (N. C.) L. 505; *State v. Hogue*, 6 Jones (N. C.) L. 381; *State v. Johnson*, 3 Jones (N. C.) L. 266; *Thomas v. People*, 67 N. Y. 218; *People v. Lamb*, 2 Keyes (N. Y.) 360; *Irwin v. State*, 29 Ohio St. 136; s. c., 1 Am. Cr. Rep. 251; *McCue v. Com.*, 78 Pa. St. 185; s. c., 1 Am. Cr. Rep. 268; *Com. v. Drum*, 58 Pa. St. 9; *Kilpatrick v. Com.*, 31 Pa. St. 108; *Cathcart v. Com.*, 37 Pa. St. 112; *State v. Ferguson*, 2 Hill (S. C.) 619; *Anderson v. State*, 3 Head (Tenn.) 455; *Dains v. State*, 2 Humph. (Tenn.) 439; *Haile v. State*, 1 Swan (Tenn.) 248; *Hamby v. State*, 36 Tex. 525; s. c., 1 Green Cr. Rep. 650; *Cockrum v. State*, 24 Tex. 394; *Gatlin v. State*, 5 Tex. App. 531; *Murray v. State*, 1 Tex. App. 417; *State v. McDonnell*, 32 Vt. 491; *State v. Douglass*, 28 W. Va. 297; *Hill v. Com.*, 2 Gratt. (Va.) 594; *State v. Ellick*, 1 Winst. (N. C.) L. 56; *U. S. v. McGlue*, 1 Curt. C. C. 1; *Macklin's Case*, 2 Lew. C. C. 225; *U. S. v. Outerbridge*, 5 Sawy. C. C. 620; *Reg. v. McDowell*, 25 Up. Can. Q. B. 112; *Rex v. Taylor*, 6 Burr 27, 93; *Reg. v. Smith*, 8 Car. & P. 160. *Compare Tesney v. State*, 77 Ala. 33; *Maher v. People*, 10 Mich. 212; *Cotton v. State*, 31 Miss. 504; *State v. Newton*, 4 Nev. 410; *Stokes v. State*, 53 N. Y. 164.

What Instructions are Proper.—The following instructions, there being evidence on the subject, on the trial of an indictment for murder, were given to the jury: "If homicide be committed in a sudden heat, by the use of a deadly weapon, no provocation given by mere words will reduce the killing to manslaughter. The question should never be, was there anger? merely; but, was there legal provocation to such anger? The use of a dangerous weapon under a provocation by words only, or under no provocation, is always evidence of malice aforethought. To constitute malice aforethought it is only necessary that there be a formed design to kill; and such design may be conceived at the moment the fatal stroke is given, as

harm from the deceased.¹ The question as to what is a deadly weapon depends largely upon the circumstances of each particular case; but it may be laid down as a general rule that a deadly weapon from the use of which malice may be inferred is not one, a blow from which would ordinarily produce death, but one from which, as it was used, death would probably result.² As a gen-

well as a long time before. Malice aforethought means the intention to kill; and, where such means are used as are likely to produce death, the legal presumption is, that death was intended." *Held*, that these instructions were correct. *Beauchamp v. State*, 6 Blackf. (Ind.) 300.

Presumption not Proof.—An instruction that "malice is proved by the selection and use of a deadly weapon, in a deadly manner, without lawful excuse." *Held*, erroneous. *State v. Perigo*, 70 Iowa 657.

Communicated Threat.—If A threatens B with personal violence, and the threat is communicated to B, and B thereupon arms himself with a deadly weapon, and meeting A kills him, while A is not making any hostile demonstration against B, the killing is willful, deliberate, malicious, and is a murder. *State v. Mullen*, 14 La. An. 577.

What Intention is Presumed.—It is not the intention to use a deadly weapon, but the intention to kill, of which the use of the weapon is evidence, that constitutes the crime of murder; and this distinction should be made clear to the jury in the instructions on this point. *Palmore v. State*, 29 Ark. 248.

What Weapons are "Deadly" in Law.—It is error to refuse to give a charge that "before malice can be inferred from the use of a weapon, it must be shown to be a deadly weapon in contemplation of law; such a weapon that death would be the natural, reasonable, or probable consequence from the use of it. *Williams v. State*, 81 Ala. 1.

Resisting Illegal Arrest.—The use of a deadly weapon in resisting an illegal arrest, is not sufficient to constitute the killing murder. *Jones v. State*, 14 Mo. 409; *Roberts v. State*, 14 Mo. 138.

1. See *Lyon v. State*, 22 Ga. 399; *State v. Hoyt*, 13 Minn. 132; *State v. Christain*, 66 Mo. 138; *Ex parte Wray*, 30 Miss. 673; *Green v. State*, 28 Miss. 687; *State v. Hogue*, 6 Jones (N. C.) L. 381; *State v. Ellick*, 1 Winst. (N. C.) 56; *State v. Ferguson*, 2 Hill (S. C.) 619.

Stabbing While in Dispute.—Two men were in a dispute together, one turned to get his stick and the other stabbed him with a long knife, so that death ensued. *Held*, that the offence was murder. *State v. Ellick*, 1 Winst. (N. C.) 56.

Weapon Prepared for Fight.—It appeared that the prisoner had prepared a deadly weapon, with an intention to use it, in case he got into a fight with deceased, and went to a particular place for the purpose of meeting deceased and having a conflict with him. *Held*, to be murder, not manslaughter. *State v. Hogue*, 6 Jones (N. C.) L. 381.

Trespassers.—A party committing a trespass, and going armed with deadly weapons, to take the life of the owner of the premises, should he attempt to eject him, would be guilty of murder in killing the owner, even to repel an assault by him, unless the assault was such as to appear to show an intention to take the intruder's life. *Lyon v. State*, 22 Ga. 399.

Superiority of Weapons.—The fact that in a mutual combat the accused used superior weapons to those used by the party slain, is not of itself evidence of malice. *People v. Barry*, 31 Cal. 357.

2. *Sylvester v. State*, 71 Ala. 17.

Effects Produced May Show its Character.—The actual effects produced by a weapon may aid in determining its character, and in showing that the person using it ought to be aware of the danger of thus using it. *State v. West*, 6 Jones (N. C.) L. 505.

Deadly Weapon—Oak Staff.—Hence, it was *held*, that an oaken staff, near three feet long, of the diameter of an inch and a half or two inches, with which three blows were stricken upon the head of a man while drunk and unawares, shattering the bones of the head, and rupturing the interior vessels of the brain, was a deadly weapon, and a killing by the use of it in that way, was murder. *State v. West*, 6 Jones (N. C.) L. 505.

Same—Bowie-knife or Dagger.—A statute, providing that a homicide shall

eral rule, the question whether a particular instrument or weapon is deadly is one of law, to be decided by the court;¹ but it has been held that where the court submitted the question to the jury the error was beneficial to the accused, and, therefore, not ground for a new trial.²

(b⁷) *Means Calculated to Produce Death Under Peculiar Circumstances.*—In order to raise an implication of malice, the means by which the homicide is committed need not necessarily be such as would ordinarily produce death; but where it is apparent from the circumstances, or from the condition of the person killed, that the act or assault made or accomplished by such means or in such manner as is likely to prove fatal, a presumption of malice arises. Thus where the defendant assaulted a woman with his hands and feet at a time when he was aware that, owing to her condition, the assault might prove fatal, it was held that the implication of malice arose, and a conviction of murder or voluntary manslaughter might be had, for in such a case the use of a weapon or instrument calculated to destroy life is not a necessary condition precedent to the implication.³

(b⁸) *Poison.*—Malice is implied by the act of administering poison of a kind and quantity ordinarily sufficient to kill, in the absence of circumstances in excuse or mitigation.⁴

(3) *Malice Shown by Surrounding Circumstances.*—While the law presumes malice from a deliberate act causing another's death, or from the cool and deliberate use of a deadly weapon, yet where a full disclosure of all the facts and circumstances obviates all necessity for presumption, all of such facts and circumstances, taken together, constitute the only basis for a finding that the homicide was committed with "malice aforethought;"⁵ but, while

be murder, if committed with a bowie-knife or dagger, is constitutional. For it does not tend to restrict the right of the citizen to bear arms for lawful purposes, but only punishes a particular abuse of that right. *Cockrum v. State*, 24 Tex. 394.

Same—Pocket-knife.—It cannot be said, as a matter of law, that a pocket-knife is not a deadly weapon. *Sylvester v. State*, 71 Ala. 17.

1. *State v. Collins*, 8 Ired. (N. C.) L. 407; *State v. West*, 6 Jones. (N. C.) L. 505.

2. *State v. Collins*, 8 Ired. (N. C.) L. 407.

3. *Murphy v. People*, 9 Colo. 435.

4. *Lang v. State*, (Ala.); 4 So. Rep. 193; *People v. Sanchez*, 24 Cal. 17; *State v. Wells*, 61 Iowa 629; s. c., 47 Am. Rep. 822; *Smith v. State*, 1 Kan. 365; *State v. Wagner*, 78 Mo. 644; s. c., 48 Am. Rep. 131; *State v. Pike*, 49 N. H. 399; *State v. Leak*, Phill. (N. C.)

L. 450; *Bratton v. State*, 10 Humph. (Tenn.) 103; *Tooney v. State*, 5 Tex. App. 163.

Nurse Giving Poison to Infant.—In the absence of any evidence to qualify, the legal presumption of guilt, a nurse who, knowing that laudanum is poison, gives an infant enough to kill it, is guilty of murder. *State v. Leak*, Phill. (N. C.) L. 450.

5. *Eiland v. State*, 52 Ala. 322; *Dacey v. People*, 116 Ill. 555; *Lamar v. State*, 63 Miss. 265. See *Newton v. State*, 21 Fla. 53; *Farris v. Com.*, 14 Bush (Ky.) 362; *State v. Wisdom*, 84 Mo. 177; *Territory v. Romine*, 2 N. Mex. 114.

Quarrel—Retreat and Pursuit.—Upon a quarrel, one of the parties retreated about fifty yards, apparently with the desire of avoiding a conflict; the other party pursued, with his arm uplifted, and, when he reached his opponent, stabbed and killed him, the latter having

stopped and first struck with his fist. *Held*, that this was murder. *State v. Howell*, 9 Ired. (N. C.) L. 485.

Revenge for Assault Upon Defendant's Son.—A father was informed on the evening of a day that his son, a small boy, had been wantonly whipped by a man. He met the man on the evening of the next day, and then with his fists and feet, beat and stamped him, while he was unresisting, with so much violence that the man died from the effects of the beating the next night. *Held*, that this was murder, there being evidence of deliberation. *McWhirt's Case*, 3 Gratt. (Va.) 594.

Punishment of Ward.—When it appeared on a trial for murder that the prisoner, a person standing *in loco parentis* to the deceased, a boy of eighteen years of age, punished him for lying by keeping him naked on his back, with his feet tied up, from morning to dinner every day for a week, and repeatedly whipped him each day while in that position, and the first day severely whipped him, the instruments being used were a heavy leathern strap, a knotted cord four-double, and an iron ram-rod. *Held*, that there was no error in refusing to charge that in the absence of express malice (death having ensued) the crime would be only manslaughter, as the acts detailed in this case manifested "a heart totally regardless of social duty and fatally bent on mischief," and fully proved malice, entirely excluding the idea of passion. *State v. Harris*, 63 N. C. 1.

Attempted Arrest by Stranger.—Where a stranger to the prisoner entered a room where the latter and a friend were seated, went immediately up to them from behind, drew a revolver, and ordered them to throw up their hands and consider themselves under arrest, and they at once engaged in a struggle with the stranger, in which he was shot. *Held*, that there was no evidence of "deliberation" or "premeditation." *Simmerman v. State*, 14 Neb. 568.

Mutual Combat.—In a case where the prisoner was in his shop cutting a child's hair, when the deceased came to the door and made some remark to some one in the shop, and the prisoner replied insultingly, whereupon the deceased said: "I can whip you," threw off his coat, advanced two steps towards the prisoner and threw up his right hand, upon which the prisoner to scare him advanced two steps, threw up his

right hand, and thrust at deceased with the scissors in his left hand, and on a general scuffle ensuing, it subsequently appeared, without any one else having struck the deceased, that he had been mortally wounded by a stab in the heart. *Held*, that the evidence would support a verdict of murder. *State v. Smith*, 24 W. Va. 814.

Assault by One of Two Slayers.—If, on a trial for murder, the evidence of the prosecution shows that, while the deceased was walking on the street, unarmed, one of the defendants fired a pistol at him from behind, and that the deceased then seized hold of him, and the other defendant came out of a building and shot him in the back, and that then the first named defendant shot him in the neck, killing him, such evidence does not tend to show that the crime was manslaughter, or that it was excusable or justifiable. *People v. Ah Kong*, 49 Cal. 7.

Undue Advantage in Combat.—One who enters into a contest dangerously armed, fights under an undue advantage, and slays his adversary pursuant to a previously formed design, either special or general, to use his weapon in a case of emergency, is guilty of murder; although mutual blows pass, it is not manslaughter. *Ex parte Nettles*, 58 Ala. 268.

Assault by Three Persons Intoxicated.—C and two others, being intoxicated and using vulgar and profane language, met the deceased quietly coming along a public road and assaulted him, he using a fence-rail in his defence, but not striking; and in the progress of the fight they knocked him down with a rail; he rose up, ran, was pursued 130 yards by them, stabbed with a knife and killed. The killing was *held* murder. *State v. Chavis*, 80 N. C. 333.

Prearranged Quarrel.—On trial of M and H for the murder of B, evidence that on the day of killing H had a quarrel with B in the presence of M; that H said in M's presence that if B would fight him he would kill him; that afterwards B stopped opposite H's house, H and M approached him, and H charged B with having sworn to a lie against him, and called on M to step up and prove it, whereupon M stepped up, was knocked down upon his knees by B and cried out—"Boys, don't let him kill me;" that H then drew a pistol, saying "Take care, I'll shoot him," and M drew a knife and gave B a fatal stab. *Held*, to show a common design and express

this is the case where there is a showing of express malice, yet there may be single acts or circumstances entering into the homicide, aside from the means used in its commission, from which malice may properly be inferred, as, for instance, threats made by defendant against deceased before the killing,¹ or a mutual agree-

malice on the part of both M and H. *State v. Matthews*, 80 N. C. 417.

Renewal of Controversy.—On a trial for murder, defendant setting up self-defence, the State showed that deceased had sought defendant, and, drawing a pistol, asked him if he had threatened to kill him. Defendant denied the threat, and deceased remarking "Then that settles it," put up his pistol, turned his back, and took several steps towards a neighboring store, when defendant called out "We had as well settle this thing now," and fired at deceased, who retired into the store, reappeared, exchanged shots with defendant, again retired into the store, and was manipulating his pistol, which appeared to be out of order, when defendant again fired and killed him. Shortly before the killing, defendant had inquired as to the whereabouts of deceased, saying that he wanted to settle with him. Defendant's witnesses testified that on first accosting the defendant deceased covered him with a pistol, and that long before the killing deceased had, in presence of bystanders, uttered deadly threats against the defendant. On rebuttal the bystanders denied this. One witness for defendant testified that deceased, after turning away, turned back and said he would see defendant again, and that defendant then said: "If the thing is to be settled, it may as well be settled now;" and deceased fired the first shot. *Held*, that the evidence showed that deceased had abandoned the controversy, and defendant had renewed it, in order to have a pretext for killing deceased. *Allen v. State*, (Tex.) 6 S. W. Rep. 67.

Killing Wife's Paramour.—One who suspected his wife of unfaithfulness followed her stealthily as she was going to a neighbor's and found her talking with a man with whom she had been criminally intimate. She ran off, telling her paramour to run also, but he remained, and the husband coming up inflicted upon him, with a stone and knife, wounds of which he died. *Held*, to be murder. *State v. Avery*, 64 N. C. 608.

Seeking Deceased to Quarrel.—Evidence that defendant went to deceased's barn and cursed and abused him; that

deceased asked him if he came there to make a fuss, and defendant said he had and that he intended to have it, and at the same time removed his coat; that deceased said to the bystanders: "Boys, I can't stand this any longer," and threw off his coat and knocked defendant down twice, and that in the scuffle that ensued deceased was fatally stabbed by defendant with a long-pointed case-knife which he carried in a scabbard in his vest, is sufficient to sustain a verdict of murder. *State v. McDaniel*, (Mo.) 7 S. W. Rep. 634.

1. See *Jackson v. State*, 81 Ala. 33; *Hawkins v. State*, 25 Ga. 207; *Boyle v. State*, 105 Ind. 469; *Pickens v. State*, 64 Miss. 52; *Riggs v. State*, 30 Miss. 635; *State v. Scott*, 4 Ired. (N. C.) L. 409; *State v. Bonds*, 2 Nev. 265; *Bonnard v. State*, (Tex.) 7 S. W. Rep. 862; *Belt ram v. State*, 9 Tex. App. 280; *Harris v. Com.*, 79 Va. 374.

Killing After Proposal of Combat.—Two days after threatening to kill deceased on sight, defendant met him and proposed a fair fight without weapons, which deceased refused, whereupon defendant deliberately shot him. Deceased had at the time an axe with which he was chopping wood, but made no motion to assault defendant. *Held*, a case of murder. *Harrison v. Com.*, 79 Va. 374.

Facts Showing Premeditation.—Proof that B stated that he was going to his house to get his gun to kill M, with whom B had a standing feud, procured the gun, loaded it, went to the field where M was ploughing, took aim at M, and, while M was dodging around his horse to escape, shot and killed M. *Held*, to establish design and premeditation, making the offence murder. *Belt ram v. State*, 9 Tex. App. 280.

Weapon Discharged During Struggle After Threat.—Where A demanded some money of B, which he claimed the latter owed him, and threatened to shoot him, unless he paid it, at the same time drawing a pistol, and two bystanders interfered, and, in the struggle between them and A, the pistol in A's hands was discharged, and B was killed, it was *held* that if A claimed that the discharge was accidental, it devolved on

ment, made with deliberation and in cool blood, to engage in combat with deadly weapons;¹ and in such case the slayer cannot invoke the doctrine of self-defense, or claim any immunity or consideration because of ill health or inferior size.²

(4) *Malice Presumed to Continue*.—Where the existence of deliberate malice in the slayer is once ascertained, its continuance until the act of killing will be presumed, unless such presumption is precluded by subsequent facts or circumstances,³ and no legal

him to prove it. *State v. Bonds*, 2 Nev. 265. The threat was no less conclusive of A's premeditated violence, because it was coupled with a condition. *State v. Bonds*, 2 Nev. 265.

Stabbing After Retreating.—In a case of homicide, where it appeared that deceased had threatened the prisoner about three weeks ago that he would kill him; that they met on the street on a star-light night where they could see each other; that the deceased pressed for a fight; that the prisoner retreated a short distance; that when the deceased overtook him, the prisoner stabbed him with some sharp instrument, which caused his death, and that at the time of this meeting the deceased had no deadly weapon, it was *held* to be murder. *State v. Scott*, 4 Ired. (N. C.) L. 409.

1. *Cates v. State*, 50 Ala. 166; *Holland v. State*, 12 Fla. 117; *Thomas v. State*, 61 Miss. 60; *State v. Underwood*, 57 Mo. 40; *State v. Hargett*, 65 N. C. 669; *State v. Boon*, 82 N. C. 637; *State v. Lane*, 4 Ired. (N. C.) L. 113; *People v. Shay*, 4 Park Cr. Cas. (N. Y.) 344; *Rosborough v. State*, 21 Tex. App. 672.

Pretense of Fighting.—Where one person seeks another with the purpose, under the pretense of fighting, to stab him, a homicide will be clearly murder in the assailant, no matter what provocation was apparently then given, or how high the assailant's passion rose during the combat, for the malice is express. *State v. Lane*, 4 Ired. (N. C.) L. 113.

Renewal of Altercation Without Cause.—In an altercation about the payment of an alleged debt, A, the deceased, promising to pay when he got the change, B, the prisoner, threatening to whip him if he did not do so then and there. A, unarmed, remonstrated with B and expressed friendship for him. A fight ensued, in which A was knocked down. They were separated and A went off. B, at the request of a witness, put up his pistol which had been

drawn, promising to do no more. B followed and overtook A and engaged in another fight, A crying out: "Hold him off me," and B killed A with a deadly weapon. *Held*, to be murder. *State v. Boon*, 82 N. C. 637.

Interference in Quarrel.—Deceased and S were quarreling, when the prisoner interfered and struck deceased; the blow was returned and deceased retreated, followed by the prisoner; the prisoner secretly opened his knife and was again struck by deceased, who retreated; the prisoner then struck him with a knife; deceased again fled, the prisoner again pursuing; K then interfered and was struck at with the knife, but jumped aside to avoid it, the prisoner then followed deceased, whose brothers told him to take care or he would be killed, and as he turned to see the danger the prisoner drove his knife into his skull, causing death. *Held*, a murder. *People v. Shay*, 4 Park Cr. Cas. (N. Y.) 344.

Killing After Refusal to Fight.—A and B quarreled about a debt due from the former to the latter. B threatened to shoot A if he did not pay him, and attempted to cut him with a knife. The next day the quarrel was renewed. It did not appear which began it. A said that if B "would take back the damned lie which had been given the day before, will settle it without a fuss; if not you have got me to fight." B refused to take back anything. A, who was the larger and stronger of the two, offered to give B some advantage if he would fight, but B declined a fair fight. B's brother interposed, and a quarrel, accompanied by blows, ensued between him and A. While this was going on, B struck A twice with a knife, and inflicted mortal wounds. *Held*, that B was properly convicted of murder. *Holland v. State*, 12 Fla. 117.

2. *Cates v. State*, 50 Ala. 166.

3. See *State v. Tilly*, 3 Ired. (N. C.) L. 424; *State v. Johnson*, 1 Ired. (N. C.) L. 354.

presumption arises that the homicide was committed upon a fresh provocation, instead of the antecedent malice, unless shown by surrounding facts and circumstances.¹

b. KILLING OFFICER IN DISCHARGE OF DUTY.—It is a general rule that when a person who has authority to arrest or imprison while using the proper means for that purpose is resisted and killed, it is murder in all who take part in such resistance;² but it has been held that unless the slayer knows the official character of the deceased, the homicide is only manslaughter, where committed without deliberation.³ If the killing was clearly malicious and premeditated, the fact that the officer was acting under a void process, is no mitigation or excuse;⁴ and so, also, if defendant had knowledge that the intended arrest was one which the officer had a right to make without a warrant,⁵ or if the subject-matter was within the jurisdiction of the magistrate issuing the warrant, even though the latter was not strictly legal;⁶ and even though the officer was exceeding his authority, the use of a deadly weapon is not justified unless defendant was in danger of death or bodily harm.⁷

1. See *State v. Tilly*, 3 Ired. (N. C.) L. 424; *State v. Johnson*, 1 Ired. (N. C.) L. 354; *Riggs v. State*, 30 Miss. 635; *Pickens v. State*, 61 Miss. 62. Compare *State v. Barnwell*, 80 N. C. 466; *McCoy v. State*, 25 Tex. 37.

2. *Boyd v. State*, 17 Ga. 194; *Rafferty v. People*, 69 Ill. 111; *State v. Spaulding*, 34 Minn. 361.

Sufficiency of Notice of Arrest.—Where, upon the trial of a defendant for killing a constable who was attempting to arrest him, witnesses testified that the declaration or summons, "You are my prisoner; hands up," was made by deceased in the first instance, it was competent evidence of a sufficient notification of the object of the deceased, especially in view of the fact that he was a constable acting within his jurisdiction; and that it was not necessary for him to have exhibited his warrant before making the arrest. *State v. Spaulding*, 34 Minn. 361.

An Escaped Convict who shoots an officer attempting to recapture him is guilty of murder. There is neither excuse, justification nor extenuation. *Wallace v. State*, 20 Tex. App. 360.

3. *Fleetwood v. Com.*, 80 Ky. 1; *Mockabee v. Com.*, 78 Ky. 380.

4. *State v. Spaulding*, 34 Minn. 361; *State v. McNally*, 87 Mo. 644.

5. **Complaint to Keep the Peace.**—If the prisoner killed the deceased, knowing that he intended only to arrest him, and carry him before a justice, to answer a complaint to keep the peace, he will be

guilty of murder, notwithstanding the intended arrest was illegal. *Noles v. State*, 26 Ala. 31.

6. *Boyd v. State*, 17 Ga. 194. Compare *Rafferty v. People*, 69 Ill. 111; *Simmerman v. State*, 14 Neb. 568.

7. **Resistance of Illegal Arrest must not be Excessive.**—The fact that an officer or citizen, slain in attempting to make an arrest, was exceeding his authority, does not necessarily reduce the killing to manslaughter. The party sought to be arrested may use such reasonable force, proportioned to the injury attempted upon him, as is necessary to effect his escape, but no more, and he cannot do this by using or offering to use a deadly weapon, if he has no reason to apprehend a greater injury than a mere lawful arrest. *Galvin v. State*, 6 Coldw. (Tenn.) 283.

Instructions.—Defendant was indicted for the murder of an officer while resisting arrest, and was found guilty of murder in the second degree. It appeared that the officer and another attempted to arrest defendant in the night-time, outside of the officer's county, and that, on defendant's refusing to go with him, the officer drew his revolver and fired at defendant twice, who at the same time shot once at the officer, who afterwards died from the wound then received. Held, that the omission of the court to charge that if the arrest, even if lawful, was made in such manner as to threaten death or bodily harm, the killing was justifiable, and that if the

It is also murder to kill an enrolling officer, acting under federal authority, by assault and resistance when in discharge of his duty.¹

c. KILLING ONE PERSON IN AN ATTEMPT TO KILL ANOTHER.—Where a person with malice aforethought attempts to kill one person but by mistake or misadventure kills another instead, the law transfers the felonious intent to the object of his assault, and the homicide so committed is murder.²

d. HOMICIDE WHILE COMMITTING A FELONY.—Homicide committed or caused by one engaged in the perpetration or attempt to perpetrate rape, arson, burglary or robbery or other felony is usually murder;³ and this is the case whether the per-

son killing was in defence against an illegal arrest, though of an ordinary character, the offence was reduced to manslaughter, was error. *Jones v. State*, (Tex.) 9 S. W. Rep. 53.

1. To make a party guilty of murder under the Act of Congress of 1864, the assaulting and resistance from which the death results must be an assault or resistance of a person engaged in the service of enrollment. This does not include service in relation to the draft. *U. S. v. Scott*, 16 U. S. (3 Wall.) 642, bk. 18 L. ed. 218.

2. *Durham v. State*, 70 Ga. 264; *McPherson v. State*, 22 Ga. 478; *State v. Gilman*, 69 Me. 163; *State v. Montgomery*, 91 Mo. 52; *State v. Payton*, 90 Mo. 220; *State v. Henson*, 81 Mo. 384; *Wareham v. State*, 25 Ohio St. 601; *Angell v. State*, 36 Tex. 542. See, *Wills v. State*, 74 Ala. 21; *State v. Dugan*, 1 Houst. Cr. Cas. (Del.) 563; *Golliher v. Com.*, 2 Duv. (Ky.) 163; *State v. Raymond*, 11 Nev. 98; *State v. Smith*, 2 Strobb. (S. C.) L. 77.

Affray.—Where two persons engaged in a shooting affray, with intent to kill or wound each other, and a bystander is killed by a ball from the pistol of one of them, such person may be convicted for the murder of such bystander although he did not intend him any harm. *State v. Raymond*, 11 Nev. 98.

Shooting at Person on Horseback.—Where the prisoner fired a loaded pistol at a person on horseback, and declared that he did so only with the intention to cause the horse to throw him, and the ball took effect on another person, and produced his death, it was held that the crime was murder. *State v. Smith*, 2 Strobb. (S. C.) L. 77.

Firing into Crowd.—Where a person goes into a crowd for the purpose of killing any person, and voluntarily fires the gun for that purpose, the unintentional

killing of a friend will be murder; but if he goes as first supposed, and the firing is accidental or involuntary, he will be guilty of manslaughter only. *Golliher v. Com.*, 2 Duv. (Ky.) 163.

3. See *Dill v. State*, 25 Ala. 15; *Adams v. People*, 109 Ill. 444; s. c., 50 Am. Rep. 617; *Kennedy v. State*, 107 Ind. 144; s. c., 57 Am. Rep. 99; *Com. v. Riley*, Thach. Cr. Cas. (Mass.) 471; *People v. Deacons*, 109 N. Y. 374; *State v. Shirley*, 64 N. C. 610; *Brooks v. Com.*, 61 Pa. St. 352.

Fright from Train Robbers.—If men board a railway train, draw deadly weapons upon a passenger, rob him, and by threats, intimidation and command, cause him to jump from the train while it is in motion, and he is thereby killed, it is murder. *Adams v. People*, 109 Ill. 444; s. c., 50 Am. Rep. 617.

Pursuit of Pickpocket.—Where a citizen gave chase to a pickpocket discovered plying his vocation, and was shot and killed by the pickpocket, it was held to be murder. *Kennedy v. State*, 107 Ind. 144; s. c., 57 Am. Rep. 99.

Pursuit of Robbers.—After the commission of robbery, fresh pursuit was made by the owner of the stolen money and the felons overtaken, told of the robbery, that they were suspected, and must return, and one of them was taken hold of; he told the other to shoot both of the pursuers; the latter shot at both, and one was killed. Held, that the killing was murder. *Brooks v. Com.*, 61 Pa. St. 352.

Tramps.—Where, on a trial for murder the defendant comes within the description of Acts N. Y. 1885, ch. 490, § 2, which defines as tramps "persons who rove about from place to place, begging, and all vagrants living with-

son killed is the one upon whom or whose property the attempt is made, or another interfering to prevent its success.¹

2. HOMICIDE BY GROSS MISCONDUCT OR RECKLESSNESS.—Homicide by gross misconduct or recklessness endangering life, is often made murder by express statutory provision.² Thus, it is murder if a person fires recklessly into a crowd, though without intent to kill and cause death;³ or if a seaman is in a state of disability and exhaustion so that he cannot go aloft without danger of death or great bodily injuries, and the facts are known to the master of the vessel, but notwithstanding he compels the seaman to go aloft, persisting with brutal malignity in such course, and the seaman falls from the mast and is drowned because of such misconduct in the master, the latter is guilty of murder.⁴

3. Degrees of Murder.—**a. DEGREES EXPLAINED AND DISTINGUISHED.**—At common law there were no degrees or divisions of the crime of murder; but in the United States the statutory provisions of the several States and territories divide murder into two degrees, and, in some States, into one or more lesser degrees besides. Under the federal statutes, however, there is no such designation as murder in the first degree or murder in the second degree; a punishment is provided simply for the crime of willful murder, which punishment is death.⁵

out visible means of support, who stroll over the country without lawful occasion," there being no dispute as to the facts, it is not error for the court to say that he is a tramp, although the offence was committed within a month after he became sixteen years of age. *People v. Deacons*, 109 N. Y. 374.

Same—Entrance of Dwelling Unlawfully, a Felony.—Under Acts N. Y. 1885, ch. 490, § 4, providing that "any tramp who shall enter any building against the will of any owner or occupant thereof, under such circumstances as shall not amount to burglary, . . . or shall threaten to do any injury to any person, or to the real or personal property of another when such offence is not now punishable by imprisonment in the States prison, shall be deemed guilty of felony," where it appears on a trial for murder that defendant entered a house without permission or invitation from the occupant, and, when ordered to depart, remained against the consent of such occupant, barring her exit from the house, and laying his hand upon her shoulder, and seizing her by the arm, the jury was warranted in finding that there was a threatened personal injury, and that defendant was engaged in the commission of a felony when the homicide was com-

mitted. *People v. Deacons*, 109 N. Y. 374.

An Instruction, that "If one is about to do an unlawful act, and a third party interferes to prevent it, and is killed, the killing is murder," is erroneous, because it includes cases of accidental homicide. *State v. Shirley*, 64 N. C. 610.

1. *Dill v. State*, 25 Ala. 15; *Com. v. Riley*, Thach. Cr. Cas. (Mass.) 471; *U. S. v. Ross*, 1 Gall. C. C. 624.

Mutiny.—If several persons conspire to seize with force a vessel, and run away with her, and death ensue to another party opposing the design, it is murder in all who are present, aiding and abetting. *U. S. v. Ross*, 1 Gall. C. C. 624.

2. See *Darry v. People*, 10 N. Y. 120.

Driving over Child.—A carriage driver who sees that he is in danger of running over a little child, and deliberately drives on, although at a moderate pace, is guilty of murder, it seems, if the child is killed in consequence. *Lee v. State*, 1 Coldw. (Tenn.) 62.

3. *Gollither v. Com.*, 2 Duv. (Ky.) 163.

4. *U. S. v. Freeman*, 4 Mason C. C. 505.

5. *U. S. v. Outerbridge*, 5 Sawy. C. C. 620.

As a rule, these statutory degrees of murder are distinguished by the presence or absence, as the case may be, of a single element in the crime. Both degrees require the killing to be willful; and both require it to be with malice aforethought. But the essential element of murder in the first degree which is not present in the second degree of that crime, is the premeditation and deliberation upon the act which aggravates the crime and precludes all idea of justification, excuse or mitigation. As these degrees of murder are usually defined, neither of them differs from the common law murder; but courts have repeatedly said that the apparent object of these statutory discriminations is merely a gradation of the punishment according to the degree of malice and malignity.¹

1. See *People v. Haun*, 44 Cal. 96; *State v. Jones*, 1 *Houst. Cr. Cas.* (Del.) 21; *Weighorst v. People*, 7 Md. 442; *State v. Lessing*, 16 Minn. 75.

In California, murder is the unlawful killing of a human being with malice aforethought, either express or implied. The act of 1856 dividing it into two degrees, did not define murder anew, but simply directed the nature of the punishment to be according to the aggravated character of the crime. *People v. Haun*, 44 Cal. 96.

Specific Intent to Kill Essential to First Degree.—To constitute murder of the first degree, under the statute, the unlawful killing must be accompanied with a clear intent to take life. In murder of the second degree, there is an absence of a deliberate and fixed purpose to kill, though a criminal intent is present. *People v. Foren*, 25 Cal. 361.

Malice Express and Implied.—The Delaware Statute has introduced no essential change in the crime of murder as it exists at common law, although when the crime is committed with express malice aforethought, it is murder in the first degree, under the statute, and when committed with malice implied, it is of the second degree; this distinction is merely for the purpose of discriminating in the punishment. *State v. Jones*, 1 *Houst. Cr. Cas.* (Del.) 21.

In Iowa.—Where several persons, armed and prepared to resist all opposition seized the deceased, having formed the design to take his life, and bound him, and, avowing their purpose to take his life, forced him to the bank of a river and cast him in, and then stood by and made no effort to save him, when by reasonable effort they might have saved him, they were guilty of murder in the first degree

under the statute. But if their design was to commit personal violence on the deceased, as by lynching or otherwise, and not to take his life, and when brought to the bank of the river, he acting under a well grounded apprehension, justified by the circumstances, that the defendants intended to commit violence on him, or to take his life, jumped into the river, the defendants standing by and not offering to rescue him. *Held*, that in such cases they would be guilty of murder in the second degree. *State v. Shelledy*, 8 Iowa 477.

The Maryland Act of 1809, ch. 138, does not create a new offence in speaking of murder in the second degree, but merely establishes a rule to guide the courts in awarding the punishment. *Weighorst v. State*, 7 Md. 442.

In Michigan.—At common law, malice aforethought, to constitute murder, need not be deliberate; malice existing before the act, so as to be its moving cause or concomitant, was enough. The statutory division of murder into degrees does not materially change its common-law elements; the line of division is, in general, between cases where the malice aforethought is deliberate and those where it is not. *Nye v. People*, 35 Mich. 16. See *People v. Potter*, 5 Mich. 1.

In Minnesota.—The statutes dividing murder into degrees, has created no new offence, but merely divided the common-law offence into different degrees, based upon circumstances mitigating the crime, and has reduced the penalty to be inflicted on the criminal when convicted of such offence as so modified. The crime whatever its degree, remains the same in its nature and name; the pleadings are not thereby changed. If the indictment charges the crime in terms which embrace the highest degree, a conviction

may be had for that or any lesser degree of the same offence. *State v. Lessing*, 16 Minn. 75. See *State v. Stokely*, 16 Minn. 282.

In Missouri.—By the act of assembly defining murder in its different degrees, the distinction between murder in the first and second degree, lies in the intention; where a homicide is committed and an intent to do the act, and no circumstance of excuse, justification, or extenuation, recognized by law, exist, it is murder in the first degree. *State v. Phillips*, 24 Mo. 475.

Willful Murder with malice and premeditation, in a cool state of blood, is murder in the first degree. Murder in the second degree is a willful killing committed with premeditation and malice, but without deliberation. *State v. Curtis*, 70 Mo. 594; s. c., 10 Cent. L. J. 370.

Under the Laws of Nevada, the essential difference between murder in the first and second degrees, is the presence of willful deliberate premeditation in the first degree, and its absence in the second. *State v. Raymond*, 11 Nev. 98.

In New Hampshire by the Gen. Stat. ch. 264, § 1, which enacts that all murder committed by poison, starving, torture, or other deliberate and premeditated killing, or committed in perpetrating or attempting to perpetrate arson, rape, robbery, or burglary, is murder of the first degree; and murder not of the first degree, is of the second degree; the legislature did not intend that killing in perpetrating one of the crimes named, should be murder of the first degree, only when accompanied by a deliberate, premeditated design to kill; for if such a design had been a necessary ingredient to constitute murder of the first degree, the latter part of the section would have been omitted. The meaning of the section is "all kinds of unlawful killing which constituted murder at common law, if committed by poison, starving, torture or other deliberate and premeditated killing, or if committed in perpetrating or attempting to perpetrate arson, rape robbery, or burglary, constitute under this statute, murder in the first degree; and all other kinds of unlawful killing which constituted murder at common law, constitute, under this statute, murder of the second degree." *State v. Pike*, 49 N. H. 399.

In Pennsylvania.—By the act of assembly defining murder in its different

degrees, the distinction between murder, in the first and second degrees, lies in the intention. Where a homicide is committed, and an intent to do the act is shown, and no circumstances of excuse, justification or extenuation recognized by law exists, it is murder in the first degree. *State v. Phillips*, 24 Mo. 475; *Com. v. Keeper of the Prison*, 2 Ashm. (Pa.) 227.

Same—Abortion.—Where a female is with child, and a potion is administered to her for the purpose of destroying the child, which produces the death of the mother, it is murder in the second degree, unless there existed in the perpetrator of the mischief an intent to take the life of the mother, as well as to destroy her offspring, in which case it would be murder in the first degree. *Com. v. Keeper of the Prison*, 2 Ashm. (Pa.) 227.

In Tennessee.—The characteristic quality of murder in the first degree, and which distinguishes it from murder in the second degree, or any other homicide is the existence, at the time of the assault, of a settled purpose, and a fixed, deliberate design on the part of the assailant that his assault should produce death. The length of time which the assailant deliberates on his intention is not material. *Swan v. State*, 4 Humph. (Tenn.) 136.

Premeditation.—If the deceased is approaching the prisoner's path with the intention of assailing the prisoner, and becomes irresolute, and stops, or abandons his intention, leaving the prisoner full and unobstructed right and liberty to pass, and the prisoner brings on the attack with the design to slay the deceased, the killing will be murder in the first or second degree, according to circumstances; that is, if the killing was the result of the old grudge, and a previously premeditated intention, it would be murder in the first degree; but if it were the result of malice suddenly produced by the sight of his enemy, without premeditation, it would be murder in the second degree. *Copeland v. State*, 7 Humph. (Tenn.) 479.

In Texas.—The "premeditated and deliberate" killing, under Tex. Stat. 1848, is where the act is not the sudden, rash conception of an enraged mind, which is murder in the second degree, but where the intention to kill is formed before the act, by a mind sufficiently cool to consider of the act about to be done; and where such intention to kill exists, it makes no difference that it is

While presumptions of malice are necessarily presumptions of murder, because all malicious killing is murder, yet a presumption of malice, either from the act of killing, the weapon or means used, or from other facts or circumstances surrounding the homicide, raise no presumption as to the degree of murder, and, consequently, no presumption that the homicide is more than the lowest degree of malicious killing, which is usually murder in the second degree; but a higher degree of guilt can be established only by additional proof of previous deliberation, premeditation or reflection.¹

b. FIRST DEGREE.—Under nearly all the statutes which divide the crime of murder into degrees, murder in the first degree consists in the willful killing of a human being with malice aforethought, premeditation and deliberation in the peace of the state. Murder committed by means of poison or by lying in wait, or in the perpetration or attempt to perpetrate rape, arson, burglary or robbery is also generally made murder in the first degree.² Under

formed at the instant, and is evidenced only by the manner and enormity of the act, nor that there is also anger, it will constitute murder in the first degree. *Atkinson v. State*, 20 Tex. 522.

1. *People v. Belencia*, 21 Cal. 544; *Dukes v. State*, 14 Fla. 499; *Milton v. State*, 6 Neb. 136; *Stokes v. People*, 53 N. Y. 164; *State v. Turner*, *Wright* (Ohio) 20; *Com. v. Drum*, 58 Pa. St. 9; *Dains v. State*, 2 *Humph.* (Tenn.) 439; *Hamby v. State*, 36 Tex. 523.

2. See *Seam v. State*, (Ala.) 4 So. Rep. 521; *Lang v. State*, (Ala.) 4 So. Rep. 493; *Williams v. State*, 81 Ala. 1; *Smith v. State*, 68 Ala. 424; *Washington v. State*, 60 Ala. 10; *Miller v. State*, 54 Ala. 155; *Palmore v. State*, 29 Ark. 248; *Bivens v. State*, 11 Ark. 455; *People v. Bezy*, (Cal.) 14 Pac. Rep. 687; *People v. Hamblin*, 68 Cal. 101; *People v. Guance*, 57 Cal. 154; *People v. Cotta*, 49 Cal. 167; *People v. Bealoba*, 17 Cal. 389; *State v. Rhodes*, 1 *Houst. Cr. Cas.* (Del.) 476; *State v. Green*, 1 *Houst. Cr. Cas.* (Del.) 217; *State v. Gardner*, 1 *Houst. Cr. Cas.* (Del.) 146; *Irvin v. State*, 19 Fla. 872; *Dacey v. People*, 116 Ill. 555; *Henning v. State*, 106 Ind. 386; *Moynihan v. State*, 70 Ind. 126; s. c., 36 Am. Rep. 178; *Binns v. State*, 66 Ind. 428; *Presley v. State*, 59 Ind. 98; *Bechtelheimer v. State*, 54 Ind. 128; *Fahenstock v. State*, 23 Ind. 231; *State v. Sopher*, 70 Iowa 494; s. c., 9 Cr. L. Mag. 218; *State v. Mahan*, 58 Iowa 304; *State v. Wells*, 61 Iowa 629; s. c., 47 Am. Rep. 822; *State v. Kearley*, 26 Kan. 77; *Craft v. State*, 3 Kan. 450;

Smith v. State, 1 Kan. 365; *Com. v. Devlin*, 126 Mass. 253; *Com. v. Desmarteau*, 82 Mass. (16 Gray) 1; *State v. Hoyt*, 13 Minn. 132; *State v. Sneed*, 91 Mo. 552; *State v. Payton*, 90 Mo. 220; *State v. McNally*, 87 Mo. 644; *State v. Hopkirk*, 84 Mo. 278; *State v. Wagner*, 78 Mo. 644; s. c., 47 Am. Rep. 131; *State v. Harris*, 76 Mo. 361; *State v. Curtis*, 70 Mo. 594; s. c., 10 Cent. L. J. 370; *State v. Hill*, 69 Mo. 451; *State v. Mahly*, 68 Mo. 315; *State v. Miller*, 67 Mo. 604; *State v. Wieners*, 66 Mo. 13; *State v. Jones*, 64 Mo. 391; *State v. Foster*, 61 Mo. 549; *State v. Harris*, 59 Mo. 550; *State v. Holme*, 54 Mo. 153; *State v. Starr*, 38 Mo. 270; *State v. Green*, 37 Mo. 466; *State v. Hicks*, 27 Mo. 588; *State v. Shoultz*, 25 Mo. 128; *State v. Nueslein*, 25 Mo. 111; *State v. Jennings*, 18 Mo. 435; *State v. Dunn*, 18 Mo. 419; *State v. Melton*, 8 Mo. 417; *State v. Dieckman*, 11 Mo. App. 538; *State v. Lopez*, 15 Nev. 407; *Anderson v. Territory* (New Mex.) 13 Pac. Rep. 21; *Donelly v. State*, 26 N. J. L. (2 Dutch) 463; *People v. Beckwith*, 103 N. Y. 360; *People v. Deacons*, 109 N. Y. 374; *People v. Kiernan*, 101 N. Y. 618; *People v. Cornetti*, 92 N. Y. 85; *People v. Majone*, 91 N. Y. 211; *Buel v. People*, 78 N. Y. 492; *Shufflin v. People*, 62 N. Y. 229; *Ruloff v. People*, 45 N. Y. 213; *People v. Skeeahan*, 49 Barb. (N. Y.) 218; *Cox v. People*, 19 Hun (N. Y.) 430; *State v. Brown*, 7 Oreg. 186; *State v. Garrand*, 5 Oreg. 216; *Nevling v. Com.*, 98 Pa. St. 323; *Green v. Com.*, 83 Pa. St. 75; *Com. v. Drum*, 58 Pa. St. 9;

this definition there must be a specific, deliberate, premeditated intention to take life unaccompanied by any circumstances of mitigation, unless the killing is committed in the perpetration or attempt to perpetrate the felonies mentioned above.¹

The generally accepted meaning of the word premeditation is a prior determination to do the act in question;² but it is not essential that this intention should exist for any considerable period of time before it is carried out. If the determination is formed deliberately, and upon due reflection, it makes no difference how soon afterwards the fatal resolve is carried into execution.³ As has been stated above, murder committed by means of

Keenan v. Com., 44 Pa. St. 55; Kilpatrick v. Com., 31 Pa. St. 108; Com. v. Williams, 2 Ashm. (Pa.) 69; Com. v. Murray, 2 Ashm. (Pa.) 41; Kelly v. Com., 1 Grant Cas. (Pa.) 484; Wilson v. State, 11 Lea (Tenn.) 310; Bratton v. State, 10 Humph. (Tenn.) 103; Riley v. State, 9 Humph. (Tenn.) 646; Clark v. State, 8 Humph. (Tenn.) 671; Swan v. State, 4 Humph. (Tenn.) 136; Dains v. State, 2 Humph. (Tenn.) 439; Lewis v. State, 3 Head (Tenn.) 127; Anthony v. State, 1 Meigs. (Tenn.) 265; Dale v. State, 10 Yerg. (Tenn.) 551; Mitchell v. State, 5 Yerg. (Tenn.) 340; Musick v. State, 21 Tex. App. 69; Osborne v. State, 23 Tex. App. 431; Weaver v. State, 19 Tex. App. 547; s. c., 53 Am. Rep. 389; Gonzales v. People, 19 Tex. App. 394; Giles v. State, 23 Tex. App. 381; Campbell v. State, 15 Tex. App. 506; Stanley v. State, 14 Tex. App. 315; Duran v. State, 14 Tex. App. 195; Pharr v. State, 7 Tex. App. 472; Smith v. State, 7 Tex. App. 414; Drake v. State, 5 Tex. App. 649; Cox v. State, 5 Tex. App. 493; Summers v. State, 5 Tex. App. 365; Tooney v. State, 5 Tex. App. 163; Primus v. State, 2 Tex. App. 369; Washington v. State, 1 Tex. App. 647; Singleton v. State, 1 Tex. App. 501; Duebbe v. State, 1 Tex. App. 159; Burnham v. State, 43 Tex. 322; Farrer v. State, 42 Tex. 265; Shelton v. State, 34 Tex. 662; Herrin v. State, 33 Tex. 638; Johnson v. State, 30 Tex. 748; Ake v. State, 30 Tex. 466; McDaniel v. Com., 77 Va. 281; Wright v. Com., 75 Va. 914; Whiteford v. Com., 6 Rand. (Va.) 721; State v. Robinson, 20 W. Va. 713; s. c., 43 Am. Rep. 799; Clifford v. State, 58 Wis. 477; Resp. v. Mulatto Bob, 4 U. S. (4 Dall.) 145, bk. 1 L. ed. 776.

"**Formed Design.**"—On a trial for murder, it is proper to charge that "murder in the first degree is the willful, deliberate, malicious and premeditated killing

of a human being. All these qualities . . . may be grouped under the phrase 'formed design,' and if . . . this 'formed design' . . . existed in the mind of the defendant for but one moment before the homicide, that, in law, would be sufficient." Seam v. State, (Ala.) 4 So. Rep. 521.

1. See Felton v. U. S., 96 U. S. (6 Otto) 699, bk. 24 L. ed.

2. See Binns v. State, 66 Ind. 428; State v. Williams, 69 Mo. 110; State v. Wieners, 66 Mo. 13; Schlencker v. State, 9 Neb. 241.

3. See Seam v. State, (Ala.) 4 So. Rep. 521; Lang v. State, (Ala.) 4 So. Rep. 193; Miller v. State, 54 Ala. 155; Green v. State, 38 Ark. 304; McKenzie v. State, 26 Ark. 534; McAdams v. State, 25 Ark. 405; People v. Cotta, 49 Cal. 166; People v. Bealoba, 17 Cal. 389; People v. Moore, 8 Cal. 90; State v. Rhodes, 1 Houst. Cr. Cas. (Del.) 476; State v. Gardner, 1 Houst. Cr. Cas. (Del.) 146; Bailey v. State, 70 Ga. 617; Mitchum v. State, 11 Ga. 615; Peri v. People, 65 Ill. 17; Binns v. State, 66 Ind. 428; Fahnestock v. State, 23 Ind. 231; Decklotts v. State, 19 Iowa 447; Craft v. State, 3 Kan. 450; Nichols v. Com., 11 Bush (Ky.) 575; Woodsides v. State, 3 Miss. (2 How.) 655; State v. Sharp, 71 Mo. 218; State v. Curtis, 70 Mo. 594; State v. Kilgore, 70 Mo. 546; State v. Hill, 69 Mo. 451; State v. Mitchell, 64 Mo. 191; State v. Holme, 54 Mo. 153; State v. Jennings, 18 Mo. 435; State v. Dunn, 18 Mo. 419; State v. Hays, 23 Mo. 287; Green v. State, 13 Mo. 382; Milton v. State, 6 Neb. 136; State v. Ah Mook, 12 Nev. 369; Donelly v. State, 26 N. J. L. (2 Dutch.) 463; People v. Beckwith, 103 N. Y. 360; People v. Kiernan, 101 N. Y. 618; People v. Majone, 91 N. Y. 211; Leighton v. People, 88 N. Y. 117; People v. Sullivan, 7 N. Y. 397; People v. Clark, 7 N. Y. 385; Lanergan v.

poison, or by lying in wait, or in the perpetration or attempt to perpetrate any of the forcible felonies—rape, arson, burglary or robbery, is usually made murder in the first degree; but this does not necessarily signify that all killing by such means or under such circumstances is murder in the first degree. Such a statutory provision merely defines the degree of the murder committed, and does not make the offence a murder, unless it would be such at common law. Thus, if the poison be administered with malice, it is murder at common law, and, therefore, murder in the first degree under the statute. But if it be administered negligently, it is only manslaughter at common law, and cannot be made more by a statute prescribing that murder committed by means of poison shall be murder in the first degree.¹ And the same is true in the case of lying in wait. If the lying in wait be merely to commit a trespass, an accidental killing is only manslaughter at common law, and, therefore, not murder in the first degree under such statutory provision.² And courts have said that homicide committed by means of lying in wait, or by poisoning, is murder in the first degree, for the sole reason that the use of such means with which to accomplish the homicide is evidence of express malice on the part of the person using them; and when this evidence of malice is rebutted, the homicide is not murder in the first degree.³ So, also, of the forcible felonies mentioned in the statutes. While, ordinarily, a homicide committed in the pepe-

People, 50 Barb. (N. Y.) 266; State v. Lipsey, 3 Dev. (N. C.) L. 485; Shoemaker v. State, 12 Ohio 43; Green v. Com., 83 Pa. St. 75; Com. v. Drum, 58 Pa. St. 9; Keenan v. Com., 44 Pa. St. 55; Warren v. Com., 37 Pa. St. 45; Kilpatrick v. Com., 31 Pa. St. 198; Com. v. Daley, 2 Pa. L. J. 150; Lewis v. State, 3 Head (Tenn.) 127; Clark v. State, 8 Humph. (Tenn.) 671; Swan v. State, 4 Humph. (Tenn.) 136; Dains v. State, 2 Humph. (Tenn.) 439; McQueen v. State, 1 Lea (Tenn.) 285; Coffee v. State, 3 Yerg. (Tenn.) 283; Duebbe v. State, 1 Tex. App. 159; Burnham v. State, 43 Tex. 322; McDaniel v. Com., 77 Va. 281; Wright v. Com., 33 Gratt. (Va.) 880; Hill v. Com., 2 Gratt. (Va.) 594; Whiteforce, v. Com., 6 Rand. (Va.) 721; Clifford v. State, 58 Wis. 477. Compare Smith v. State, 68 Ala. 424; Bivens v. State, 11 Ark. 455; Anderson v. State, 31 Tex. 440; Ake v. State, 30 Tex. 466; s. c., 31 Tex. 416.

What Shows Premeditation.—Where it appears that the accused had time, not only to form a purpose, but to announce his intention to the person killed, and then carry it into effect, it is proof of premeditation and deliberation sufficient to constitute murder in the

first degree. People v. Kiernan, 101 N. Y. 618.

1. See State v. Dowd, 19 Conn. 388; Bechtelheimer v. State, 54 Ind. 128; State v. Wagner, 78 Mo. 644; s. c., 47 Am. Rep. 131; Lane v. Com., 59 Pa. St. 371; Rhodes v. Com., 15 Pa. St. 272; Souther v. Com., 7 Gratt. (Va.) 678; Com. v. Jones, 1 Leigh (Va.) 610; Whart. Hom. (2d ed.) § 186, *et seq.*

Intent to Kill Necessary.—Under 2 Ind. Rev. Stat. 1876, 423, defining murder in the first degree, an intent to kill is necessary to constitute killing by poison murder in the first degree. To administer cantharides to a woman with intent to excite her passions so as to induce consent to sexual intercourse, and without intending to kill, is not murder in the first degree, although she dies from its effects. Bechtelheimer v. State, 54 Ind. 128.

Intent only to Stupefy.—One who kills another by administering poison, with intent only to stupefy him, so that he may lawfully obtain possession of his property, he is guilty of murder in the first degree. State v. Wagner, 78 Mo. 644; s. c., 47 Am. Rep. 131.

2. See Whart. Hom. (2d ed.) § 187.

3. See Riley v. State, 9 Humph.

tration or attempt to perpetrate any of the forcible felonies would ordinarily be a murder at common law, yet, in any case where it was not, it would not be murder in the first degree within the provisions of such statutes.¹

The above are the general rules of construction of the usual statutory provisions defining murder in the first degree; but the statutes are not uniform, either in phraseology or in meaning, and, consequently, each has, to a greater or less degree, its own peculiar significance and construction and can not be placed or classified under any arbitrary rule.²

(Tenn.) 646; *Osborne v. State*, 23 Tex. App. 431.

1. *State v. Dowd*, 19 Conn. 388; *Earnest v. State*, 70 Mo. 520; *Com. v. Hanlon*, 3 Brewt. (Pa.) 461; s. c., 8 Phila. (Pa.) 401; *Com. v. Jones*, 1 Leigh (Va.) 610. See *Shore v. State*, 6 Mo. 640; *Cox v. People*, 80 N. Y. 500; *Buel v. People*, 78 N. Y. 392; *State v. Brown*, 7 Oreg. 186; *Compare, State v. Hopkirk*, 84 Mo. 278; *People v. Van Steenburg*, 1 Park. Cr. Cas. (N. Y.) 29; *Giles v. State*, 23 Tex. App. 281; *Gonzales v. State*, 19 Tex. App. 344; *Stanley v. State*, 14 Tex. App. 315; *Duran v. State*, 14 Tex. App. 195; *Pharr v. State*, 7 Tex. App. 472; *Singleton v. State*, 1 Tex. App. 501.

Missouri Doctrine. Mo. Rev. Stat. § 1232, providing that "every murder" committed in an attempt to commit a felony shall be deemed murder in the first degree. *Held*, to mean that any homicide so committed is murder in the first degree. (Overruling *State v. Hopper*, 71 Mo. 425; *State v. Earnest*, 70 Mo. 520;) *State v. Hopkirk*, 84 Mo. 278.

2. Alabama Statutory Provisions.—

Under the Code of Alabama, § 3725, declaring "every homicide perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing," etc., to be murder in the first degree, it is proper, on a trial for such offence, to charge that "if defendant . . . purposely killed the deceased, . . . after reflection, with a wickedness or depravity of heart towards the deceased, and the killing was determined on beforehand, even a moment before the fatal blow was struck, the defendant is guilty of murder in the first degree." *Lang v. State*, (Ala.) 4 So. Rep. 193.

Specific Intent as to Deceased not Necessary.—On trial of an indictment for murder, under the Alabama Code, § 4295, declaring that "every homicide

perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any pre-conceived purpose to deprive any particular person of life, is murder in the first degree," there was evidence that the homicide was committed by firing a pistol by night, through the window of a lighted room, in which four persons were sitting around the fire. *Held*, that an instruction asked by the prisoner, that if he did not intend to kill or shoot at any of the inmates, but merely intended to frighten them, he was not guilty of any higher offence than manslaughter in the second degree, was properly refused. *Washington v. State*, 60 Ala. 10.

Under the Arkansas Statute defining murder, a malicious killing is not necessarily murder in the first degree. It must also be willful, deliberate and premeditated, or committed in the attempt to perpetrate some one of the felonies described in the statute. *Palmore v. State*, 29 Ark. 248.

In California.—Murder in the first degree consists of willful, premeditated, unlawful, killing; the intent to kill must exist, and may be proved from circumstances, though it need not have existed for any length of time before the act; it is sufficient if it be formed upon the instant, if the killing be unjustified; and murder in the commission of a felony is of the first degree, though no intent to kill existed at the time of the act. *People v. Bealoba*, 17 Cal. 389.

In Florida.—In charging the jury on a trial for murder, the court instructed them that if, under certain circumstances detailed, "the accused, being armed with a concealed pistol, walked up to the deceased, and, intending to kill him, did then and there kill him by shooting him with a pistol aforesaid, then it is your duty to find the accused guilty of murder in the first degree," etc. *Held*,

to be in accordance with the statute and no error. *Irvin v. State*, 19 Fla. 872.

In Indiana.—One who unintentionally kills another in an attempt at robbery is guilty of murder in the first degree, under a statute making it murder in the first degree to kill any person in an attempt to commit a robbery. *Moynihan v. State*, 70 Ind. 126; s. c., 36 Am. Rep. 178.

Same—Obstructing Railroad Track.—If a train of railroad cars is thrown from the track by obstructions wrongfully placed upon it, and a human being is killed, the person committing the act is guilty of murder in the first degree. *Presley v. State*, 59 Ind. 98.

In Iowa.—Defendant, at a time when he was excited, if not intoxicated by liquor, engaged in a fight and killed his opponent. *Held*, that, there being no evidence tending to show that, before the conflict commenced, there was an instant of time for premeditation and deliberation, a verdict of murder in the first degree would be set aside. *State v. Sopher*, 70 Iowa 494; s. c., 9 Cr. L. Mag. 218.

Same—Lying in Wait.—Lying in wait, as the term is used in law, is lying in ambush or concealment. *State v. Mahan*, 68 Iowa 304.

Same—Prisoners Poisoning Guard.—Where defendants, prisoners in the State penitentiary, for the purpose of making their escape administered chloroform to one of the guards, whereof he died. *Held*, that this was within the statute making all murder "which is perpetrated by means of poison," murder in the first degree. *State v. Wells*, 61 Iowa 629; s. c., 47 Am. Rep. 822.

Same—Preparation of Weapons.—Where one armed with a pistol, goes to meet another, with the deliberate intention of committing homicide if the other fails to retract certain words used, and an affray ensues, during which such other is killed, a verdict of murder in the first degree is not set aside. *State v. Kearley*, 26 Kan. 77.

In Kansas, murder, as defined at common law, is divided into two degrees. To constitute the offence within the first degree, the crime must be premeditated and deliberate; that is the murderer must not only plan, contrive, and scheme, as to the means and manner of the commission of the deed, but he must consider and weigh different means of accomplishing it. *Craft v. State*, 3 Kan. 450.

Same—Willful, Deliberate, and Premeditated.—Where there is no pretense that the killing in question was done by poison or lying in wait, or in the attempt to commit any other crime mentioned in the statute defining murder in the first degree, the killing must have been willful, deliberate and premeditated, in order to constitute murder in the first degree, and such deliberate and premeditated will or intent to kill must be alleged in the indictment. *Smith v. State*, 1 Kan. 365.

In Massachusetts—Extreme Cruelty.—At the trial of an indictment for the murder of a woman, evidence that the defendant who was her husband, caused her death by beating, stamping and jumping upon her person, and kicking her upon vital portions of the prostrate body, and that these acts were repeated at intervals during the day, by reason of which she suffered prolonged agony before death, will justify the jury in finding that the defendant was guilty of murder committed with extreme atrocity and cruelty, and consequently of murder in the first degree, under Mass. Gen. Stat. ch. 160, § 1. *Com. v. Devlin*, 126 Mass. 253.

Same—To Conceal Rape.—The murder of a girl of eight years in order to conceal a rape perpetrated with severe lacerations. *Held*, to be "murder committed with extreme atrocity or cruelty," and therefore, under Mass. Stat. 1858, ch. 154, murder of the first degree, although the only means of death alleged in the indictment were blows upon the head and face and drowning. *Com. v. Desmarteau*, 82 Mass. (16 Gray) 1.

Under the Minnesota Statute.—If the intention to kill is formed before the "heat of passion, upon sudden provocation, or in sudden combat," or though formed in the heat of passion, is executed after sufficient cooling time, or after the heat of passion has subsided, the case comes within the meaning of a premeditated design to effect the death of the person killed. *Minn. Gen. Stat. p. 598, § 12. State v. Hoyt*, 13 Minn. 132.

In Missouri.—The words "malice aforethought" are equivalent to "malice and premeditation." "Deliberation" means a "cool state of the blood;" premeditation, in a cool state of the blood, is murder in the first degree. Willful killing, without deliberation, and without malice aforethought, constitutes manslaughter. *State v. Curtis*, 70 Mo. 549; s. c., 10 Cent. L. J. 370.

Same—Infanticide.—If defendant willfully, premeditatedly, and of malice aforethought, kill a child, or is present aiding or abetting another so to shoot and kill deceased, it is murder at common law; and where it is also committed by lying in wait, it is murder in the first degree. *State v. Payton*, 90 Mo. 220.

Same—Killing Officer Making Arrest.—The intentional killing of an officer acting under proper warrant of arrest, is murder in the first degree. *State v. McNally*, 87 Mo. 644.

Same—Killing Another than Intended.—Where one hides behind a hedge, shoots at a man driving his family in a wagon, with intent to kill him, and kills his child instead, he is guilty of murder in the first degree, under the statutes of Missouri. *State v. Payton*, 90 Mo. 220.

One who shoots at another with intent to kill, but misses him and kills a third person, is guilty of murder in the first degree. *State v. Payton*, 90 Mo. 220.

Same—Premeditation Defined.—An instruction defining "premeditation," as "thought of for any length of time, however short," is erroneous by the omission of "beforehand." *State v. Harris*, 76 Mo. 361.

Same—Deliberation Essential.—In order to make the crime of homicide murder in the first degree, the jury must find that the deed was committed with deliberation, not merely done willfully. *State v. Hill*, 69 Mo. 451; *State v. Melton*, 8 Mo. 417.

Deliberation does not mean brooded over, considered, reflected on for a week, a day, or an hour; but it means an intent to kill, executed, not under the influence of a violent passion suddenly aroused, amounting to a temporary dethronement of reason, but in the furtherance of a formed design to gratify a feeling of revenge or to accomplish some other unlawful purpose. *State v. Wieners*, 66 Mo. 13.

"Deliberately"—What Killing is Murder.—The word "deliberately" was properly defined to the jury as signifying an act done in cold blood, and not in a sudden passion caused by a lawful or reasonable provocation. *State v. Sneed*, 91 Mo. 552.

Malice Before Mutual Combat.—When the immediate occasion on which a homicide occurred, was the result of preconceived anger and malice, it was *held*, that the killing, if done in malice, though in mutual combat, was

deliberate and premeditated murder. *State v. Green*, 37 Mo. 466.

Without Specific Intent to Kill.—The following instructions were properly given in a trial for murder: "If you believe that defendant in malice did willfully strike and wound deceased as described, by striking her with a club or stick likely to produce death or great bodily harm, and that he did so without the specific intent to kill her, but with the intent to inflict upon her great bodily harm, and deceased came to her death by wounds inflicted under such circumstances, then defendant is guilty of murder in the first degree." *Held*, that there was no error. *State v. Nueslein*, 25 Mo. 111.

Provoking Quarrel.—If, in pursuance to a previously formed design, one prepares his weapon, provokes another to combat, and kills him, his mental excitement at the time does not necessarily reduce the crime to murder in the second degree. *State v. Dieckman*, 11 Mo. App. 538.

Under the Nevada Statute defining murder, the words "deliberate" and "premeditated" are synonymous. *State v. Lopez*, 15 Nev. 407.

Under the Statute of New Jersey, a premeditated design to kill, no matter of what duration, will constitute murder in the first degree. *Donnelly v. State*, 26 N. J. L. (2 Dutch.) 463. Affirmed in error, 26 N. J. L. (2 Dutch.) 601.

In Nebraska.—The words "deliberate and premeditated malice" in Neb. Gen. St. 720, that if any person shall purposely, and of deliberate and premeditated malice, kill another, he shall be deemed guilty of murder in the first degree, restricts convictions to cases where some degree of deliberation is shown to have taken place before the killing. *Milton v. State*, 6 Neb. 136, 143.

In New York, for the existence of the deliberation required to constitute the statutory crime of murder in the first degree, the time need not be long, and may be short. If it furnishes room and opportunity for reflection, and the facts show that such reflection existed, and the mind was busy with its design, and made the choice with full chance to choose otherwise, the condition of the statute is fulfilled. *People v. Beckwith*, 103 N. Y. 360; s. c., 3 N. Y. St. Rep. 159; *People v. Majone*, 91 N. Y. 211.

Same—Deliberation After First Assault.—Where one in the heat of passion strikes another, and, supposing the blow to have been fatal, proceeds to

conceal the body, but the person struck revives and is then deliberately strangled for the purpose of escape and concealment, such facts show a "deliberate and premeditated design," sufficient to warrant a conviction for murder in the first degree. *People v. Deacons*, 109 N. Y. 374.

At the trial of an indictment for murder, defendant's testimony was that he and deceased, as the result of a quarrel in defendant's house, became engaged in a furious struggle there, in the course of which he, being jammed back against the wall and choked by deceased, seized a knife from a shelf near him and struck deceased with it, weakening him so that defendant got him down and choked him until, finding, as defendant expressed himself, "that he was about past recall," defendant "let him go," and "was afraid" he "had killed him;" that defendant then went for and obtained his ax, with which he struck deceased on the head, killing him; and it appeared that he then proceeded to mutilate and destroy the body. *Held*, that defendant's own testimony, in connection with the other evidence, furnished ground for a conviction of murder in the first degree; that while the blow of the knife might have been given in the heat of the affray, and without a purpose to kill, the procuring the axe and the subsequent conduct showed a design to kill, and some degree of premeditation and deliberation. *People v. Beckwith*, 103 N. Y. 360; s. c., 3 N. Y. St. Rep. 759.

Motive Need Not be Shown.—One may be convicted of murder in the first degree, although no motive for the crime is disclosed, nor any previous ill-feeling shown to have existed, the act having, apparently, been one of deliberate stabbing without provocation. *People v. Cornetti*, 92 N. Y. 85.

Committing Rape.—Where a person engaged in the commission of the crime of rape, by means of any force or violence employed by him for the purpose of accomplishing his object, causes the death of the female, although he did not intend to kill, he is guilty of murder in the first degree; it is a killing perpetrated by a person engaged in the commission of a felony, within the meaning of the statute defining that degree of murder. (2 R. & S., § 5, subd. 3, as amended by ch. 333, Laws of 1876); *Buel v. People*, 78 N. Y. 492.

Killing Wife in the Act of Adultery.—Prior to N. Y. Laws 1873, ch. 644,

amending the revised statutes, the killing of a wife by her husband, with a premeditated design to effect death, was murder in the first degree, although done under the provocation of finding her in the act of adultery. Under the law as it then stood, and as it now is, an intentional killing, under such circumstances, is murder; to reduce the offence of the grade of manslaughter it must have been committed without a design to effect death. *Shufflin v. People*, 62 N. Y. 239.

In Burglary.—One of three burglars, who had entered a store in the night, was seized by two clerks, and, in the struggle with them, was struck and severely injured. The other two at first fled, but, upon his cries for help, they returned and shot and killed the clerk who was at the time struggling with him. Although the deceased had the captive burglar at an advantage, there was no evidence that the latter was in any danger of bodily harm, or that the deceased was doing anything more than was necessary to defend himself, or possibly to detain the burglar in custody and prevent his escape. *Held*, that an instruction that if the killing of the clerk was necessary, in order to prevent his unnecessarily killing the burglar, such killing was only manslaughter in the second degree, was properly refused as unsupported by the evidence. A conviction for murder in the first degree was proper. *Ruloff v. People*, 45 N. Y. 213; s. c., sub. nom. *Ruloff's Case*, 11 Abb. (N. Y.) Pr. N. S. 245.

"Depraved Mind."—On a trial for murder, it appeared that the accused and the deceased had had no acquaintance before the occasion of the homicide, that their meeting was casual; that the deceased made some trifling remark, and the accused, taking offence thereat, stabbed him with a knife, causing immediate death. *Held*, that the killing, though probably unintentional, was "by an act imminently dangerous to others, and evincing a depraved mind regardless of human life" and would have warranted a verdict of murder in the first degree; that, if not murder in the first degree, it must have been manslaughter in the third or fourth degree, as it did not come within the statutory definition of murder in the second degree, the accused not having been engaged in the commission of any other felony at the time of the killing. *People v. Skechan*, 49 Barb. (N. Y.) 217.

No Intention to Kill While Committing Felony.—Under N. Y. Laws, 1876, ch. 323, making the killing by one engaged in the commission of a felony murder in the first degree, the fact that the accused, while committing a burglary, did not intend to kill the mistress of the house whom he strangled, but only to avoid outcry and pursuit. *Held*, to be immaterial. *Cox v. People*, 19 Hun (N. Y.) 430.

Under the Oregon Statute defining murder, a malicious killing is not necessarily murder in the first degree. It must also be willful, deliberate and premeditated, or committed in the attempt to perpetrate some one of the felonies mentioned in the statute. *State v. Garrand*, 5 Oreg. 216.

Killing Another Than Intended.—Where the defendant committed a robbery, and while carrying off the plunder was pursued by a constable, whom he shot at, and, in so doing, killed a boy standing near. *Held*, that he was guilty of murder in the first degree. *State v. Brown*, 7 Oreg. 186.

In Pennsylvania.—Although murder in the first degree under the statute of Pennsylvania is confined to the willful, deliberate and premeditated killing of another, the intention—to be collected from words and actions—remains as much as ever the true criterion of crime. *Resp. v. Mulatto Bob*, 4 U. S. (4 Dall.) 145, bk. 1, L. ed. 776.

Same—While Intoxicated.—A and B having a street fight, in which A was knocked down and beaten, and the parties having, at A's suggestion, shaken hands, A went off, but made threats during the evening to different persons that he would shoot B the next day. A was then very drunk, and, after drinking further, he took a pint bottle of whisky home with him, and went to bed without taking any supper but a cup of coffee. The next morning he ate no breakfast, but drank a pint of whisky, and a half-pint of alcohol in which was dissolved about an ounce of gum camphor. Then he started for town with his gun in his hand, stating to a person whom he saw on the way that he had a load in it to shoot the man that hit him the night before. On arriving at town he drank more whisky, and finally met B on the street walking alone and perfectly sober. B passed him without speaking, but A, after going a few steps, stopped, turned around, shot B in the back and fatally

wounded him. On being arrested, A said he knew what he had done, and expected to be hung for it. *Held*, that a conviction of murder in the first degree was proper. *Nevling v. Com.*, 98 Pa. St. 323.

Fully Formed Purpose to Kill.—G, after a business altercation with M, started up the road for M's house towards home. M seized a poker and called out to G that if he would come back, he (G) should never go away alive. G replied "I will come back, God damn your wicked heart," and levelled a gun at M, who said: "Shoot if you want to." G discharged the gun and shot M. *Held*, that here was the ingredients of murder in the first degree, the intent being within the Pennsylvania statute in that regard a fully formed purpose to kill, with so much time for deliberation and premeditation as to convince the jury that this purpose is not the immediate result of rashness and impetuous temper. *Green v. Com.*, 83 Pa. St. 75.

Purpose to Kill Must be Present at Time of Killing.—If, at the time defendant did the act, he thought of his purpose to kill the deceased, and had time to think that he would execute it, and formed fully in his mind the conscious design of killing, and had time to think of the weapon that he had prepared, and that he would use it, and accordingly did so use it, it would be murder of the first degree. *Com. v. Drum*, 58 Pa. St. 9.

Act Must be Specifically Against Life.—In order to constitute murder in the first degree, it is not only necessary that the act of killing should be willful, premeditated, malicious, legally unjustifiable, and inexcusable, but the act of violence must be specifically directed against life. *Com. v. Williams*, 2 Ashm. (Pa.) 69; *Com. v. Murray*, 2 Ashm. (Pa.) 41.

Unless While Committing Felony.—A killing, to constitute murder in the first degree, without the specific intent to take the life, must be clearly shown by the prosecution to have occurred in the performance of such acts as establish clearly an attempt to perpetrate arson, rape, robbery or burglary. *Kelly v. Com.* 1 Grant Cas. (Pa.) 484.

In Rape.—To constitute murder in the first degree, where the killing happened in attempt to perpetrate a rape, the attempt must be actual, not constructive. *Kelly v. Com.*, 1 Grant Cas. (Pa.) 484.

In Tennessee.—To constitute murder in the first degree, under the Tennessee statute of 1829, ch. 23, the killing must be done premeditatedly. It is not sufficient that it was malicious and willful in the common-law sense. *Aliter*, to constitute murder in the second degree. *Mitchell v. State*, 5 Yerg. (Tenn.) 340; s. c., 8 Yerg. (Tenn.) 514.

In order to constitute murder in the first degree, a design must be formed to kill willfully, that is, of purpose, with the intent that the act by which the life of a party is taken should have that effect; deliberately, that is, with cool purpose; maliciously, that is, with malice aforethought; and with premeditation, that is, the design must be formed before the act by which the death is produced is performed. *Dale v. State*, 10 Yerg. (Tenn.) 551; *Anthony v. State*, 1 Meigs (Tenn.) 265.

Specific Purpose to Kill Deceased.—Under Tenn. Stat. 1829, ch. 23, § 3, which declares that "all murder which shall be perpetrated by means of poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate, by rape, arson, burglary, or larceny, shall be deemed murder in the first degree." *Held*, that to constitute murder in the first degree there must exist in the mind of the person who slays another a specific intention to take the life of the person slain, and that if he, with premeditated intention to slay one person, against his intention slay another, it will not be murder in the first degree. *Bratton v. State*, 10 Humph. (Tenn.) 103.

Lying in Wait.—Under Tenn. Stat. 1829, ch. 23, § 1, if a blow be struck by the party lying in wait, with a deadly weapon, without provocation, it is murder in the first degree; the lying in wait is evidence of malice and premeditation, and all evidence as to the extent of the injury which assailant intended to inflict on the deceased is irrelevant. *Riley v. State*, 9 Humph. (Tenn.) 646.

Provocation Immaterial After Intent Formed.—The characteristic ingredient in the offence of murder of the first degree is the existence of a specific intention to take life; and if that intention be deliberately and coolly formed and acted upon, and death ensue, the intervention of provocation between the formation of the purpose to take the life and the slaying will not reduce the of-

fence to manslaughter. *Clark v. State*, 8 Humph. (Tenn.) 671.

Resisting Arrest by a Citizen.—A caught B carrying away property which he had stolen from A. In catching him he shot him in the leg and then took him into a drug-store and sent for the police. Before the police came B tried to escape, and A tried to prevent it. A had a pistol in his hand all the while, and in the struggle B grasped it, and failing to possess himself of it drew his own pistol and killed A. *Held*, that A was justified in making the arrest, and in trying to prevent B's escape, and that B was properly convicted of murder in the first degree. *Wilson v. State*, 11 Lea. (Tenn.) 310.

Under the Texas Code, the express malice, which is the distinctive ingredient of murder in the first degree, must be directed towards the particular individual killed. If another than the one against whom the express malice is conceived and entertained be the victim, the homicide becomes murder in the second degree. *Musick v. State*, 21 Tex. App. 69.

Same—Lying in Wait.—"Lying in wait" is evidence of express malice, but the Penal Code of Texas nowhere provides that a murder committed while lying in wait is *per se* murder in the first degree. *Osborne v. State*, 23 Tex. App. 431.

Combat of Strangers.—Two men, utter strangers to each other, on their first meeting engaged in a rencounter, in which one was killed. The difficulty began by an effort on the part of deceased to stop the way of the survivor as he was passing, followed by the drawing of a pistol by deceased, over which a struggle occurred for its possession. During the struggle the pistol was fired and deceased fell, whereupon the survivor, after stepping from the body four or five steps, instantly returned and fired the pistol at the head of his late adversary, inflicting a mortal wound. Not more than twenty seconds elapsed from their first meeting to the consummation of the homicide. *Held*, that the circumstances attending the homicide did not afford evidence of that express malice necessary to constitute murder of the first degree. *Burnham v. State*, 43 Tex. 322.

Brutal Treatment.—Evidence of brutal and cruel treatment towards the deceased, prior to the homicide, will not suffice to establish such malice as will sustain a conviction for murder in the

c. SECOND DEGREE.—As a general rule, all homicide committed with malice aforethought which lack premeditation and deliberation, and which are not committed by poison or lying in wait, or in the perpetration or attempt to perpetrate rape, arson, burglary or robbery is murder in the second degree under the statute.¹ This includes all cases of common law murder where

first degree. *Shelton v. State*, 34 Tex. 662.

After Fight.—Evidence that in a fight between two parties, the defendant was worsted, whereupon he threatened to kill the deceased, his adversary, where, three hours later, the deceased was killed by a shot fired by one lying in wait. *Held*, sufficient proof of malice to sustain a conviction for murder in the first degree. *Johnson v. State*, 30 Tex. 748.

Robbery.—Under article 606, of the Texas Code, a homicide committed in the perpetration of robbery is *per se* murder in the first degree. *Singleton v. State*, 1 Tex. App. 501; *Gonzales v. State*, 19 Tex. App. 394; *Giles v. State*, 23 Tex. App. 281; *Duran v. State*, 14 Tex. App. 195; *Stanley v. State*, 14 Tex. App. 315; *Pharr v. State*, 7 Tex. App. 472.

Other Felonies.—Murder committed in the perpetration of arson, rape or burglary, is, under the penal code of this State, murder in the first degree; the malice in such cases, being evidenced by the act of killing for such purposes. *Singleton v. State*. 1 Tex. App. 501.

Poisoning.—Paschal's Tex. Dig. art. 2198, defines the offence of mingling poison with any drink, food, or medicine, "with intent to kill or injure any other person;" and article 2199 enacts that if any one shall "with intent to injure" cause another to inhale or swallow any substance injurious to health or to any of the bodily functions or shall administer such substance "with intent to kill," he shall be punished, etc. Article 2200 provided that if, within one year, death ensues from such acts, "the offender shall be guilty of murder, and punished accordingly." *Held*, that a murder so committed would, by virtue of article 2267, be murder in the first degree. *Tooney v. State*, 5 Tex. App. 163.

In West Virginia.—One who, while sober, deliberately resolves to kill another, and makes himself drunk for that purpose, and while temporarily insane, and unconscious of what he is

doing, because of such drunkenness, kills the person, is guilty of murder in the first degree. *State v. Robinson*, 20 W. Va. 713; s. c., 43 Am. Rep. 799.

1. See *Fields v. State*, 52 Ala. 348; *Duncan v. State*, 49 Ark. 503; s. c., 6 S. W. Rep. 164; *Green v. State*, 45 Ark. 281; *Harris v. State*, 36 Ark. 127; *People v. Grigsby*, 62 Cal. 482; *People v. Doyell*, 48 Cal. 85; *State v. Johnson*, 41 Conn. 584; *State v. O'Neill*, 1 *Houst. Cr. Cas. (Del.)* 468; *State v. Boice*, 1 *Houst. Cr. Cas. (Del.)* 355; *State v. Till*, 1 *Houst. Cr. Cas. (Del.)* 233; *State v. Hamilton*, 1 *Houst. Cr. Cas. (Del.)* 101; *Boyle v. State*, 105 Ind. 469; *Brooks v. State*, 90 Ind. 428; *Miller v. State*, 74 Ind. 1; *Fahenstock v. State*, 23 Ind. 231; *State v. Marsh*, 70 Iowa 759; *State v. Leeper*, 70 Iowa 748; *State v. Townsend*, 66 Iowa 741; *State v. Spangler*, 40 Iowa 365; *State v. Morphy*, 33 Iowa 270; *State v. O'Hara*, 92 Mo. 59; s. c., 4 S. W. Rep. 422; *State v. Kotovsky*, 74 Mo. 247; *State v. Lewis*, 74 Mo. 222; *State v. Ellis*, 74 Mo. 207; *State v. Robinson*, 73 Mo. 306; *State v. Stoeckli*, 71 Mo. 559; *State v. Cooper*, 71 Mo. 436; *State v. Curtis*, 70 Mo. 594; *State v. Hill*, 69 Mo. 451; *State v. Wieners*, 66 Mo. 13; *State v. Erb*, 74 Mo. 199; *State v. Lewis*, 14 Mo. App. 191; *Bohannon v. State*, 15 Neb. 209; *Daly v. People*, 39 Hun (N. Y.) 182; *McCue v. Com.*, 78 Pa. St. 185; *Com. v. Drum*, 58 Pa. St. 9; *Kelly v. Com.*, 1 *Grant. Cas. (Pa.)* 484; *Petty v. State*, 6 Baxt. (Tenn.) 610; *Gray v. State*, 4 Baxt. (Tenn.) 332; *Witt v. State*, 6 Coldw. (Tenn.) 5; *Fitzgerald v. State*, 15 Lea (Tenn.) 99; *Hull v. State*, 6 Lea (Tenn.) 249; *Allsup v. State*, 5 Lea (Tenn.) 362; *McQueen v. State*, 1 Lea (Tenn.) 285; *Anthony v. State*, 1 Meigs (Tenn.) 265; *Scott v. State*, 23 Tex. App. 432; *Van v. State*, 21 Tex. App. 676; *Hart v. State*, 21 Tex. App. 163; *Musick v. State*, 21 Tex. App. 69; *Lucas v. State*, 19 Tex. App. 79; *Alexander v. State*, 17 Tex. App. 614; *Cunningham v. State*, 17 Tex. App. 89; *Aiken v. State*, 10 Tex. App. 610; *Ross v. State*, 10 Tex. App. 455; s. c., 38

the intention is not to take life, but only to do great bodily harm, or to commit other injuries¹ and all other common law murder, unless the statute expressly prescribes that homicide committed under certain circumstances shall be of a lesser degree.

In murder in the second degree there may be a former design and purpose to kill; but it is followed immediately by the act, and is not premeditated, the time and circumstances being such as not to allow deliberate thought. Thus, where a person forms a design, in the midst of a conflict, to kill his opponent, and immediately executes such design, the killing is not premeditated, and is, therefore, no higher offence than murder in the second degree.² No rule can, however, be laid down for universal appli-

Am Rep. 643; Hubby v. State, 8 Tex. App. 597; Douglas v. State, 8 Tex. App. 520; Harris v. State, 8 Tex. App. 90; Evans v. State, 6 Tex. App. 513; Wilson v. State, 6 Tex. App. 427; Coldwell v. State, 41 Tex. 87; Hogan v. State, 36 Wis. 226.

1. Washington v. State, 53 Ala. 29; Harris v. State, 36 Ark. 127; State v. Rhodes, 1 Houst. Cr. Cas. (Del.) 476; State v. Boice, 1 Houst. Cr. Cas. (Del.) 355; State v. Till, 1 Houst. Cr. Cas. (Del.) 233; State v. Green, 1 Houst. Cr. Cas. (Del.) 217; State v. Gardner, 1 Houst. Cr. Cas. (Del.) 146; State v. Hamilton, 1 Houst. Cr. Cas. (Del.) 101; State v. Jones, 1 Houst. Cr. Cas. (Del.) 21. State v. Decklotts, 19 Iowa 447; State v. Erb, 74 Mo. 199; State v. Robinson, 73 Mo. 306; State v. Hill, 69 Mo. 451; Allsup v. State, 5 Lea (Tenn.) 362; Caldwell v. State, 41 Tex. 86; Hill v. State, 11 Tex. App. 456; Whiteford v. Com., 6 Rand. (Va.) 721; Com. v. Dougherty, 7 Smith's Law 698.

2. Fahnestock v. State, 23 Ind. 231.

Malice Without Deliberation.—N, a colored man went to the door of a room of C, a Chinaman (who lived on the same plantation with him), and after asking C "ain't you up yet?" went into the room with a pistol in his hand, and said to C: "Get up, by God." To this C replied: "Go away; don't bother me. I no work to-day, it Sunday." N said "you don't mean to tell me to go away?" and thereupon jerked C out of the bed. C fell on his feet, and picking up a large pole which was lying near the door, struck N with it, the latter retreating from the blows into the yard and out at the gate, repeatedly warning C to go away, and telling him that he didn't want to hurt him. After getting out through the gate N fired at C and killed him, the witness leaving it in doubt whether C was near enough to

him to hit him or not. *Held*, that these facts were only sufficient to warrant a conviction for murder in the second degree. Harris v. State, 36 Ark. 127.

Homicide After Fight.—Two men fought. Then one said to the other, "Go away," and started off. The other followed, and struck and killed him with a stout stick. *Held*, that a verdict of murder in the second degree was properly rendered. Green v. State, 45 Ark. 281.

Altercation Begun by Deceased.—The testimony was to the effect that the accused and the deceased, who was his farm hand, had some words, the deceased being in the inclosure where he lived, and the accused on the other side of the fence in the road. The deceased was given his discharge, when he began cursing the accused, and drew a pocket-knife and advanced toward him. As he mounted the fence, he threatened to "cut the heart out" of the accused, and dared him to shoot. The accused, who was carrying a double-barreled shotgun on his shoulder, retired about twelve feet and warned the deceased not to come over the fence. The deceased jumped down, and was within ten feet of the accused when the latter brought the gun from his shoulder with the breach to his hip and fired, the load passing into the breast of the deceased and ranging upwards. The accused, at the time, was quite feeble from sickness, but his son, who was near him, was an able-bodied man. *Held*, sufficient to support a verdict of murder in the second degree. Duncan v. State, 49 Ark. 543.

Obtaining Weapon After Assault.—A gave B money to buy tobacco for him; B spent the money for himself, and, on his return, was struck by A with his fists and kicked. B went into the house

cation as to the elements or essentials of murder in the second degree; but, as in the first degree, courts must be largely guided by the statutory provisions in their jurisdictions, and their own adjudications as applied to the peculiar circumstances of each separate case.¹

in a rage, got a gun, and approached A with it cocked. A advanced upon him with a large hoe raised in his hands, when he was shot fatally by B. *Held*, that B was guilty of murder in the second degree if there had been time for his blood to cool after he was struck by A, otherwise of manslaughter. *State v. Till*, 1 *Houst. Cr. Cas. (Del.)* 233.

Husband Beating Wife.—Where the principal evidence in a murder trial showed that while the defendant and the only witness of the occurrence were drinking in one room, the defendant, after striking his wife and sending her into the next room, passed into the latter room at several different times, and struck his wife on the head with his clenched fist, and she died several days after, the jury were properly instructed to convict of murder in the second degree, if they found that she died from the repeated blows. *State v. Hamilton*, 1 *Houst. Cr. Cas. (Del.)* 101.

1. **The Rule in Alabama.**—An instruction as follows: "Every homicide which the evidence establishing it fails to show to be murder in the first degree, but which the evidence does show to be murder at common law, is murder in the second degree in Alabama. Murder in the second degree may be defined to be the unlawful killing of a reasonable person with malice aforethought express or implied. Without malice there cannot be murder. With malice as the prompting motive there is always murder," is correct. *Fields v. State*, 52 *Ala.* 348.

In California.—Under the division of murder into degrees, prescribed by statute in California, a homicide which is unlawful, and accompanied with malice, but not deliberate and premeditated, is murder in the second degree. *People v. Doyell*, 48 *Cal.* 85.

In Delaware—Robbery.—One who, while attempting to rob another, kills him, but without having had any intent to deprive him of his life, is guilty of murder in the second degree. *State v. Boice*, 1 *Houst. Cr. Cas. (Del.)* 355.

Same—Officer Shooting a Third Person.—If a police officer fires a pistol at another who is attempting to escape

arrest for a misdemeanor, the officer having a warrant at the time in his possession, and fatally shoots a third party, he is guilty of murder in the second degree. *State v. O'Niel*, 1 *Houst. Cr. Cas. (Del.)* 468.

In Iowa.—One who, without any necessity, either real or apparent, kills another, is guilty of murder in the second degree, under the Iowa statute, although he entered the combat without any intent to kill. Especially is this true if the slayer takes an undue advantage, or uses a deadly weapon. *State v. Morphy*, 33 *Iowa* 270.

Same—Deadly Weapon.—An instruction which in defining murder in the second degree, says: "When one assaults another with a deadly weapon, likely to produce death, the law presumes malice, in the absence of proof, either direct or by circumstances, to the contrary," is correct; following *State v. Townsend*, 66 *Iowa* 741.

Same—Abortion.—Defendant was convicted of murder in the second degree by causing a miscarriage of a pregnant woman, upon evidence showing that the woman had lived in his house since she was twelve years old; that improper intimacy existed between them; that he was a physician and treated and was constantly with her during her sickness, and that, after he had told her she could not recover, she stated in his presence, but in the Swedish language, which he did not understand, that her sickness and approaching death were the result of a miscarriage caused by defendant, who had used instruments to produce it. *Held*, that, in the absence of a single fact tending to show that the miscarriage was necessary to save the woman's life, the conviction would be sustained. *State v. Leeper*, 70 *Iowa* 748.

In Missouri those cases of murder at common law, in which there was no specific intent to kill, but in which the law presumes the intent to kill, which are not declared manslaughter or specifically made murder in the first degree by statute, are cases of murder in the second degree, and where there is evidence in the case tending to show that the killing was with malice afore-

thought, but without deliberation, an instruction for murder in the second degree ought to be given. *State v. O'Hara*, 92 Mo. 59.

Same—Willfully, but not Deliberately.—If a homicide be committed willfully, and without justification, but not deliberately or premeditatedly, it is not murder in the second degree. *State v. Cooper*, 71 Mo. 436.

Same—Premeditation Upon the Act Essential.—To constitute murder in the second degree, there must have been premeditation, not necessarily of the killing, but of the act causing it. *State v. Lewis*, 74 Mo. 222; *State v. Erb*, 74 Mo. 199; *State v. Robinson*, 73 Mo. 306; *State v. Curtis*, 70 Mo. 594.

Same—Provocation by Words.—The state of mind produced by lawful provocation arising from a blow, which reduces the killing to manslaughter, when it arises from degrading words, reduces the homicide to murder in the second degree. *State v. Kotovsky*, 74 Mo. 247; *State v. Ellis*, 74 Mo. 207.

Same—Whether for Court or Jury to Determine Provocation.—What will be deemed a just cause of provocation and constitute murder in the second degree is a question for the court, and whether the state of mind necessary was in fact produced by such provocation is a question for the jury. *State v. Ellis*, 74 Mo. 207.

Same—Heat of Passion.—The passion referred to in the phrase "heat of passion" is not limited to that heated state which is produced only by some legal provocation. *State v. Lewis*, 74 Mo. 222.

Same—Provocation must come from Victim.—Provocation by words which will reduce the homicide from murder in the first degree to murder in the second, must come from the victim of the homicide; rough language by bystanders is not sufficient. *State v. Lewis*, 14 Mo. App. 191.

Same—A Rejection of her Suitor by a Young Woman is not a just cause for such a heat of passion as will reduce homicide to murder in the second degree. *State v. Kotovsky*, 74 Mo. 247.

Same—Firing into Crowd.—Where one purposely fired into a crowd without intending to kill any particular person, but did kill one. *Held*, that the law presumes the killing to have been intentional, and that the crime was murder in the second degree. *State v. Edwards*, 70 Mo. 312.

In Tennessee.—To constitute murder in the second degree, the proof must

show that the killing was unlawful and malicious, although without the cool, deliberate purpose requisite to constitute murder in the first degree. *Gray v. State*, 4 Baxt. (Tenn.) 332.

In Texas, when the fact of unlawful killing is proved, and no evidence tends to show express malice on the one hand, or any justification, excuse, or any mitigation on the other, the law implies malice, and the offence is murder in the second degree. *Hart v. State*, 21 Tex. App. 163; *Harris v. State*, 8 Tex. App. 90; *Douglass v. State*, 8 Tex. App. 520; *Hubby v. State*, 8 Tex. App. 597.

Same—Express Malice Against Third Person.—Under Texas Code, if it appears that the express malice of defendant was not directed toward the person killed by shooting but against another, the crime is murder in the second, not in the first, degree. *Musick v. State*, 21 Tex. App. 69.

Same—"Rash Killing."—Any rash and inconsiderate killing from some sudden impulse, without any sedate and deliberate mind, is upon implied malice, and is murder in the second degree. *Van v. State*, 21 Tex. App. 676.

Same—Firing into Car.—One who fires a pistol into the window of a car in which he knows there are passengers is properly convicted of murder in the second degree. *Aiken v. State*, 10 Tex. App. 610.

Same—Killing Officer when Attacked.—A and B, brothers, were convicted of murder in the second degree. It appeared that they were strangers in the town, and that A had with him a gun, which deceased, the marshal of the town, ordered him to deliver up, and before A had an opportunity to comply or refuse the marshal drew and fired a pistol, whereupon B drew and fired his pistol killing the marshal. There was no evidence tending to show that either A or B were acting in a disorderly manner. *Held*, that the verdict was unsupported by the evidence. *Ross v. State*, 10 Tex. App. 455; s. c., 38 Am. Rep. 643.

Same—By Officer to Prevent Escape.—When an officer, whose life is not endangered nor person threatened, kills a prisoner while attempting to escape, not from malice, but from a desire to prevent his escape, the offence is murder in the second degree. *Caldwell v. State*, 41 Tex. 87.

In Wisconsin.—Where the homicide and its circumstances are fully proved, evidence of good character can only

d. OTHER DEGREES.—In some of the States the crime of murder is divided into three or more degrees; but, as such statutes are exceptional, and do not define the same offence, no general rule can be laid down for their interpretation.¹

4. Principals and Accessories.—*a. PRINCIPALS.*—(1) *General Rules.*—All persons who participate in a felonious homicide either as actors or actual perpetrators, or by their presence aiding, abetting and advising, are principals in the crime. They are divided into two classes, to wit: principals in the first degree, and principals in the second degree. But this distinction shows no difference in the offence, except where there is a different punishment for each.²

A principal in the first degree is one who is the actor or actual perpetrator of the fact.³ Where the killing is done directly, he must be the slayer, or one of them, causing death with his own hand, or by his own direct act, at that time and place. But where the homicide is committed by means which do not require the presence of the slayer for its commission, his actual presence is not required. Thus, if, with malice, he does the fatal act through the medium of an insane person,⁴ or a person acting innocently and in total ignorance of the circumstances,⁵ he is a principal in the first degree, being the perpetrator of the homicide as much as if he had committed it with his own hand; or, if he dispose of a poisonous substance purposely, so that another takes it and dies therefrom, he is a principal in the first degree.

go to the intent of the accused. The qualities of the act as "imminently dangerous and evincing a depraved mind, regardless of human life," within Wis. Rev. Stat. ch. 164, § 2, defining murder in the second degree, are to be found in the act itself, and the circumstances of its commission. *Hogan v. State*, 36 Wis. 226.

1. Murder in Fifth Degree—New Mexico Doctrine.—Evidence that there was ill-feeling existing at the time of a homicide between the prisoner and the deceased, and that, the parties being about thirty-five yards apart, deceased took his gun from his shoulder as if to offend the prisoner, but did not present or point it at him, when the latter stepped back a few steps and fired the fatal shot, is sufficient to support a conviction for murder in the fifth degree. *Duran v. Territory*, 1 New Mex. 218.

Murder in Third Degree—Wisconsin Doctrine.—Under Taylor's (Wis.) Stat. 1826, ch. 164, §§ 1 and 2, defining murder in the third degree to be the unlawful killing of a human being without any design to effect death, by a person engaged in the commission of

a felony, and 1830, § 31, making mayhem a felony, a verdict for such murder should be set aside, where the circumstances furnish no proof of the intent to kill, maim, or disfigure. *State v. Hammond*, 35 Wis. 315.

To make a killing without a "design or intention" murder in the third degree the felony committed or attempted, from which the implied malice is derived, must have intimate relation and close connection with the killing; and when the act constituting the felony is in itself dangerous to life, the killing must be naturally consequent to the felony. *Pliemling v. State*, 46 Wis. 516.

2. See *State v. Davis*, 29 Mo. 391; *State v. Fley*, 2 Brev. (S. C.) L. 338; *State v. Green*, 4 Strobb. (S. C.) L. 128; Whart. Hom. (2nd ed.) § 341.

3. 1 Hale P. C. 233, 615.

4. See *Blackburn v. State*, 23 Ohio St. 165; *Reg. v. Tyler*, 8 Car. & P. 616; *Rex v. Giles*, 1 Moo. C. C. 166; 1 Hale P. C. 19.

5. See *Com. v. Hill*, 11 Mass. 36; *Adams v. People*, 1 N. Y. 173; *Collins v. State*, 3 Heisk. (Tenn.) 14; *Reg. v.*

A principal in the second degree is one who is present aiding and abetting at the commission of the homicide. He must be a participant in the act, and he must be either actually or constructively present.¹ It is not necessary that he should bear any particular malice against the person killed,² but he must do something affirmatively to show that he is a conspirator in the crime, or is in some way interested in bringing about the success of the attempt to kill. The mere sanction or presence of a person, whether it be passive or constrained, cannot render him a principal.³

By some statutory provisions all distinctions between principals and accessories before the fact are abolished, thus making any person criminally concerned in a homicide a principal whether he be present or absent at the time of its commission.⁴

(2) *Conspirators*.—Where two or more persons conspire together, either to commit a homicide, or to do any other unlawful act, and, in the execution of their design, a homicide is committed, it is murder in all who enter into or take part in the execution of the design.⁵

Mazeau, 9 Car. & P. 676; Reg. v. Michael, 9 Car. & P. 256; Reg. v. Clifford, 2 Car. & K. 202.

1. See Whart. Hom. (2nd ed.) § 333.

2. Brennan v. People, 15 Ill. 511; State v. Cockman, 1 Winst. (N. C.) L. 95; State v. Fley, 2 Brev. (S. C.) L. 338; U. S. v. Ross, 1 Gall. C. C. 624.

3. Butler v. Com., 2 Duv. (Ky.) 435; Connaughty v. State, 1 Wis. 159.

4. See Spies v. People (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

5. State v. Williams, (Ala.) 9 Cr. L. Mag. 480; People v. Brown, 59 Cal. 345; People v. Vasquez, 49 Cal. 560; State v. McCahill, (Iowa) 9 Cr. L. Mag. 37; Peden v. State, 61 Miss. 267; Stephens v. State, 42 Ohio St. 150; Weston v. Com., 111 Pa. St. 251; Kirby v. State, 23 Tex. App. 13; Rex v. Passey, 7 Car. & P. 282; Rex v. Lockett, 7 Car. & P. 300; Rex v. Standley, Russ. & Ry. C. C. 305.

In Committing Robbery.—If several are associated together in the commission of a robbery, and one of the associates does not intend to take life, and prohibits the others from taking life, yet if one of his associates takes life while they are engaged in the robbery and in furtherance of the common purpose to rob, he is as much guilty of murder in the first degree as though his own hand had given the fatal blow. People v. Vasquez, 49 Cal. 560; Stephens v. State, 42 Ohio St. 150.

Specific Agreement to Kill.—It appeared that defendant went to deceased's house the day of the killing, and said that he and three others whom he named would kill the deceased that night. The four met together and prepared ammunition, and the defendant said: "The one that crawfishes out of this business, we will all turn on him." One of the four called after they had passed, some one from their number shot deceased. The fifth person testified that defendant was with him, and that they did not stop and did not hear or witness the shooting, and that he did not hear of it until the next morning. *Held*, that there was a conspiracy to kill deceased, in which the defendant was the chief actor, though he might not have been present at the killing; and that he was principal, and guilty as such, within the meaning of Texas Penal Code, articles 74, 76, providing that all persons who act together to commit a crime, in furtherance of the common design, shall be guilty as principals. Phillips v. State, (Tex.) 9 S. W. Rep. 557.

Flogging.—If A, in carrying out a conspiracy with B to take C from his house and flog him, kills C, B is equally guilty of murder. Peden v. State, 61 Miss. 267.

Escaping from Jail.—Three prisoners A, B, and C, conspired to escape from jail. It was arranged that C should secure the jailer. It did not appear that there was any design to kill or in-

Where death takes place as the ordinary and probable result of acts committed in the due course of the execution of the conspiracy, the act of one is the act of all, and all are guilty whether present or absent; for he who enters into a combination or conspiracy to do such an unlawful act as will probably result in the taking of human life, must be presumed to have understood the consequences which might reasonably be expected to flow from carrying it into effect, and, also, to have assented to the doing of whatever would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life.¹ It is not essential to the guilt of one of the conspirators that, in the preparation of the instrumentalities for the carrying out of the common design, he did not know the name of the particular individual who was to use them. Thus, where a number of persons conspired together to destroy the police force of a city in case of a certain event, as, for instance, a collision between said police force and workmen, by throwing a bomb among the police, it was immaterial that the bomb-maker did not know what particular person was to throw it, if he made and delivered it in the knowledge that it was to be exploded by one of a number of persons having a common purpose, and in furtherance of that purpose; and, therefore, it was not necessary for the thrower of the bomb to be personally identified, but it was sufficient to implicate the bomb-maker that it appeared that the bomb-thrower belonged to the conspiracy, and threw the bomb to carry out its arrangement and further its design. The fact that the principal in the first degree was personally unknown to a person charged with aiding, abetting, advising and encouraging a homicide is not necessarily any obstacle to a conviction.² And it is alike unimportant that the person charged as a conspirator does not know which one of the class of persons at whom the conspiracy is aimed is to be its victim. So, it was immaterial, in fixing the guilt of the bomb-maker, that he did not know what particular policeman might be killed or injured. The design of the conspiracy virtually designated the body or class of men who were to be attacked, and

jure him, but C killed him with a piece of iron which A had concealed the morning before. At the time C killed the jailer A and B were locked up. *Held*, that A could be found guilty of murder. *Kirby v. State*, 23 Tex. App. 13.

Holding Forcible Possession of Land.—One who, with others, is holding forcible possession with fire arms of land claimed by other parties, may be convicted of murder although not he but one of his confederates did the killing. *Weston v. Com.*, 111 Pa. St. 251.

1. See *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep.

320; 9 Cr. L. Mag. 829; *Brennan v. People*, 15 Ill. 511.

Mob of Miners.—On a trial for murder committed by a mob of miners on strike, in carrying out a conspiracy to drive out new men, an instruction to the effect that if the defendant was engaged in a conspiracy to forcibly compel the new men to leave, and in carrying out of such conspiracy the act of homicide was committed, such homicide was binding upon him as much as if done by himself, is not error. *State v. McCahill*, (Iowa) 9 Cr. L. Mag. 37.

2. *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

where one of such class was killed, the guilt of the bomb-maker was the same as though a particular person had been pointed out to him as the intended victim.¹

Where, in a conspiracy to accomplish an unlawful purpose, the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged.² But, where the ways and means for the accomplishment of the unlawful design are mutually agreed upon beforehand, in order to place responsibility for the homicide upon co-conspirators, the conspiracy must be carried out according to the original design; but this does not mean that every detail of the plan must be executed as arranged, for that is not always a possibility; but that the general plan of the conspiracy shall be carried out in a manner corresponding with that arranged so as to successfully accomplish the purpose by means agreed upon. Thus, where the arrangement was to kill policemen at a station house, but the agents of the conspiracy killed the policemen a short distance away from the station house, where they had marched to disperse a meeting convened by the conspirators and addressed by some of them, there was no such departure from the original plan as to relieve any of the conspirators, whether present or absent, from responsibility for the homicide. Nor did it matter that some of the conspirators participating in the attack made use of pistols instead of bombs; but, although the homicide was committed by means of the bomb, those conspirators firing pistols for the same purpose were equally guilty with the one who threw the bomb.³

The purpose of the conspiracy must be unlawful. But this does not imply that the means agreed upon to carry it out must themselves always be forcible and unlawful; it is enough if it is understood that unlawful and forcible means are to be used only in case of the failure of means lawful and peaceable. Thus, the fact that persons who formed a conspiracy to bring about a change of government may not have intended to resort to force, unless in their judgment they should deem it necessary to do so, did not make their conspiracy any the less unlawful. Its object was criminal, and when the homicide was committed in furtherance of the common design, and by means previously understood and mutually agreed upon, all the conspirators were equally guilty, no matter what their intention may have been at the time of the formation of the conspiracy.⁴ Nor is it always necessary that the ultimate object sought to be attained should be the same with all the conspirators, if the immediate end in

1. *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

2. *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

3. *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

4. *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

view be the same and all combine and work together to accomplish it, and the homicide be committed as a result of such combination. Thus, if men combine together as conspirators to accomplish an unlawful purpose, as, for instance, the overthrow of society and government and law, called by them a "social revolution," and seek, as a means to an end, by print and speech, to excite to tumult and riot and murder, another class of persons having a different purpose in view, as in the case of workmen who have entered upon a "strike" with the view of bringing about a reduction of the hours of day labor, then, notwithstanding the difference in the ultimate objects desired to be attained by the respective classes of persons, the conspirators who advised and instigated the others to violence will be held responsible for any murder that may result from their aid, advice and encouragement.¹

(3) *Persons Giving Aid or Advice*.—A person who is present at a homicide, abetting or advising its commission, is guilty as a principal, even though he may not have previously conspired to bring it about.²

But the mere presence of a party at the commission of a homicide, whether passive or constrained, is not sufficient to constitute him a principal; there must be something shown in his conduct which unmistakably evinces a design to encourage, incite, approve of, or in some manner afford aid or consent to the act.³ Neither is a bystander responsible for the commission of a homicide, even though he takes part in acts connected with it, if the killing does not result therefrom, and there is no preconcert between him and the slayer.⁴

1. *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

2. *Jordan v. State*, 79 Ala. 9; *Frank v. State*, 27 Ala. 37; *Dumas v. State*, 62 Ga. 58; *Johns v. Com.*, (Ky. App.) 3 S. W. Rep. 369; *Thompson v. Com.*, 1 Met. (Ky.) 13; *Com. v. Chapman*, 65 Mass. (11 Cush.) 422; *Com. v. Bowen*, 13 Mass. 359; *State v. Walker*, (Mo.) 9 S. W. Rep. 647; *Wynn v. State*, 63 Miss. 260; *Shoemaker v. State*, 12 Ohio 43; *State v. Morgan*, (Oreg.) 14 Pac. Rep. 419; *Connaught v. State*, 1 Wis. 159; *Tharpe v. State*, 13 Lea (Tenn.) 138; *Fisher v. State*, 10 Lea (Tenn.) 151; *Beets v. State*, 1 Meigs (Tenn.) 106; *Phelps v. State*, 15 Tex. App. 145; *Trim v. Com.*, 18 Gratt. (Va.) 983.

Loanng the Weapon.—If W lends A a pistol, and a short time afterwards A kills M, and W is present at the killing, and just before the firing exclaims to A: "Shoot him," and just after the firing: "Shoot him again," then W is an aider and abettor of the crime, and under the Miss. Code 1880, § 2698, is guilty as

principal, even though W supposed that A was shooting at J and not at M. *Wynn v. State*, 63 Miss. 260.

Using Other Weapons.—Defendant, after having been overheard to say to A in a low tone, "we have a fight fixed up, and we will carry it through," fired his pistol at deceased, who disarmed him, and requested him to cease the difficulty. Shortly afterward A shot deceased, and defendant also tried to shoot him with a gun he had borrowed after his pistol was taken from him. Held, that a conviction of defendant as an aider and abettor of the murder, should be sustained. *Johns v. Com.*, (Ky. App.) 3 S. W. Rep. 369.

Joint Blows.—If a murdered man dies from the joint effect of blows given by A and B, and B's blows are given last, it is murder by B whether they acted in concert or not. *Fisher v. State*, 10 Lea (Tenn.) 151.

3. *Connaught v. State*, 1 Wis. 159.

4. See *Jordan v. State*, 79 Ala. 9; *Frank v. State*, 27 Ala. 37; *Tharpe v. State*, 13 Lea (Tenn.) 138.

A person may aid, abet or encourage a homicide by standing upon watch, or keeping guard,¹ or by aiding or advising another person to administer a poisonous substance,² as well as by being actually present at the commission of the act.³

b. ACCESSORIES.—(1) *Before the Fact.*—To commit murder and to be accessory thereto, are different offences. An accessory before the fact is one who, although absent at the time of the commission of a homicide, yet procures, counsels, commands, abets or advises its commission by another.⁴ A person cannot be an accessory before the fact to a homicide unless he is absent at the time of its commission; for if he is present he is guilty as principal, if guilty at all.⁵ To constitute a person an accessory, there must be some affirmative act or encouragement by him looking towards its commission; the mere knowledge that a felony is about to be committed, his presence, together with his knowledge of it, will not, without more, make him an accessory to it or to a homicide resulting from it; neither will the fact that he is present, or gives his bare permission or tacit acquiescence in the

Bystander Participating.—Where two persons are jointly indicted and tried for murder, and the evidence shows that one fired the fatal shot, while the other cut the deceased with a knife, during the difficulty, the latter is not guilty of murder, unless the cut with the knife contributed to the death of the deceased, or unless preconcert or community of purpose between the two defendants is shown, rendering each liable for the acts of the other. *Jordan v. State*, 79 Ala. 9. Thus if A and B by preconcert, make an attack on C, in which D not being privy to their common designs, participates, this will not be murder in D if death ensues from wounds inflicted by either A or B. *Frank v. State*, 27 Ala. 37.

On a trial for murder, there was evidence tending to show that defendant attacked deceased, and that they were separated, and that at the moment of the separation, A came up and killed the deceased. *Held*, that, assuming that there was no conspiracy between defendant and A, a charge to the effect that if defendant assailed the deceased with intent to kill, defendant would be guilty of murder, should have been qualified by an instruction that if the fight had ended when deceased was killed, or if the killing by A was not to assist defendant, but to carry out his own unlawful purpose, defendant would not be guilty. *Tharpe v. State*, 13 Lea (Tenn.) 138.

1. *State v. Walker*, (Mo.) 9 S. W.

Rep. 647; *Shoemaker v. State*, 12 Ohio 43.

2. Under the Criminal Code of Oregon, § 748, which provides that "all persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the crime, or aid or abet in its commission, though not present, are principals," evidence is admissible on a trial for murder in the usual form, that poison was administered to the deceased by another person, and that defendant was implicated in the deed. *State v. Morgan*, (Oreg.) 14 Pac. Rep. 419.

3. **Aiding in Robbery.**—On the trial of a prisoner for murder who confessed that he was of the party who robbed the store of the deceased on the night of the murder, but declares that he was about two hundred yards off when the gun was fired, and did not go to the store, but had the plunder brought to him by the others, the jury found that he was constructively present aiding and abetting the murder. *Held*, that this court will not set aside the verdict. *Trim v. Com.*, 18 Gratt. (Va.) 983.

4. *State v. Cassady*, 12 Kan. 550; *State v. Phillips*, 24 Mo. 475; *Norton v. People*, 8 Cow. (N. Y.) 137; *Jones v. State*, 13 Tex. 168; *U. S. v. Ramsay*, 1 Hempst. C. C. 481; *Rex v. Cooper*, 5 Car. & P. 535; *Rex v. Gordon*, 1 Leach C. C. 515; 1 East P. C. 352; 1 Hale P. C. 615.

5. *Rex v. Gordon*, 1 Leach C. C. 515; 1 East P. C. 352; 1 Hale P. C. 615.

contemplated felonious act.¹

An accessory before the fact is responsible for all the consequences of an unlawful act, which he aids, abets, advises or encourages; the only difference, if any, between his guilt and that of the actual slayer being one of degree, and going only to the punishment, which, however, is usually the same in the case of both. Thus, if a person command or encourage an assault, and the party assaulted dies from the effects thereof, the adviser is guilty of the murder as accessory before the fact.²

The means used need not be those prescribed or advised, if of the same nature as to the result of their use, and the accomplishment of the object sought. So, where a person advises the killing of another by poisoning, but the homicide is committed by shooting, the adviser is still guilty as accessory.³ The communication between the accessory and the slayer must be direct,⁴ unless the act be directly towards the person slain, as, for instance, an invitation by the accessory to a person to go to a certain place, in order that he may there be killed.⁵

The aid or encouragement given must continue up to the time of the commission of the murder, or of the acts from which it results. If the adviser countermands his order, or withdraws his advice or encouragement before the slayer has committed any overt act, he is not guilty.⁶

An accessory may usually be indicted, tried and convicted, either before or after the trial of the person charged as principal; and the dismissal of the charge against the latter does not discharge the accessory.⁷ From the nature of the offence, accessories before the fact are generally charged as being advisers or abettors of the crime of murder in the first degree; but it has been held that a person may be convicted as accessory before the fact, of murder in the second degree.⁸

(2) *After the Fact.*—An accessory after the fact is one who receives, shelters, comforts, assists, relieves or counsels a person whom he knows to be guilty of a homicide, either as principal or accessory before the fact.⁹ The offence cannot be committed by a mere passive allowing the felon to escape; but it is complete whenever any affirmative acts are done which tend to hinder or delay his apprehension or trial.¹⁰

At common law the relationship of husband and wife excuses

1. 1 Hale P. C. 616.
2. See 1 Hale P. C. 617.
3. Fost. 369.
4. Reg. v. Blackburn, 6 Cox. C. C. 333.
5. Reg. v. Manning, 2 Car. & K. 903.
6. 1 Hale P. C. 618.
7. State v. Phillips, 24 Mo. 475.
8. Jones v. State, 13 Tex. 168.
9. See White v. People, 81 Ill. 333; Harrel v. State, 39 Miss. 702; 2 Hawks ch. 29, § 1.

Accessory After the Fact.—Where two persons are alone at the time of the killing of another, and but one does the killing, and the other does not aid, abet, or assist in the killing, but afterwards they both, with guilty knowledge, conceal the fact of the crime, the one not participating in the crime is only guilty of an accessory after the fact, and is not guilty of murder. White v. People, 81 Ill. 333.

10. Dalt. 350; 1 Hale P. C. 619.

the harboring, sheltering or concealing a felon, the wife being subject to his control;¹ and, under some statutes, the excuse of relationship is made available by a parent, brother or sister.²

VI. MANSLAUGHTER.—1. **Definition.**—Manslaughter is the unlawful killing of a human being without malice, either express or implied, and without excuse.³

Manslaughter is distinguished from murder by the absence of the malice, either express or implied, which is the essence of murder;⁴ but it has been held that it is no defence to an indictment for manslaughter, that the evidence shows the homicide to have been committed with malice aforethought, and, therefore, to

1. Reg. v. Manning, 2 Car. & K. 903; 1 Hale P. C. 621.

2. See Mass. Gen. Stat. ch. 168, § 6; Whart. Hom. (2nd ed.), § 354.

3. 2 Bouv. L. Dict. (15th ed.) 149. See People v. Crowey, 56 Cal. 36; People v. Freel, 48 Cal. 436; People v. March, 6 Cal. 543; People v. Milgate, 5 Cal. 127; Hadley v. State, 58 Ga. 309; Stokes v. State, 18 Ga. 17; Studstill v. State, 7 Ga. 2; Reynolds v. State, 1 Kelly (Ga.) 222; Murphy v. People, 37 Ill. 448; Murphy v. State, 31 Ind. 511; Com. v. Webster, 59 Mass. (5 Cush.) 295; Com. v. Riley, Thach. C. C. (Mass.) 471; Com. v. Selfridge, (Mass.) 1 Horr. & T. 2; s. c., Whart. Hom. (2d ed) 692; State v. Knight, 43 Me. 11; Long v. State, 52 Miss. 23; Green v. State, 28 Miss. 687; State v. Zellers, 7 N. J. L. (2 Halst.) 221; *Ex parte* Tayloe, 5 Cow. (N. Y.) 51; People v. Austin, 1 Park. Cr. Cas. (N. Y.) 154; United States v. Travers, 2 Wheel. Cr. Cas. (N. Y.) 506; State v. Johnson, 3 Jones (N. C.) L. 266; State v. Morris, 1 Hayw. (N. C.) 429; Com. v. Drum, 58 Pa. St. 9; Pennsylvania v. Lewis, Addis. (Pa.) 279; State v. Turner, Wright (Pa.) 23; State v. Smith, 10 Rich. (S. C.) L. 341; State v. Stark, 1 Strobb. (S. C.) L. 479; Beets v. State, Meigs (Tenn.) 106; Isaacs v. State, 25 Tex. 174; Drake v. State, 5 Tex. App. 661; King v. Com., 2 Va. Cas. 78; Com. v. Mitchell, 1 Va. Cas. 116; McWhirt's Case, 3 Gratt. (Va.) 594; Republica v. Bob, 4 U. S. (4 Dall.) 146, bk. 1. L. ed. 776; U. S. v. Outerbridge, 5 Sawy. C. C. 620; U. S. v. Wiltberger, 3 Wash. C. C. 515; Rex v. Mawbridge, Kelying 124; Lord Cornwallis' Case, 2 St. Tr. 730; 4 Bl. Com. 190; 2 Bish. Cr. L. (7th ed.), § 672; Desty Cr. L., § 128; East P. C. 232; 1 Hale P. C. 466; Harris' Cr. L. 169; 1 Hawk. P. C. ch. 30, §§ 2, 3; Roscoe's Cr. Ev. 723; 1 Russ. on Cr. 810; Stephen's Cr.

L. Art. 223; Wash. Cr. L. 80; Whart. Hom. (2nd ed.), § 4.

4. See People v. Crowey, 56 Cal. 36; People v. Freel, 48 Cal. 436; People v. March, 6 Cal. 543; People v. Milgate, 5 Cal. 127; Hadley v. State, 58 Ga. 309; Stokes v. State, 18 Ga. 17; Murphy v. State, 37 Ill. 448; Murphy v. State, 31 Ind. 511; State v. Knight, 43 Me. 11; Com. v. Webster, 59 Mass. (5 Cush.) 295; Com. v. Selfridge, (Mass.) 1 Horr. & T. 2; s. c., Whart. Hom. (2d ed) 692; Green v. State, 28 Miss. 687; *Ex parte* Tayloe, 5 Cow. (N. Y.) 39; U. S. v. Travers, 2 Wheel. Cr. Cas. (N. Y.) 506; State v. Johnson, 3 Jones (N. C.) L. 266; Com. v. Drum, 58 Pa. St. 9; Pennsylvania v. Lewis, Addis. (Pa.) 279; State v. Turner, Wright (Pa.) 23; State v. Tookey, 2 Rice (S. C.) Dig. 104; State v. Smith, 10 Rich. (S. C.) L. 34; State v. Stark, 1 Strobb. (S. C.) L. 479; King v. Com., 2 Va. Cas. 78; Com. v. Mitchell, 1 Va. Cas. 116; McWhirt's Case, 3 Gratt. (Va.) 594; Resp. v. Mulatto Bob, 4 U. S. (4 Dall.) 426; bk. 1 L. ed. 776; U. S. v. Outerbridge, 5 Sawy. C. C. 620; U. S. v. Wiltberger, 3 Wash. C. C. 515; 4 Bl. Com. 190; 2 Bish. Cr. L., § 672; Desty Cr. L., § 128; East P. C. 232; 1 Hale P. C. 466; Moore Cr. L., § 369; Wash. Cr. L., 80; Whart. Hom. (2nd ed.), § 4.

"Manslaughter Differs From Murder in this, that, though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting; and the act being imputed to the infirmity of human nature, the punishment is proportionably lenient." Whart. Hom., § 4. See 1 Russ. on Cr. (5th Eng. ed.), 810.

Moral Character of the Crime.—In Harris' Cr. L. (3rd ed.) 169, it is said: "In this crime . . . we shall find

have been murder—but that the defendant may be convicted of manslaughter as charged in the indictment.¹ The two crimes are also distinguished by the fact that in manslaughter there can be no accessories before the fact, because there is no time for premeditation or deliberation upon the act.²

Manslaughter, at common law, is of two distinct kinds, namely: voluntary manslaughter, resulting from an injury intentionally inflicted; and involuntary manslaughter, resulting from injury unintentionally inflicted.³

2. Voluntary Manslaughter.—*a.* DEFINITION.—Voluntary manslaughter is manslaughter committed with design or intent to kill, or to inflict serious bodily harm.⁴

b. WHAT CONSTITUTES THE OFFENCE.—To constitute voluntary manslaughter, the killing must be done when the reason is disturbed or obscured by passion to an extent which might render ordinary persons liable to act rashly without reflection, and from passion rather than judgment; there must be an adequate provocation for the passion, and the killing must be without previous malice.⁵

acts varying to the utmost in their moral gravity and offensiveness. Perhaps on no other charge do persons more often appear in the dock and leave it without a stain on their character. To take one class of examples, it constantly happens after an accident in a mine or on a railway that some of those engaged in the management of the one or the other are required to meet the charge of manslaughter preferred against them."

1. *Com. v. McPike*, 57 Mass. (3 Cush.) 181. In this case the court says: "The party on trial has no reasonable ground for complaint. The government have elected to proceed against him for the minor offence, and the defendant has secured to him all the privileges which are incident to a trial for such offences. It is not for him to say that his crime has another element in it, which if charged in the indictment, would have constituted it a higher offence and one more severely punishable."

2. 1 Bish. Cr. L. (3rd ed.) 678; 2 Bouv. L. Dict. (15th ed.) 149; 1 Hale P. C. 437; 1 Russ. on Cr. (5th Eng. ed.) 485.

3. See 2 Bouv. L. Dict. (15th ed.) 149; 1 Whart. Cr. L. (9th ed.), §§ 304, 305; Whart. Hom. (2nd ed.), §§ 5, 6.

Distinction Obsolete.—But Dr. Wharton, in his work on criminal law (9th ed. vol. I, § 305), observes: "The distinction, however, between voluntary and involuntary manslaughter is now obsolete, in most jurisdictions, so far as

concerns the common law. Unless it should be required by the statute, the terms 'voluntary' and 'involuntary' are not now introduced either in indictment, verdict or sentence." And language nearly to the same effect is also used by the same author in his work on homicide (2nd ed., § 7).

4. See *Perry v. State*, 43 Ala. 21; *People v. Jamarillo*, 57 Cal. 111; *Brown v. State*, 28 Ga. 215; *Stokes v. State*, 18 Ga. 17; *Bruner v. State*, 58 Ind. 159; *Murphy v. State*, 31 Ind. 511; *Nye v. People*, 35 Mich. 16; *Ex parte Tayloe*, 5 Cow. (N. Y.) 51; *Erwin v. State*, 29 Ohio St. 186; *Com. v. Drum*, 58 Pa. St. 9; *State v. Smith*, 10 Rich. (S. C.) L. 341; *King v. Com.*, 2 Va. Cas. 78; 1 Bl. Com. 190; *Desty Cr. L.* § 108 b; 1 *East P. C.* 232; *Harris Cr. L.* (3rd ed.) 169; 1 *Hawk. P. C.* c. 30, § 3; *Whart. Cr. Hom.* (2nd ed.), § 5.

5. *Smith v. State*, (Ala.) 3 So. Rep. 556; *Ex parte Brown*, 65 Ala. 446; *Perry v. State*, 43 Ala. 215; *Stokes v. Rhodes*, 1 *Houst. Cr. Cas.* (Del.) 476; *Fogarty v. State*, (Ga.) 5 S. E. Rep. 782; *Gann v. State*, 30 Ga. 67; *Stokes v. State*, 18 Ga. 17; *Bruner v. State*, 58 Ind. 159; *Murphy v. State*, 31 Ind. 511; *Ex parte Moore*, 30 Ind. 197; *Creek v. State*, 24 Ind. 151; *State v. Hockett*, 70 Iowa 442; s. c., 9 *Cr. L. Mag.* 208; *State v. Spangler*, 40 Iowa 365; *State v. Decklotts*, 19 Iowa 447; *Maher v. People*, 10 Mich. 212; *Kilpatrick v. Com.*, 31 Pa. St. 108; *Young v. State*, 11 *Humph. (Tenn.)* 200; *Seal v. State*,

To reduce a homicide from murder to manslaughter, it is not necessary that "the reason of the party should be dethroned," and that he must act "in a whirlwind of passion;" but there must be sudden passion upon reasonable provocation, to negative the idea of malice.¹

A positive intent to kill is not requisite if there be an intentional use of unlawful force wrongly, calculated to cause death or great bodily harm.²

c. PROVOCATION CAUSING PASSION.—(1) *What Provocation Sufficient*.—The provocation sufficient to reduce an intentional killing from the grade of murder to that of manslaughter must arise at the time of the commission of the offence, or before the passion of the slayer has had time to cool.³ The provocation by deceased must be the direct and controlling cause of the passion,⁴ and it must be such as naturally and instantly to produce, in the minds of persons ordinarily constituted, the highest degree of exasperation, rage, anger, sudden resentment or terror, rendering the mind incapable of cool reflection.⁵ Thus, ordinary provoca-

59 Tenn. 459; *Hinton v. State*, 24 Tex. 454.

Sudden Passion.—A sudden transport of passion, caused by adequate provocation, if it suspends the exercise of judgment and dominates volition, so as to exclude premeditation and a previously formed design, is sufficient to reduce the killing to manslaughter, although it does not "entirely dethrone reason." *Smith v. State*, (Ala.) 6 So. Rep. 551.

1. *Young v. State*, 11 Hump. (Tenn.) 200.

An instruction as to manslaughter, as follows: "If you find from the evidence beyond a reasonable doubt, that the defendant . . . did take the life of the said James Fowler by means of the weapon described in the indictment . . . and that the killing, if any, was done in the heat of blood or passion, upon a sudden quarrel, and upon reasonable provocation, and without malice, express or implied, and you further so find that it was not excusable or justifiable . . . he is guilty of manslaughter"—it is a clear, concise, and correct definition of manslaughter as applicable to the evidence. *State v. Hockett*, 73 Iowa 442; s. c., 9 Cr. L. Mag. 208.

2. See *White v. State*, (Ala.) 4 So. Rep. 508; *Harrington v. State*, (Ala.) 3 So. Rep. 425; *McManus v. State*, 36 Ala. 285; *Montgomery v. State*, 11 Ohio 424.

The Rule in Alabama.—To constitute manslaughter in the first degree under

Alabama Code, § 4301, "there must be either a positive intention to kill, or an act of violence from which, ordinarily, in the usual course of events, death or great bodily harm may result." Qualifying *Harrington v. State*, (Ala.) 3 So. Rep. 425; *McManus v. State*, 36 Ala. 285.

Same—First Degree.—If an act, amounting to manslaughter, be voluntarily committed, the statute, without regard to the circumstances of provocation, fixes the grade of the offence and pronounces it manslaughter in the first degree. *Johnson v. State*, 17 Ala. 618.

Under Federal Statutes.—There is no act of congress which makes punishable an unlawful stroke on the sea, without malice, followed by death on shore. But the guilty person may be convicted of an assault with a dangerous weapon. *U. S. v. Armstrong*, 2 Curt. C. C. 446.

3. *Studstill v. State*, 7 Ga. 2; *Patterson v. State*, 66 Ind. 190; *Bechtelheimer v. State*, 54 Ind. 128; *Wall v. State*, 51 Ind. 453; *Field v. State*, 50 Ind. 15; *Allison v. State*, 42 Ind. 354; *Miller v. State*, 37 Ind. 432; *Murphy v. State*, 31 Ind. 511; *Ex parte Moore*, 30 Ind. 197; *Com. v. Mink*, 123 Mass. 422; *Com. v. Webster*, 59 Mass. (5 Cush.) 295; *Com. v. Selfridge*, (Mass.) 1 Horr & T. 2; *Com. v. Drum*, 58 Pa. St. 9; *Boyett v. State*, 2 Tex. App. 93; *U. S. v. Wiltberger*, 3 Wash. C. C. 515.

4. *Boyett v. State*, 2 Tex. App. 93.

5. *Flanagan v. State*, 46 Ala. 703; *People v. Freeland*, 6 Cal. 96; *Silgar v. People*, 107 Ill. 563; *Patterson v. State*,

tion given by a woman or child to a man of average strength, even though it may amount to giving a blow, does not, it seems, reduce a homicide from murder to manslaughter, because manifestly not sufficient to cause uncontrollable passion.¹

The question whether certain undisputed facts are sufficient provocation to reduce a homicide from a murder to manslaughter is one of law, for determination by the court;² but the questions whether, in the particular case under consideration, there was adequate and reasonable provocation, and whether the passions had had reasonable time to subside, are generally for the jury to determine.³

(2) *By Words.*—(a) *Towards the Slayer.*—Mere words towards the slayer by deceased, however grievous, are not sufficient to reduce a killing from murder to manslaughter; nor are indecent, provoking actions, or gestures, expressive of reproach or contempt;⁴ although the use of insulting or abusive or violent language may give sufficiency to an assault otherwise insufficient.⁵

66 Ind. 185; *Nichols v. Com.*, 11 Bush (Ky.) 575; *Thomas v. State*, 61 Miss. 60; *Preston v. State*, 25 Miss. 383; *State v. Ellis*, 74 Mo. 207; 1 Whart. Cr. L. (9th ed.) 455; *McKinney v. State*, 8 Tex. App. 626; *Boyett v. State*, 2 Tex. App. 93; *Territory v. Catton*, (Utah Tr.) 16 Pac. Rep. 902.

1. *Com. v. Mosler*, 4 Barr (Pa.) 264.

2. *State v. Dunn*, 18 Mo. 419; *State v. Craton*, 6 Ired. (N. C.) L. 164.

3. *Maher v. People*, 10 Mich. 212; *Mackey v. State*, 13 Tex. App. 360.

4. *Watson v. State*, 82 Ala. 10; *Ex parte Brown*, 65 Ala. 446; *People v. Murback*, 64 Cal. 369; *People v. Turley*, 50 Cal. 469; *People v. Butler*, 8 Cal. 435; *State v. Draper*, 1 Houst. Cr. Cas. (Del.) 531; *State v. Buchanan*, 1 Houst. Cr. Cas. (Del.) 79; *Bird v. State*, 55 Ga. 317; *Jackson v. Georgia*, 45 Ga. 198; *Ross v. State*, 59 Ga. 248; *Hawkins v. State*, 25 Ga. 207; *Rapp v. Com.*, 14 B. Mon. (Ky.) 615; *State v. Leonard*, 6 La. An. 420; *State v. Fuentes*, 5 La. An. 427; *State v. McNeill*, 92 N. C. 812; *State v. Carter*, 76 N. C. 20; *State v. Lipsey*, 3 Dev. (N. C.) L. 485; *State v. Merrill*, 2 Dev. (N. C.) L. 269; *State v. Sackett*, 1 Hawks (N. C.) L. 210; *Wall v. State*, 18 Tex. 682; *U. S. v. Carr*, 1 Woods C. C. 480; 1 Arch. C. Pr. 740; *East P. C.* 251; *Harris Cr. L.* (3rd ed.) 169; *Steph. Cr. L.*, article 223 *et seq.*; *Washb. Cr. L.* 81; *Whart. Hom.* (2nd ed.), § 393 *et seq.*; 1 Hale P. C. 456. See *Com. v. Biron*, 4 U. S. (4 Dall.) 125; bk. 1 L. ed. 769; *Compare Harris v. State*, 34 Ark. 469; *Wilson v. People*, 4 Park. Cr. Cas. (N. Y.) 619; *State v.*

Jacobs, (S. C.) 4 S. E. Rep. 799; *Bonnard v. State*, (Tex.) 7 S. W. Rep. 862; *Seals v. State*, 59 Tenn. 459.

5. *Reg. v. Smith*, 4 F. & F. 1099; *Whart. Hom.* (2nd ed.), § 393.

Intoxication of Deceased.—Where A kills B on mere provocation by words, the jury may consider the fact that B was drunk when he uttered the words, in determining whether there was an excuse for A's assault on B. *Harris v. State*, 34 Ark. 469.

The Rule in Georgia.—The provision of the Georgia Code, § 4259, that, "provocation by words, threats, menaces or contemptuous gestures, shall in no case be sufficient to free the person killing from the guilt and crime of murder," does not imply that provocation by mere threats, etc., can excuse a homicide committed under circumstances rendering it manslaughter. Neither murder nor manslaughter can be affected by verbal threats. *Jackson v. Georgia*, 45 Ga. 198.

In New York.—The "heat of passion" mentioned in the statutory definition of manslaughter, affords the intended protection to the accused, whether it was produced by acts or words, if the provocation was such as was naturally calculated to produce it. *Wilson v. People*, 4 Park. Cr. Cas. (N. Y.) 619.

"Cooling Time."—Defendant visited deceased, his tenant, remonstrating with him about burning rails, and as defendant was leaving deceased addressed abusive language to him. Shortly afterwards defendant returned and shot deceased. The court instructed that in

(b) *Towards a Female Relative.*—Some statutory enactments provide that the use of insulting words towards a female relative of the slayer shall be adequate cause or sufficient provocation to reduce the killing of the person speaking them from murder to manslaughter.¹ Under a statute which uses the term "insulting words towards a female relative," they need not be uttered in her presence. The term includes insulting words concerning her, whether she was present or not;² and it has also been held that the words need not be uttered in the presence of the slayer in order to constitute adequate cause for the homicide;³ but where such is the case, it must appear that before the homicide the defendant was informed of them, and that he killed by reason of the passion so induced, and from no other cause.⁴ During the life-

order to reduce the killing to manslaughter, it must have been done before there had been time for the passion to cool and it was therefore to be considered whether the killing was done in consequence of what occurred when defendant was first at deceased's house, or when he came last. *Held*, correct. *State v. Jacobs*, (S. C.) 4 S. Rep. 799.

Where Defendant Sought Deceased to ask pay for certain spurs which he claimed that deceased had stolen from him, and with no intention of provoking a quarrel, but one ensued, in which defendant, in the heat of passion caused by the violence and abuse of deceased, shot and killed deceased, such killing was manslaughter. *Bonnard v. State*, (Tex.) 7 S. W. Rep. 862.

1. See *People v. Turley*, 50 Cal. 469; *Williams v. State*, 3 Heisk. (Tenn.) 377; *Williams v. State*, 24 Tex. App. 637; 7 S. W. Rep. 333; *Melton v. State*, 24 Tex. App. 47; 5 S. W. Rep. 652; *Simmons v. State*, 23 Tex. App. 653; *Orman v. State*, 22 Tex. App. 604; *Clanton v. State*, 20 Tex. App. 615; *Niland v. State*, 19 Tex. App. 166; *Eams v. State*, 10 Tex. App. 421; *Richardson v. State*, 9 Tex. App. 602; *Hudson v. State*, 6 Tex. App. 565; *Hill v. State*, 5 Tex. App. 92.

The Texas Penal Code makes a homicide manslaughter and not murder if induced by insulting words or conduct towards defendant's female relative, and if the killing occurred as soon as the parties met, after knowledge of the insult.

On the trial of R for the murder of S, refusal of an instruction asked by R, that if S used insulting words or conduct towards a female relative of R at the place of killing, this would constitute a sufficient adequate cause to reduce the offence from murder to man-

slaughter, if R be guilty of an offence. *Held*, to be error. *Richardson v. State*, 9 Tex. App. 612.

2. *Hudson v. State*, 6 Tex. App. 565.

3. *Niland v. State*, 19 Tex. App. 166.

4. *Orman v. State*, 22 Tex. App. 604; s. c., 58 Am. Rep. 662. See *Hill v. State*, 5 Tex. App. 2.

Provocation—Words Spoken in Defendant's Absence.—Defendant being informed that H had publicly stated that defendant's mother and sister had accumulated all the money defendant had by prostitution with negro men, consulted an attorney concerning the punishment for killing under such circumstances, and shortly afterward, upon meeting H, asked him if he would take back what he had said about his mother and sister; and on his answering "No," shot and killed him. On defendant's trial for murder the court charged the jury that they should find defendant guilty of manslaughter if they believed that the shooting was done "under the immediate influence of sudden passion . . . arising from an adequate cause, such as "insulting words or conduct" of deceased "towards female relatives of defendant." *Held*, that the charge was erroneous in requiring the killing to take place under the immediate influence of "sudden" passion; which instruction would have been proper under the Texas statute (Pen. Code, art. 599), only in a case where the defendant heard the insulting language or witnessed the conduct; and that, notwithstanding no exceptions were taken nor instructions asked, yet, as there was a strong probability of injury to defendant, the judgment would be reversed. *Orman v. State*, 22 Tex. App. 604; s. c., 58 Am. Rep. 662.

time of a man's wife, her daughter is his "female relative" within the meaning of such a statute.¹

(3) *By Assault*.—An assault by the deceased, where not a justification or excuse, may still be sufficient provocation to reduce the killing to manslaughter; and ordinarily the provocation is complete when the person of the defendant is touched, with apparent insolence, whether the assailant was armed or not,² but it has been

The evidence showed that the deceased made indecent proposals to defendant's wife, and cursed her in the morning, while defendant was absent; that his wife told him about it when he returned at noon; that when he met the deceased, at eight o'clock in the evening, he killed him. *Held*, error to charge the jury that to reduce the homicide to manslaughter the provocation under which the defendant acted must have arisen at the time of the commission of the offence. *Williams v. State*, 24 Tex. 637.

The defendant killed the deceased for using insulting language concerning his daughters, but not until the second meeting after he was informed of the insults. *Held*, that under these facts the homicide was not manslaughter. *Melton v. State*, 24 Tex. App. 47.

1. *Clanton v. State*, 20 Tex. App. 615.

What are "Insulting Words Towards a Female Relative."—The expression "damned son of a bitch" is not within the legal meaning of the terms "insulting words toward a female relative," as those words are used in the statute defining manslaughter. *Simmons v. State*, 23 Tex. App. 653.

2. See *Stewart v. State*, 78 Ala. 436; *Ex parte Warrick*, 75 Ala. 57; *Judge v. State*, 58 Ala. 406; *Atkins v. State*, 16 Ark. 568; *McCoy v. State*, 8 Ark. 451; *People v. Turley*, 50 Cal. 469; *State v. List*, 1 Houst. Cr. Cas. (Del.) 133; *State v. Downham*, 1 Houst. Cr. Cas. (Del.) 45; *McGuffie v. State*, 17 Ga. 497; *Bird v. State*, 55 Ga. 317; *Thompson v. State*, 55 Ga. 47; *Evans v. State*, 33 Ga. 4; *Golden v. State*, 25 Ga. 527; *Ray v. State*, 15 Ga. 223; *State v. Fitzsimmons*, 63 Iowa 656; *State v. Abarr*, 39 Iowa 185; *Hurd v. People*, 25 Mich. 405; *State v. Rheams*, 34 Minn. 18; *State v. Watson*, 95 Mo. 411; *State v. Blunt*, 91 Mo. 503; *State v. Levigne*, 17 Nev. 435; *State v. Anderson*, 4 Nev. 265; *State v. Crane*, 95 N. C. 619; *State v. Gaskins*, 93 N. C. 547; *State v. Tackett*, 1 Hawks (N. C.) L. 210; *State v. Yarbrough*, 1 Hawks (N. C.) L. 78; *State v. Barfield*, 8

Ired. (N. C.) L. 344; State v. Sizemore, 7 Jones (N. C.) L. 206; *State v. Ramsey*, 5 Jones (N. C.) L. 195; *State v. Brodnax*, Phil. (N. C.) L. 41; *Com. v. Drum*, 58 Pa. St. 9; *Draper v. State*, 4 Baxt. (Tenn.) 246; *Holly v. State*, 10 Humph. (Tenn.) 141; *Williams v. State*, 15 Tex. App. 617; *Ruthford v. State*, 15 Tex. App. 236; *Tickle v. State*, 6 Tex. App. 623; *Bonnard v. State*, (Tex.) 7 S. W. Rep. 862; *U. S. v. Armstrong*, 2 Curt. C. C. 446; 1 Whart. Cr. L. (9th ed.), § 456.

Endeavor to Strike.—If, immediately preceding the striking of a fatal blow, defendant was "grabbed at" by deceased, who was "starting to strike him," *held*, that the homicide would not rise above voluntary manslaughter. *Ex parte Warrick*, 73 Ala. 57.

Shooting Unarmed Adversary.—One who, in the day-time, in the presence of bystanders to whom he might have appealed for protection, shoots an unarmed drunken man with whom he is struggling and from whom he is in possible danger of receiving a threshing, and after once shooting him follows as he runs and shoots him again, is guilty of manslaughter. *State v. Fitzsimmons*, 63 Iowa 656.

Killing Attacking Officer.—On the trial of an indictment for murder, the evidence showed that defendant and two companions were on the streets of a city at 3 o'clock in the morning, and were somewhat intoxicated and disorderly; that deceased, a police officer, attempted to induce them to leave the streets; that they resisted his efforts, and tried to get his club away from him; that deceased arrested them, and defendant ran; that during pursuit, and before deceased had discharged his pistol, although he had attempted to do so, defendant drew a revolver and continued fleeing; that deceased shot at him without effect, and defendant instantly turned and shot deceased, inflicting a fatal wound. *Held*, that a verdict of manslaughter in the second degree would be sustained. *State v. Cantieny*, 34 Minn. 1.

Difficulty Begun by Defendant.—A had possession of ore belonging to B, which B demanded, and which A refused to give up unless he should be paid \$25. B drew a pistol with threats. A got the pistol away from B, and threw him down and beat him. B arose, drew another pistol, and shot and killed A. *Held*, that a verdict of manslaughter was not improperly rendered, and that instructions under which B would have been found not guilty were properly refused. *State v. Levigne*, 17 Nev. 435.

Wound Given by Deceased.—A and B wanted to fight, but were prevented. A went away, and on his return B presented a loaded gun and ordered A to stand. A went away again and returned with a gun, whereupon B shot and wounded A, and then set down his gun. Then A shot and killed B. *Held*, that A was guilty of manslaughter at the least. *State v. Crane*, 95 N. C. 619.

Struck with Fist.—Where a person, on being struck a heavy blow with the fist, a moment after stabbing his assailant with a deadly weapon, it was *held*, that, if death had ensued, it would have been manslaughter only. *State v. Tackett*, 1 Hawks (N. C.) L. 210; *State v. Yarbrough*, 1 Hawks (N. C.) L. 78.

Striking with Weapon.—When one strikes another a violent blow, with a heavy pole, pointed with iron, and a fight ensues, in which the assailant uses a deadly weapon, with which he knocks down his adversary and disables him, yet follows up his blows with great violence and cruelty, and kills him; on account of the great provocation in the first instance, and the passion naturally produced by the conflict, this is but manslaughter. *The State v. Curry*, 1 Jones (N. C.) L. 280.

Instructions—Adequate Cause.—On a trial for murder, an instruction to the jury, *held*, to be misleading as importing that an assault and battery on the defendant by the deceased could not constitute "adequate cause," such as would reduce the offence to manslaughter, unless it produced severe pain or bloodshed. *Tickle v. State*, 6 Tex. App. 623.

Passion the Criterion.—The adequate cause which may justify manslaughter may be estimated, not by pain, but by passion, notwithstanding that the statute declares that an assault causing pain and bloodshed shall be deemed "adequate cause." *Williams v. State*, 15 Tex. App. 617; *Rutherford v. State*, 15 Tex. App. 236.

Interview Sought by Defendant.—Where the evidence showed that defendant, without hostile intent, sought an interview with deceased, who became enraged and assaulted defendant, inflicting pain, and defendant, under the passion thus engendered, killed him, the pain would amount to "adequate cause," so as to reduce the killing to manslaughter, and failure to affirmatively so charge was error. *Bonnard v. State*, (Tex.) 7 S. W. Rep. 862.

Banter by Deceased.—A presented a gun at B, and subsequently took it down. B then said that if he raised it again he would throw a brickbat at him. He did again raise it, the brickbat was thrown, and B was shot. *Held*, that in consideration of the threat or banter of B, such killing may have been no more than voluntary manslaughter, and that it was error in the court below to charge that "if the first presenting of the gun was with malicious intent, notwithstanding what followed, the killing was murder." *McGuffie v. State*, 17 Ga. 497.

Killing in the House of Deceased.—A man has a right to order another to leave his house, but has no right to put him out by force until gentle means fail; and if he attempt to use violence in the outset, and is slain, it will not be a higher offence than manslaughter in the slayer, if there is no previous malice. *McCoy v. State*, 8 Ark. 451.

Pursuit by Officer.—Where one fired a pistol at an officer and fled to his house, pursued by the latter, who, with a pistol in his hand and with threats to kill the former, forced open the door, and was himself killed in the rencontre which ensued. *Held*, that the killing amounted only to manslaughter. *State v. List*, 1 Houst. Cr. Cas. (Del.) 133.

"Cooling Time."—Where one was assaulted and pursued into his house through one room, and then armed himself and shot and killed his assailant, the whole transaction occupying less than fifteen minutes, *held*, that there was no interval for cooling time. *Hurd v. People*, 25 Mich. 405.

Acts of Preparation to meet and resist an aggressor cannot be urged by him as provocation. The drawing of a weapon with intent to use it upon one of two brothers present, will justify the procurement of a stick with which to resist the intended assault; and, hence, possession of the stick will not be such provocation as will reduce to manslaughter a homicide committed by the

said that it is not every assault which will reduce the homicide from murder to manslaughter.¹

(4) *By the Killing of Another.*—It has been held that the sudden killing of defendant's friend, causing rage and resentment, making the mind incapable of cool reflection, is a provocation sufficient to reduce the killing of the slayer by defendant from murder to manslaughter.²

assailant. *People v. Turley*, 50 Cal. 469; *Bird v. State*, 55 Ga. 317.

Preparing Weapon.—B, a large man, while road-making twenty feet from A, called him lazy; angry words were exchanged, and B said he could whip A; A answered: "Pitch in, go your length." B started towards A, and A took out and opened a knife, almost unobserved; B attempted to seize him, and A stabbed B at his heart, killing him. *Held*, that a verdict that A was guilty of manslaughter ought not to be disturbed. *State v. Abarr*, 39 Iowa 185.

Preventing Defendant's Departure.—Where the deceased took hold of the bridle rein of a horse, on which the prisoner was mounted (who was about to go home from the place where they were), and held it forcibly for from ten to forty-five minutes, in spite of the efforts of the prisoner to loosen the rein, and the prisoner, at the end of that time, struck the deceased with a gallon jug of molasses, which he casually held in his hands, several violent blows, the first of which knocked the deceased down; on death ensuing from these blows, it was held to be manslaughter and not murder. *State v. Ramsey*, 5 Jones (N. C.) L. 195.

Where One Laid in Walt, and shot another dead, *held*, that the murder was not reduced to manslaughter by the fact that the accused had gone bail for the deceased, who had refused to appear in court according to his recognizance, and had made violent threats to resist his bail, and, on the night before the homicide, had shot at him in his carriage. *State v. Downham*, 1 *Houst. Cr. Cas. (Del.)* 45.

If two Conspire to Kill or inflict grave bodily injury on a third person, and one of the two fires at him and he pursues them and kills the one who did not fire, it is manslaughter. *State v. Gaskins*, 93 N. C. 547.

1. **A Blow with the Hand** may or may not afford such provocation as to reduce the crime of killing to manslaughter, according to the facts and attendant circumstances. *Stewart v. State*, 78 Ala. 436.

Instruction as to Assault.—On a trial for murder by shooting the deceased, an instruction that "if the jury believed from the evidence that immediately before the firing of the pistol by the defendant the deceased had assaulted the defendant or had given to him a serious and highly provoking injury sufficient to excite an irresistible passion in a reasonable person, and that such provocation did excite in the defendant a sudden violent impulse and irresistible passion, and that acting under such passion he, the defendant, fired upon and killed the deceased, the jury should find the defendant guilty of manslaughter," is erroneous. It is not every assault that will reduce a homicide from murder to manslaughter, and the proof in this case showed that if there was any assault on the prisoner by the deceased, it was of the slightest kind. *State v. Anderson*, 4 Nev. 365.

Throwing a Chair over Defendant's Head.—Where it was proven, on a trial for murder, that the deceased and the prisoner were quarreling, and as the prisoner approached the deceased he pitched over his head a chair, without touching him and with no apparent intention to do so, it was *held*, that this was no provocation, as nothing less than an actual assault, or battery, or an attempt to assault within striking distance, is a legal provocation to mitigate murder to manslaughter. *State v. Barfield*, 8 *Ired. (N. C.)* L. 344.

After Abusive Language by Defendant.—Where opprobrious words were used by the defendant to the deceased, and the latter struck him with a small walking-stick. *Held*, that the blow could not be considered as such considerable provocation as would rebut the presumption of malice on the part of the defendant in killing the deceased, provided the battery was not disproportionate to the insult offered. *Thompson v. State*, 55 Ga. 47.

2. *Moore v. State*, (Tex. App.) 9 S. W. Rep. 610. Compare *State v. Gut*, 13 Minn. 341.

In *Moore v. State*, (Tex. App.) 9 S. W. Rep. 610, the court say: "It is a

(5) *By Adultery with the Slayer's Wife.*—The detection of a person in adultery with the slayer's wife is sufficient provocation to reduce the killing of such person or of the wife from murder to manslaughter; but to constitute the mitigation the detection must have been in the very act, and the killing immediately upon the detection.¹

(6) *By Criminal Intimacy with a Female Relative.*—It has been held that the fact that deceased was in criminal intimacy with defendant's sister might be a sufficient provocation to reduce the killing to manslaughter.² It is thought that the same is true with regard to any other female relative or a female in the defendant's charge and control, such as a female ward.

d. MUTUAL COMBAT.—Where two persons, upon a sudden quarrel and in hot blood, enter into a fight mutually and upon equal terms, whether with or without weapons, and one is killed, the homicide is manslaughter,³ unless the combat was sought by

question of fact in this case to be ascertained by the jury as to the existence or non-existence of such adequate cause as would reduce the killing from murder to manslaughter. If defendants, seeing their friend shot down, were so aroused by sudden rage and resentment as that their minds were incapable of cool reflection, and, acting under the immediate influence of such sudden passion, they shot and killed the deceased, their offence would have been manslaughter and not murder."

1. See *People v. Hurtado*, 63 Cal. 288; *State v. Pratt*, 1 Houst. Cr. Cas. (Del.) 249; *Turner v. State*, 70 Ga. 767; *Biggs v. State*, 29 Ga. 723; *Briggs v. State*, 35 Ind. 492; *Sawyer v. State*, 35 Ind. 80; *Maher v. People*, 10 Mich. 212; *People v. Horton*, 4 Mich. 69; *State v. Holme*, 54 Mo. 153; *State v. France*, 76 Mo. 681; *Shuffin v. People*, 62 N. Y. 229; *State v. Harman*, 78 N. C. 515; *State v. Avery*, 64 N. C. 608; *State v. John*, 8 Ired. (N. C.) L. 330; *State v. Neville*, 6 Jones (N. C.) L. 423; *State v. Samuel*, 3 Jones (N. C.) L. 74; *Com. v. Whittler*, 2 Brewst. (Pa.) 388; *Reed v. State*, 9 Tex. App. 217; *Peirson's Case*, 2 Lew. C. C. 216; *Reg. v. Kelly*, 2 Car. & K. 814; *Manning's Case*, 1 Ventr. 212; 1 Whart. Cr. L. (9th ed.), § 459.

What Shows Provocation.—On the trial of R for the murder of W, there was evidence that W had separated from his wife A, and was living in a separate house; that R had been sleeping in the same room with A; that owing to threats by W, R proposed to leave, but A prevented it by assuring R

that she would not let W. enter; that she was heard to bolt the door and R to protest against it; that a policeman hearing two shots from R's pistol, approached, found the door shattered and W lying dead with two bullet wounds in his body, on a bed on the floor where R was in the habit of sleeping. *Held*, that from these facts the jury might infer "adequate cause," within Tex. Penal Code, art. 595, for the sudden passion which reduces culpable homicide from murder to manslaughter, and the law of manslaughter should have been stated to the jury. *Reed v. State*, 9 Tex. App. 317.

2. *Com. v. Lynch*, 3 Pittsb. (Pa.) 412. *Compare State v. Hockett*, 70 Iowa 442; s. c., 9 Cr. L. Mag. 208.

When not Sufficient.—L, suspecting his sister was in the act of adultery, took his knife from his pocket, opened it, and forced in her chamber door. He found her rising from her bed, undressed, and a man in bed. He stabbed the man three times with his knife, causing his death. *Held*, that the provocation was not sufficient to reduce the killing to voluntary manslaughter. *Lynch v. Com.* 77 Pa. St. 205.

3. *Cates v. State*, 50 Ala. 166; *People v. Sanchez*, 24 Cal. 17; *State v. Costen*, 1 Houst. Cr. Cas. (Del.) 340; *State v. O'Neal*, 1 Houst. Cr. Cas. (Del.) 58; *State v. Davis*, 1 Houst. Cr. Cas. (Del.) 13; *Stiles v. State*, 57 Ga. 183; *Tate v. State*, 46 Ga. 148; *Irby v. State*, 32 Ga. 496; *Gann v. State*, 30 Ga. 67; *Hinch v. State*, 25 Ga. 699; *Stokes v. State*, 18 Ga. 17; *State v. Partlow*, 90 Mo. 608; 4 S. W. Rep. 14; *State v.*

one of the parties for the purpose of killing the other.¹

c. TRESPASS.—A mere civil trespass on the land or property of another, not his dwelling-house, is never sufficient to reduce the intentional killing of the trespasser, with a deadly weapon, from murder to manslaughter.² But where the killing of the trespasser

Massage, 65 N. C. 480; *State v. Roberts*, 1 Hawks (N. C.) L. 349; *State v. Floyd*, 6 Jones (N. C.) L. 392; *Copeland v. State*, 7 Humph. (Tenn.) 476; *Spearman v. State*, 23 Tex. App. 224; *State v. McDonnell*, 32 Vt. 491; *United States v. Mingo*, 2 Curt. C. C. 1; *Desty Cr. L.*, § 128 b.; *Fost.* 295; 1 Russ. on Cr. (5th Eng. ed.) 811.

If a Mutual Intent to Fight Exists there is a mutual combat reducing the homicide to manslaughter, although the first blow kills one of the parties. *Tate v. State*, 46 Ga. 148.

Where a Combat is Renewed after it has ceased for a time, and killing ensues, the question to be decided is, not whether the defendant remained in a state of anger, but whether there had been sufficient time to cool. *People v. Sullivan*, 7 N. Y. 396.

If one Provokes a Combat, and in the affray has to kill his adversary in order to save his own life, the killing is not murder, but manslaughter only, if the intent with which the combat was provoked was not a felonious one. *State v. Partlow*, 90 Mo. 608.

Equal Terms.—In case of mutual combat, to reduce the offence of taking life from murder to manslaughter, it must appear that the contest was waged upon equal terms, and no undue advantage was taken. *People v. Sanchez*, 24 Cal. 17.

Previous Malice not Presumed.—If a person, upon meeting his adversary unexpectedly, who had intercepted him upon his lawful road and in his lawful pursuit, accepts the fight when he might have avoided it by passing on, the provocation being sudden and unexpected, the law will not presume the killing to have been upon the ancient grudge, but upon the insult given by stopping him on the way and it would be manslaughter. *Copeland v. State*, 7 Humph. (Tenn.) 479.

Defence of Slayer's Father.—On the trial of an infant fourteen years of age for murder, it appeared that his father and the deceased were engaged in a common fist fight, no weapons being used or threatened on either side, and while so engaged, a brother-in-law of

the prisoner actually having hold of his father, trying to separate them, the bystanders not otherwise interfering or attempting to do so, the prisoner ran up and shot down his father's antagonist, without warning and without the slightest necessity for so doing. *Held*, that these facts were amply sufficient to justify a verdict of "guilty of voluntary manslaughter." *Irby v. State*, 32 Ga. 496.

What Weapon Sufficient.—Where one of the combatants in a fight was killed by a knife. *Held*, that if the deceased used a billet heavily loaded with lead at one end, it would constitute such a provocation as would reduce the crime to manslaughter. *State v. O'Neal*, 1 Houst. Cr. Cas. (Del.) 58.

Two Against One.—Where a fight sprang up between A and B on one side, and C on the other, and C was killed. *Held*, in the absence of any evidence of premeditation, that the act of killing constituted the crime of manslaughter, and it did not matter whether A or B struck the blow. *State v. Davis*, 1 Houst. Cr. Cas. (Del.) 13.

1. *Tate v. State*, 46 Ga. 148; *State v. Underwood*, 57 Mo. 40; *Melton v. State*, 24 Tex. App. 47; 1 Hale P. C. 453; 1 Hawks. P. C., ch. 31, § 29; 1 Whart. Cr. L. (9th ed.) 482.

2. *Simpson v. State*, 59 Ala. 1; *Carrol v. State*, 23 Ala. 28; *Noles v. State*, 26 Ala. 31; *Harrison v. State*, 24 Ala. 67; *Oliver v. State*, 17 Ala. 587; *State v. Woodward*, 1 Houst. Cr. Cas. (Del.) 455; *State v. Buchanan*, 1 Houst. Cr. Cas. (Del.) 79; *Hayes v. State*, 58 Ga. 35; *Keener v. State*, 18 Ga. 194; *Monroe v. State*, 5 Ga. 95; *Davison v. People*, 90 Ill. 221; *State v. Kennedy*, 20 Iowa 569; *State v. Nance*, 17 Iowa 138; *Com. v. Drew*, 4 Mass. 391; *People v. Horton*, 4 Mich. 67; *State v. Hoyt*, 13 Minn. 132; *State v. Lambeth*, 23 Miss. 222; *McDaniel v. State*, 16 Miss. (8 Smed. & M.) 401; *State v. Sheppy*, 10 Miss. (2 Smed. & M.) 223; *People v. Cole*, 4 Park. Cr. Cas. (N. Y.) 35; *State v. Morgan*, 3 Ired. (N. C.) L. 186; *State v. Brandon*, 8 Jones (N. C.) L. 462; *State v. McDonnell*, 31 Vt. 491; *Rex v. Scully*, 1 Carr. & P. 319;

was caused by his resistance of efforts to eject him, and was unintentional on the part of the slayer, and is accomplished by means not generally calculated to produce death, the homicide is only manslaughter;¹ and the same is true if the killing is in the heat of passion, under such circumstances.²

f. RESISTANCE OF ARREST.—If a person in resisting an attempt unlawfully to arrest him, unnecessarily takes the life of the person so making the attempt, he is guilty of manslaughter, but not of murder, in the absence of proof of express malice.³ And his guilt is of the same degree if he commits the homicide in attempting to escape from such unlawful restraint.⁴

g. HOMICIDE IN MAKING ARREST.—While a homicide committed by one who was attempting to make an illegal arrest of the person slain may be murder, it can never be of less degree than manslaughter, even though committed under reasonable apprehension of death, or of great bodily harm.⁵

Reg. v. Archer, 1 F. & F. 351; *Langstaff's Case*, 1 Lew. C. C. 162; 1 *Whart. Cr. L.* (9th ed.), § 462.

Deadly Weapon.—Section 13, Gen. Stats. 598: "Whoever unnecessarily kills another except by accident or misfortune, and, except in cases mentioned in subd. 2, § 5," etc., "either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt has failed, shall be guilty of manslaughter in the second degree," does not apply where the killing is by inflicting blows with an axe on the head and neck of the deceased, and the accused claims that the blows were given in resisting a civil trespass on his lands and cattle, but makes no pretense that the weapon was used without a design to effect the fatal result which followed. *State v. Hoyt*, 13 Minn. 132.

1. See *Com. v. Drew*, 4 Mass. 391; 1 *Hale P. C.* 473; 1 *Hawks P. C.* ch 31, § 42; 1 *Whart. Cr. L.* (9th ed.) 462.

2. See *Claxton v. State*, 2 *Humph. (Tenn.)* 181.

3. *State v. Oliver*, 2 *Houst. Cr. Cas. (Del.)* 585; *Rafferty v. People*, 72 *Ill.* 73; *Dias v. State*, 7 *Blackf. (Ind.)* 20; s. c., 39 *Am. Dec.* 443; *Com. v. McLaughlin*, 66 *Mass. (12 Cush.)* 615; *Com. v. Carey*, 66 *Mass. (12 Cush.)* 246; *Com. v. Drew*, 4 *Mass.* 391; *People v. Burt*, 51 *Mich.* 199; *Drennan v. People*, 10 *Mich.* 169; *Jones v. State*, 14 *Mo.* 409; *Roberts v. State*, 14 *Mo.* 138; s. c., 55 *Am. Dec.* 97; *Drake v. State*, 535 *Neb.* 14; s. c., 18 *Rep.* 790; *Poteete v. State*, 9 *Baxt. (Tenn.)* 261; s. c., 40 *Am. Rep.* 90; *Peter v. State*, 23 *Tex. App.* 684; *Alford v. State*, 8 *Tex. App.* 545;

Goodman v. State, 4 *Tex. App.* 349; *State v. Tiner*, 44 *Tex.* 128.

Officer without Warrant—Resistance.—When an officer, knowing of the issuing of a warrant, but not having it in his possession, made an arrest, and being asked for his warrant, said he had one but refused to show it, and at once seized his man and jerked him towards the door, whereon the man drew and snapped his pistol; *held*, that if death had ensued it would not have been murder. *Drennan v. People*, 10 *Mich.* 168.

A Mittimus issued by the clerk of a court for the arrest of one who has been released from custody, upon giving a bond with surety for costs and upon which bond judgment has been had and execution issued, confers upon a sheriff no right to make the arrest and if the sheriff is killed in attempting the arrest the crime is not murder. *Poteete v. State*, 9 *Baxt. (Tenn.)* 261; s. c., 40 *Am. Rep.* 90.

4. *Dias v. State*, 7 *Blackf. (Ind.)* 20; s. c., 39 *Am. Dec.* 443; *Com. v. McLaughlin*, 66 *Mass. (12 Cush.)* 615; *Com. v. Carey*, 66 *Mass. (12 Cush.)* 246; *Goodman v. State*, 4 *Tex. App.* 349.

Breaking and entering a railroad ticket office in the day-time with an intent to steal therein, but not actually stealing, is, under *Mass. Rev. Stats.* ch. 126, § 13, but a misdemeanor; and an arrest by an officer without a warrant for such an offence previously committed, is illegal; and killing the officer by the person so arrested is not murder, but manslaughter. *Com. v. Carey*, 66 *Mass. (12 Cush.)* 246.

5. See *Peter v. State*, 23 *Tex. App.* 684.

Although a homicide by an officer is justifiable when necessary to prevent the escape of a person lawfully under arrest for a felony, yet where the escape might be prevented by other means, the killing will be manslaughter. Thus, a killing cannot be justified where the officer neglected to use proper means to secure the prisoner, and so prevent an attempt to escape.¹

h. VOLUNTARY HOMICIDE WHILE COMMITTING AN UNLAWFUL ACT LESS THAN FELONY.—A voluntary homicide, without malice, caused or brought about by the commission by the slayer of an unlawful act less than felony, is manslaughter.²

i. KILLING ONE IN AN ATTEMPT TO KILL ANOTHER.—Where one person is killed in an attempt to kill another, the killing of whom would have been manslaughter, the law transfers the degree of guilt and makes the homicide manslaughter. Thus, where one, in a mutual combat or scuffle, by accident shoots a third person, the offence is manslaughter.³

j. HOMICIDE BY ONE INTERFERING TO PRESERVE THE PEACE.—If life be unnecessarily taken by a third person interfering between two combatants for the purpose of preserving the peace in protecting one against the other, the offence is manslaughter.⁴

3. Involuntary Manslaughter.—*a. DEFINITION.*—Involuntary manslaughter is the unlawful killing of a human being without malice either express or implied, and without intent to kill or inflict the injury causing death,⁵ committed accidentally in the commission of some unlawful act not felonious, or in the improper or negligent performance of an act lawful in itself.⁶

b. HOW COMMITTED.—(1) *By Gross Carelessness or Negligence.*—Any homicide caused by the gross carelessness or negligence of

1. *Reneau v. State*, 2 Lea (Tenn.) 720; s. c., 31 Am. Rep. 626.

2. See *State v. Shelledy*, 8 Iowa 477; *Reed v. State*, 11 Tex. App. 509; s. c., 40 Am. Rep. 795.

Homicide by Adulterer.—In Texas adultery being only a misdemeanor, one who, being caught by a husband in adultery with his wife, resists an attack made on him by the husband, and kills him to save his own life, is guilty of manslaughter. *Reed v. State*, 11 Tex. App. 509; s. c., 40 Am. Rep. 795.

3. *Com. v. Flanigan*, 8 Phila. (Pa.) 430; *Clark v. State*, 19 Tex. App. 495.

Scuffle.—F in a quarrel with L, at an election pool, shot a pistol at L and in the scuffle which ensued, another barrel was discharged which killed a boy. *Held*, that this was voluntary manslaughter. *Com. v. Flanigan*, 8 Phila. (Pa.) 430.

4. *People v. Cole*, 4 Park. Cr. Cas. (N. Y.) 35.

5. See *Desty Cr. L.*, § 128; 2 *Bouv. L. Dict.* (15th ed.) 149.

6. *Brown v. State*, 28 Ga. 199; *Bruner v. State*, 58 Ind. 159; *State v. Benham*, 23 Iowa 154; s. c., 92 Am. Dec. 416; *Chrystal v. Com.*, 9 Bush (Ky.) 669; *State v. McNab*, 20 N. H. 160; *State v. Zellers*, 7 N. J. L. (2 Halst.) 220; *People v. Rector*, 19 Wend. (N. Y.) 569; *Lee v. State*, 1 Coldw. (Tenn.) 62; *Keenan v. State*, 8 Wis. 132; *Whart. Hom.* (2nd ed.), § 6; 1 *Whart. Cr. L.* (9th ed.), § 305; *Desty Cr. L.*, § 128 c.; 4 *Bl. Com.* 192; 1 *East P. C.* 55; *Harris' Cr. L.* (3rd ed.) 170; 1 *Hawk. P. C.* c. 12, § 1; *Roscoe Cr. Ev.* (10th ed.) 724; 1 *Russ. Cr.* (5th Eng. ed.) 822.

Without Deadly Weapon.—To reduce the offence to manslaughter in the fourth degree, under *Wis. Rev. Stat.* c. 133, § 20, the involuntary killing must be without a cruel or unusual weapon, and without any cruel or unusual means. *Keenan v. State*, 8 Wis. 132.

any person in the discharge of any act or duty is manslaughter. This carelessness or negligence may consist either in the improper or negligent performance of an act, or in the omission to perform a prescribed duty.¹

As instances of homicide from omissions, the following have been held to support an indictment for manslaughter, where causing death. The omission of officers of a vessel to keep a proper lookout;² the omission of an officer in charge of a coal mine to give it ventilation;³ omission by a railway tender to give the proper signal;⁴ omission by a switch tender to properly turn a switch,⁵ and omission by a street car conductor to keep proper lookout ahead of the car.⁶ But a person is not liable to be charged criminally for the omission to perform an act unless the duty and responsibility is upon him exclusively.⁷ And the following are instances of carelessness or negligence in the commission of an act sufficient to support an indictment for manslaughter, when death ensues as the result: The reckless handling or discharge of firearms;⁸ gross carelessness or negligence by officers of vessels, or

1. "Omissions are not the Basis of Penal Action, unless they constitute a defect in the discharge of a responsibility with which the defendant is especially invested. There is no such thing, in fact, as an omission that can be treated as an absolute blank. A man who is apparently inactive is actually doing something, even though that something is the cancelling of something else that he ought to have done. Even sleeping is an affirmative act, and may become the object of penal prosecution when it operates to interrupt an act on the part of the defendant which the law requires of him with the penalty of prosecution for his disobedience. As, therefore, an omission takes its character from the prior responsibility must be scrutinized when we undertake to estimate the penal character of an omission to perform it. As a general rule in this respect we may say, that when a responsibility exclusively imposed on the defendant is such that an omission in its performance is, in the usual course of events, casually followed by an injury to another person or to the State, then the defendant is indictable for such an omission. (Citing *Reg. v. Lowe*, 3 Car. & K. 123; s. c., 4 Cox C. C. 449; *Reg. v. Haines*, 2 Car. & K. 368; *Reg. v. Hughes*, Dears & B. C. C. 248; s. c., 7 Cox C. C. 301; *Reg. v. Gray*, 4 Fost. & F. 1098). *Whart. Hom.* (2nd ed.), § 72.

2. See *Rex v. Green*, 7 Car. & P. 156; *Reg. v. Lowe*, 4 Cox C. C. 449; s.

c., 3 Car. & K. 123; *Reg. v. Spence*, 1 Cox C. C. 352.

3. *Reg. v. Haines*, 2 Car. & K. 368.

4. *Reg. v. Pargeter*, 3 Cox C. C. 191.

5. *State v. O'Brien*, 32 N. J. L. (3 Vr.) 169.

6. *Com. v. Metropolitan R. Co.*, 107 Mass. 236.

7. *Reg. v. Barrett*, 2 Car. & K. 343; *Reg. v. Gray*, 4 Fost. & F. 1098.

8. *McPherson v. State*, 22 Ga. 487; *Sparks v. Com.*, 3 Bush (Ky.) 111; s. c., 96 Am. Dec. 196; *Adams v. State*, 65 Ind. 565; *State v. Hardie*, 47 Iowa 647; s. c., 29 Am. Rep. 496; *State v. Vance*, 17 Iowa 138; *State v. Emery*, 78 Mo. 77; s. c., 47 Am. Rep. 92; *People v. Fuller*, 2 Park. Cr. Cas. (N. Y.) 16; *State v. Vines*, 93 N. C. 493; s. c., 53 Am. Rep. 466; *State v. Roane*, 2 Dev. (N. C.) L. 58; *Williams v. State*, (Ohio) 2 Ohio Circuit Court 292; *Nelson v. State*, 6 Baxt. (Tenn.) 418; *Robertson v. State*, 2 Lea (Tenn.) 239; s. c., 31 Am. Rep. 602; *Farrant v. Barnes*, 11 C. B. N. S. 553; s. c., 31 L. J. C. P. 137; *Reg. v. Jones*, 12 Cox C. C. 628; *Reg. v. Skeet*, 4 Fost. & F. 931; *Reg. v. Archer*, 1 Fost. & F. 351; *Levy v. Langridge*, 4 Mees. & W. 337; s. c., 7 L. J. Ex. 387; *Reg. v. Martin*, L. R. 8 Q. B. Div. 54; *Burton's Case*, 1 Str. 481; *Whart. Hom.* (2d ed.), § 88, *et seq.*; *Desty Cr. L.*, § 1 128 c; 1 East P. C. 266; Fost. 256, 263; 1 Hale 475.

Discharging Weapon in the Dark.—It is manslaughter at common law, if one

in the commission of acts prescribed by the navigation laws;¹ the rash or reckless administering of medicine or remedies or physical treatment causing death, either by a physician or other

discharge a gun in the highway in the dark, and kill one whom he did not see. *People v. Fuller*, 2 Park. Cr. Cas. (N. Y.) 16.

Endeavor to disarm Deceased.—On the trial of A, indicted jointly with B for the murder of C, it appeared that A was called upon by B to assist him and others in taking from C a pistol exhibited by him, with which he threatened to shoot any one who interfered with him. In the struggle for the pistol, and while it was in B's hands, it was accidentally discharged, and C was killed. *Held*, that B was only guilty of involuntary manslaughter, and, as there could be no aider and abettor in such a case, A was not guilty. *Adams v. State*, 65 Ind. 565.

Trespassers.—A person, learning that some boys were stealing melons belonging to him, rushed out to his melon-patch, and fired a gun, killing one of the depredators. *Held*, that, if the killing was the result of pure accident, and there was no purpose to injure or aim in the direction of any one, it was excusable; but, if the gun was fired recklessly or heedlessly, the act would be, at least, manslaughter, though the gun was pointed in the direction of the deceased, by accident, with no purpose to injure. *State v. Vance*, 17 Iowa 138.

In Sport.—Where one by the careless use of a pistol in sport kills another by accident, it is manslaughter, although the victim told him to shoot. *State v. Vines*, 93 N. C. 493; s. c., 53 Am. Rep. 466.

Frightening Deceased.—A revolver was found in the road with one load in it. Six months thereafter repeated attempts failed to discharge it or remove the load. Four years thereafter the defendant endeavoring to frighten a woman with the revolver accidentally discharged it and killed her, and he was rightly convicted of manslaughter. *State v. Hardie*, 47 Iowa 647; s. c., 29 Am. Rep. 496.

Aimed without Intent to Shoot.—Where the evidence shows that the person killed came to his death by means of a shot discharged from a pistol, intentionally, but without malice, pointed or aimed by the defendant at or towards him, he may properly be convicted of manslaughter, the slayer at the time

having been in the commission of an unlawful act. Section 6822, Rev. Stat., was not intended to cover a case of this kind, but one where the aiming or injury does not produce death. *Williamson v. State*, (Ohio) 2 Ohio Circuit Court 202.

More Negligent Handling.—Unless there are circumstances to render it an assault, one's playful and negligent handling of a pistol which he believes to be empty, with no intent to harm, will not make the consequent killing voluntary manslaughter. *Robertson v. State*, 2 Lea (Tenn.) 239; s. c., 31 Am. Rep. 602.

Pistol Loaded with Paper Wad.—N, after amusing himself with a small pistol shooting "Christmas guns," loaded it with only a paper wad, approached a friend, asking her to kiss him, and, upon her refusal, said: "If you don't kiss me, I will shoot you," put both arms around her, discharged the pistol below her shoulder, and her falling mortally wounded, exclaimed: "For God's sake, forgive me, Milley; I didn't think it would hurt you!" *Held*, that the facts did not warrant a conviction for voluntary manslaughter. *Nelson v. State*, 6 Baxt. (Tenn.) 418.

1. *People v. Sheriff*, 1 Park. Cr. Cas. (N. Y.) 659; *U. S. v. Taylor*, 5 McL. C. C. 242; *U. S. v. Warner*, 4 McL. C. C. 464; *U. S. v. Keller*, 19 Fed. Rep. 663.

Steamboat Navigation.—If, on the trial of an indictment for manslaughter, under section 12 of the act of congress of July 7, 1838, providing that any act of "misconduct, negligence or inattention" on the part of persons employed in steamboat navigation, producing death as a result, shall be deemed manslaughter, it appear that the steamboat of which the defendants had charge came into collision with another vessel, whereby life was lost without fault on the part of defendants, they shall be acquitted. *U. S. v. Warner*, 4 McL. C. C. 463.

Racing.—Where the officers of a steamboat increased the fires in racing with another boat, to such a degree as to burn the boat, so that death ensued, *held*, not to be murder, but manslaughter. *People v. Sheriff*, 1 Park. Cr. Cas. (N. Y.) 659.

person;¹ rudeness of sport resulting in death;² the use of poor and defective materials by a builder, resulting in the fall of the building and death of an occupant;³ and recklessness in driving or controlling a hack or other vehicle.⁴

(2) *By Assault*.—Where, in the commission of an unlawful assault less than felony, an injury is unintentionally inflicted, and it results in death, the person inflicting it is guilty of involuntary manslaughter.⁵

(3) *By Attempting Abortion*.—Unlawfully attempting to produce an abortion upon a female when she is quick with child, and thereby causing her death, is manslaughter.⁶

1. *Com. v. Thompson*, 6 Mass. 134; *Rice v. State*, 8 Mo. 561; *State v. Center*, 35 Vt. 378.

2. *Pennsylvania v. Lewis*, Addis. (Pa.) 279; *Rex v. Murphy*, 6 Car. & P. 103; *Whart. Hom.* (2nd ed.), § 162; *Desty Cr. L.*, § 128 c; 1 *East P. C.* 270.

3. *People v. Buddensieck*, 103 N. Y. 287; s. c., 57 Am. Rep. 766.

4. *Killing Child*.—A hack driver was convicted of involuntary manslaughter, in running over and killing a little child. The evidence showed that the prisoner "deliberately saw the danger in which the child was placed, and yet drove on at a moderate pace." *Held*, upon appeal, that the conviction must stand. *Lee v. State*, 1 Coldw. (Tenn.) 62.

Hand-car.—Upon indictment for murder, caused by suddenly applying the brake to a hand-car on which deceased, defendant and others were riding, whereby the car was stopped, and deceased killed, an instruction that if defendant did not know the result of stopping the car suddenly, although he may have stepped on the brake in jumping off the car, he would not be guilty, is erroneous, as, if he knew that stepping on the brake would stop the car suddenly, and did so intentionally, he might have therefore been guilty of gross carelessness, which causing death, would be at least manslaughter. *White v. State*, (Ala.) 4 So. Rep. 598.

5. *State v. Johnson*, 102 Ind. 247. See *Brown v. State*, 110 Ind. 486; *State v. Downs*, 91 Mo. 19.

Striking Insult.—One who, thinking that he had been insulted, brutally pushed or struck the offender, who fell, striking his head against a pavement, *held*, guilty of involuntary—not of voluntary—manslaughter. *Brown v. State*, 110 Ind. 486.

Striking with Bottle.—At the trial of an indictment for manslaughter, the evidence showed that defendant's son,

eleven years old, struck deceased in the face, when the latter stepped back and threw up his hands, though not within reach of the boy, and at that moment defendant, without any warning, stepped up behind deceased and struck him on the head with a bottle containing liquor and weighing from three to five pounds, inflicting injuries from which he soon died. *Held*, that an instruction on manslaughter in the first degree under the statute defining it to be "the killing of a human being, without the design to effect death by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration or attempt to perpetrate any crime or misdemeanor not amounting to a felony, in case where such killing would be murder at common law" (*Mo. Rev. Stat.* 1879, § 1238), was erroneous. *State v. Downs*, 91 Mo. 19.

6. *Yundt v. People*, 65 Ill. 372; *State v. Fitzporter*, 93 Mo. 390; *People v. Clark*, 7 N. Y. 385; *State v. Glass*, 5 *Oreg.* 73; *Com. v. Railing*, 113 Pa. 37; *Reg. v. Gaylor*, *Dears. & B. C. C.* 288; s. c., 40 *Eng. L. & Eq.* 566.

Prior Attempt by Deceased.—Where the crime charged is manslaughter, committed by attempting to produce abortion, evidence that the deceased, prior to the commission of the crime, made an attempt upon herself, is immaterial, unless such attempt contributed to her death. *State v. Glass*, 5 *Oreg.* 73.

What Defendant Must Show.—On an indictment for manslaughter, under Mississippi Rev. Stat., § 1241, providing that it shall be manslaughter to produce an abortion on a woman quick with child, "unless the same shall have been advised by a physician to be necessary for that purpose," the court instructed the jury that if they should find that defendant destroyed a quick

(4) *By Threats Causing Fright.*—Manslaughter may be caused by an act of the person killed, committed in consequence of fear caused by threats or menaces of another; but the fear must be well grounded and reasonable.¹

(5) *By Undue Correction by Persons in Authority.*—When death results from violent, unreasonable or immoderate correction or punishment administered by parents, masters and others in like authority to those under their control, the killing will be manslaughter in the absence of malice.²

(6) *Upon Person under Arrest.*—Where an officer or other person, in arresting another, recklessly and carelessly shoots him without necessity, he is guilty of manslaughter.³ And it has been held that where an officer without warrant arrested a man who was guilty of no offence, and, in preventing an escape, struck and killed him, he was guilty of involuntary manslaughter.⁴

(7) *By Obstructing Railroad Track.*—Where a person places an obstruction upon a railroad track without actual intent to commit

child by the use of an instrument, "and that the same was not necessary to preserve the mother . . . and was not advised by a physician to be necessary for the purpose" for which it was used, they should find a verdict of guilty. *Held*, erroneous, in that it put defendant to proof of more than the statute required. *State v. Fitzporter*, 90. Mo. 390.

Drugs Taken in Defendant's Absence.—The prisoner had procured certain drugs and given them to his wife, with intent that she should take them in order to procure abortion. She took them in his absence and died from their effects. On an indictment against him for manslaughter, it was objected that it was only an accessory before the fact, and that in law there cannot be an accessory before the fact, to manslaughter. *Held*, that he was properly found guilty of manslaughter. *Reg. v. Gaylor, Dears. & B. C. C.* 288; s. c., 40 Eng. L. & Eq. 556.

1. During a fight at night between defendant, who was crippled and lacked the use of one arm, and his wife, the wife knocked defendant down with a shovel, got on him and choked him. He started for his trousers, saying if he had a knife he would cut her throat. The wife thereupon ran out of the house, and next morning was found in the snow frozen to death. The court *held* that the defendant could not be convicted of manslaughter merely because such violence caused the wife to leave the house for fear of death or

great bodily harm at his hands, unless such fear was well grounded or reasonable, and the wife's death by freezing was the natural and probable consequence of her so leaving the house. *Hendrickson v. Com.*, (Ky.) 3 S. W. Rep. 166.

2. See *State v. Fields*, 70 Iowa 196; *Com. v. Randall*, 70 Mass. (4 Gray) 36; *U. S. v. Freeman*, 4 Mason C. C. 505; *U. S. v. Knowles*, 4 Sawy. C. C. 517; *Rex v. Cheesman*, 7 Car. & P. 455; *Anon.*, 1 East P. C. 261; *Reg. v. Hopley*, 2 F. & F. 202.

What is Ordeal Punishment.—At the trial of an indictment for murder, the evidence showed that defendant, a man of peaceable and quiet disposition, stood in relation of a parent to deceased, an orphan boy about ten years old, who was in the habit of running away from home and was disobedient; that a method of punishment adopted was to put the boy in a sack with holes in it; that on a certain day defendant tied him in a sack and deposited him near the house, and, acquaintances having engaged defendant in drinking, the boy was permitted to remain in the sack for several hours, and when found was dead. *Held*, that would not sustain a conviction of murder in the first degree, and, defendant consenting, the sentence should be reduced to the maximum punishment authorized for the crime of manslaughter. *State v. Field*, 70 Iowa 196.

3. *York v. Com.*, 82 Ky. 360.

4. *O'Connor v. State*, 64 Ga. 125; s. c., 37 Am. Rep. 58.

injury or to take life, and death results, he is guilty of manslaughter.¹

VII. DEFENCES TO HOMICIDE.—1. **Homicide to Prevent the Commission of Crime.**—*a.* IN DEFENCE OF THE PERSON.—(1) *Self-Defence.*—(*a*) *Reasonable Belief of Imminent Danger Necessary.*—Homicide is always excusable when committed in actual and necessary defence of the life or person of the slayer.²

In order to justify a homicide on the ground that it was committed in self-defence, it must appear that the defendant, at the time he caused the death of deceased, was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from deceased, and that it was necessary for him to strike the fatal blow or to perform such other act causing the death of deceased, in order to avoid the death or great bodily harm which was apparently imminent.³

1. **Where a Party Places an Obstruction Upon a Railroad Track**, with the intention of returning to a station and informing the conductor of an accommodation train thereof, thereby hoping to secure a position on the road as a reward, and, contrary to his expectation, an express train comes first, and, though he tries to stop it, an accident ensues and persons are killed, he is guilty of manslaughter. *State v. Brown*, 1 *Houst. Cr. Cas. (Del.)* 539.

2. See *Gholson v. State*, 53 *Ala.* 520; *s. c.*, 25 *Am. Rep.* 652; *McManus v. State*, 36 *Ala.* 293; *Monroe v. State*, 5 *Ga.* 85; *Com. v. Selfridge*, (*Mass.*) 1 *Horr. & T.* 2; *Com. v. Riley*, *Thach. Cr. Cas. (Mass.)* 471; *Silvus v. State*, 22 *Ohio St.* 90; *Stewart v. State*, 1 *Ohio St.* 66; *Pond v. State*, 8 *Mich.* 150; *Desty Cr. L.*, § 126; 1 *Whart. Cr. L.*, § 97, *et seq.*; § 484, *et seq.*; *Whart. Hom.* (2d ed.), § 480 *et seq.*

3. *Morrison v. State*, (*Ala.*) 4 *So. Rep.* 402; *Watson v. State*, 82 *Ala.* 10; *Finch v. State*, 81 *Ala.* 41; *Baker v. State*, 81 *Ala.* 38; *Jackson v. State*, 81 *Ala.* 33; *Dolan v. State*, 81 *Ala.* 11; *Tesney v. State*, 77 *Ala.* 33; *Jackson v. State*, 77 *Ala.* 18; *Jones v. State*, 76 *Ala.* 8; *Holley v. State*, 75 *Ala.* 14; *De Arman v. State*, 71 *Ala.* 351; *Ingram v. State*, 67 *Ala.* 67; *Leonard v. State*, 66 *Ala.* 461; *Cross v. State*, 63 *Ala.* 40; *Myres v. State*, 62 *Ala.* 599; *Rogers v. State*, 62 *Ala.* 170; *Judge v. State*, 58 *Ala.* 406; *s. c.*, 29 *Am. Rep.* 757; *Eiland v. State*, 52 *Ala.* 322; *Lewis v. State*, 51 *Ala.* 1; *Taylor v. State*, 48 *Ala.* 157; *Murphy v. State*, 37 *Ala.* 142; *Dupree v. State*, 33 *Ala.* 380; *s. c.*, 73 *Am. Dec.* 422; *Noles v. State*, 26 *Ala.* 31; *s. c.*, 62 *Am. Dec.* 711; *Harrison v. State*, 24

Ala. 67; *s. c.*, 60 *Am. Dec.* 450; *Carroll v. State*, 23 *Ala.* 28; *s. c.*, 58 *Am. Dec.* 282; *Holmes v. State*, 23 *Ala.* 17; *Pritchett v. State*, 22 *Ala.* 39; *s. c.*, 58 *Am. Dec.* 250; *Johnson v. State*, 17 *Ala.* 618; *Pierson v. State*, 12 *Ala.* 149; *Henderson v. State*, 7 *Ala.* 77; *Murphy v. State*, 1 *Ala. Sel. Cas.* 48; *Duncan v. State*, (*Ark.*) 6 *S.W. Rep.* 164; *Mize v. State*, 36 *Ark.* 653; *Levells v. State*, 32 *Ark.* 585; *Palmore v. State*, 29 *Ark.* 248; *McPherson v. State*, 29 *Ark.* 227; *Coker v. State*, 20 *Ark.* 53; *People v. Gonzales*, 71 *Cal.* 569; *s. c.*, 9 *Cr. L. Mag.* 307; *People v. Scott*, 69 *Cal.* 69; *People v. Robertson*, 67 *Cal.* 646; *People v. Biggins*, 65 *Cal.* 564; *People v. Bush*, 65 *Cal.* 129; *People v. Wong Ah Teak*, 63 *Cal.* 544; *People v. Tamkin*, 62 *Cal.* 468; *People v. Westlake*, 62 *Cal.* 303; *People v. Cochran*, 61 *Cal.* 548; *People v. Herbert*, 61 *Cal.* 544; *People v. Morine*, 61 *Cal.* 367; *People v. Simons*, 60 *Cal.* 72; *People v. Perdue*, 49 *Cal.* 425; *People v. Anderson*, 44 *Cal.* 65; *People v. Walsh*, 43 *Cal.* 447; *People v. Scoggins*, 37 *Cal.* 676; *People v. Williams*, 32 *Cal.* 280; *People v. Barry*, 31 *Cal.* 357; *People v. Campbell*, 30 *Cal.* 312; *People v. Batchelder*, 27 *Cal.* 69; *s. c.*, 85 *Am. Dec.* 231; *People v. Gatewood*, 20 *Cal.* 146; *People v. Lamb*, 17 *Cal.* 323; *People v. Hurley*, 8 *Cal.* 390; *People v. Payne*, 8 *Cal.* 341; *People v. Stonecipher*, 6 *Cal.* 405; *Morris v. Pratt*, 32 *Conn.* 75; *U. S. v. Knowlton*, 3 *Dak. Tr.* 58; *U. S. v. Leighton*, 3 *Dak. Tr.* 29; *Gladden v. State*, 12 *Fla.* 562; *Simmons v. State*, (*Ga.*) 4 *S. E. Rep.* 894; *Barbey v. State*, (*Ga.*) 3 *S. E. Rep.* 663; *Roberts v. State*, 65 *Ga.* 430; *Brown v. State*, 58 *Ga.* 212; *Stiles v. State*, 57 *Ga.* 183; *Thompson v.*

- State, 55 Ga. 47; *Malone v. State*, 49 Ga. 210; *Roach v. State*, 34 Ga. 78; *Evans v. State*, 33 Ga. 4; *Lingo v. State*, 29 Ga. 470; *Hinch v. State*, 25 Ga. 701; *Hawkins v. State*, 25 Ga. 209; *Mitchell v. State*, 22 Ga. 211; *Teal v. State*, 22 Ga. 75; s. c., 68 Am. Dec. 482; *Bailey v. State*, 26 Ga. 579; *Keener v. State*, 18 Ga. 194; s. c., 63 Am. Dec. 269; *Wortham v. State*, 17 Ga. 796; *Haynes v. State*, 17 Ga. 465; *Monroe v. State*, 5 Ga. 85; *Hudgins v. State*, 2 Ga. 173; *Gilmore v. People*, (Ill.) 15 N. E. Rep. 758; *Panton v. People*, 114 Ill. 505; *Kinney v. People*, 108 Ill. 519; *Cahill v. People*, 106 Ill. 621; *Steinmeyer v. People*, 95 Ill. 383; *Davison v. People*, 90 Ill. 350; *Davis v. People*, 88 Ill. 350; *Allen v. People*, 77 Ill. 484; *Roach v. People*, 77 Ill. 25; *Lawlor v. People*, 74 Ill. 228; *Greschia v. People*, 53 Ill. 295; *Murphy v. People*, 37 Ill. 447; *Maher v. People*, 24 Ill. 241; *Schnier v. People*, 23 Ill. 17; *Hopkinson v. People*, 18 Ill. 264; *Campbell v. People*, 16 Ill. 17; s. c., 61 Am. Dec. 49; *Story v. State*, 90 Ind. 413; *Adams v. State*, 65 Ind. 565; *Runyan v. State*, 57 Ind. 80; *Wall v. State*, 51 Ind. 453; *West v. State*, 50 Ind. 113; *Kinoen v. State*, 45 Ind. 518; *Creek v. State*, 24 Ind. 154; *DeForest v. State*, 21 Ind. 23; *Hittner v. State*, 19 Ind. 48; *State v. Thompson*, 71 Iowa 503; *State v. Perigo*, 70 Iowa 657; *State v. Archer*, 69 Iowa 420; *State v. Donnelly*, 69 Iowa 705; s. c., 58 Am. Rep. 234; *State v. Mahan*, 68 Iowa 304; *State v. Sterrett*, 68 Iowa 76; *State v. Shelton*, 64 Iowa 333; *State v. Middleham*, 62 Iowa 150; *State v. Westfall*, 49 Iowa 328; *State v. Stanley*, 33 Iowa 526; *State v. Collins*, 32 Iowa 36; *State v. Burke*, 30 Iowa 331; *State v. Benham*, 23 Iowa 154; s. c., 92 Am. Dec. 416; *State v. Kennedy*, 20 Iowa 372; *State v. Neeley*, 20 Iowa 108; *State v. Thompson*, 9 Iowa 188; s. c., 74 Am. Dec. 342; *Tweedy v. State*, 5 Iowa 433; *State v. Rose*, 30 Kan. 501; *State v. Bohan*, 19 Kan. 28, 55; *State v. Rogers*, 18 Kan. 78; s. c., 26 Am. Rep. 574; *State v. Potter*, 13 Kan. 414; *State v. Horne*, 9 Kan. 119; s. c., 1 Green Cr. L. Rep. 117; *Stanley v. Com.*, (Ky.) 6 S. W. Rep. 155; *Markcum v. Com.*, (Ky.) 14 S. W. Rep. 786; *Ferris v. Com.*, (Ky.) 1 S. W. Rep. 729; *Wright v. Com.*, (Ky.) 9 Cr. L. Mag. 331; *Oder v. Com.*, 88 Ky. 32; *Minton v. Com.*, 79 Ky. 461; *Fain v. Com.*, 78 Ky. 183; s. c., 39 Am. Rep. 213; *Parsons v. Com.*, 78 Ky. 102; *Farris v. Com.*, 14 Bush (Ky.) 362; *Kennedy v. Com.*, 14 Bush (Ky.) 340; *Terrell v. Com.*, 13 Bush (Ky.) 246; *Luby v. Com.*, 12 Bush (Ky.) 1; *Holloway v. Com.*, 11 Bush (Ky.) 344; *Coffman v. Com.*, 10 Bush (Ky.) 495; s. c., 1 Am. Cr. Rep. 293; *Bohannon v. Com.*, 8 Bush (Ky.) 481; *Carico v. Com.*, 7 Bush (Ky.) 124; *Young v. Com.*, 6 Bush (Ky.) 312; *Phillips v. Com.*, 2 Duv. (Ky.) 328; s. c., 87 Am. Dec. 499; *Payne v. Com.*, 1 Met. (Ky.) 370; *Meridith v. Com.*, 18 B. Mon. (Ky.) 49; *Rapp v. Com.*, 14 B. Mon. (Ky.) 614; *State v. Garic*, 35 La. An. 970; *State v. St. Geme*, 31 La. An. 302; *State v. Swift*, 14 La. An. 839; *State v. Mullen*, 14 La. An. 577; *Com. v. Riley*, Thach. Cr. Cas. (Mass.) 471; *Com. v. White*, 110 Mass. 407; *Com. v. Selfridge*, (Mass.) 1 Horr. & T. 2; *Brownell v. People*, 38 Mich. 732; *People v. Lilly*, 38 Mich. 270; *People v. Coughlin*, (Mich.) 35 N. W. Rep. 72; *People v. Cook*, 39 Mich. 236; s. c., 33 Am. Rep. 380; *Hurd v. People*, 25 Mich. 405; *Patten v. People*, 18 Mich. 314; s. c., 100 Am. Dec. 173; *Pond v. People*, 8 Mich. 150; *People v. Doe*, 1 Mich. 457; *State v. Rheams*, 34 Minn. 18; *State v. Shippey*, 10 Minn. 223; s. c., 88 Am. Dec. 70; *Ex parte Hamilton*, (Miss.) 3 So. Rep. 241; *Lamar v. State*, 64 Miss. 428; *Hall v. State*, (Miss.) 1 So. Rep. 351; *Guice v. State*, 60 Miss. 714; *Bang v. State*, 60 Miss. 571; *Scott v. State*, 56 Miss. 287; *Kendrick v. State*, 55 Miss. 436; *Parker v. State*, 55 Miss. 414; *Fortenberry v. State*, 55 Miss. 403; *Long v. State*, 52 Miss. 23; *Edwards v. State*, 37 Miss. 581; *Wesley v. State*, 37 Miss. 327; s. c., 75 Am. Dec. 621; *Cotton v. State*, 51 Miss. 504; *Staten v. State*, 30 Miss. 619; *Green v. State*, 28 Miss. 687; *Dyson v. State*, 26 Miss. 362; *State v. Hardy*, 95 Mo. 455; *State v. Davidson*, 95 Mo. 155; *State v. Rose*, 92 Mo. 201; *State v. Downs*, 91 Mo. 19; *Nichols v. Winfrey*, 90 Mo. 403; *State v. Elliott*, 90 Mo. 350; *State v. Rider*, 90 Mo. 54; *State v. Peak*, 85 Mo. 190; *State v. Johnson*, 76 Mo. 121; *State v. Eaton*, 75 Mo. 586; *State v. Harris*, 73 Mo. 287; *State v. Edwards*, 70 Mo. 480; *State v. Brown*, 64 Mo. 367; *State v. Stockton*, 61 Mo. 382; *State v. Hudson*, 59 Mo. 135; *State v. Underwood*, 57 Mo. 40; s. c., 1 Am. Cr. Rep. 251; *State v. Linney*, 52 Mo. 40; s. c., 1 Green Cr. L. Rep. 753; *State v. Keene*, 50 Mo. 357; *State v. Sloan*, 47 Mo. 604; *State v. Starr*, 38 Mo. 270; *State v. O'Connor*, 31 Mo. 389; *Parrish v. State*, 14 Neb. 60; *State v. Smith*, 10

- Nev. 106; *State v. Wells*, 1 N. J. L. (Coxe) 424; s. c., 1 Am. Dec. 211; *Territory v. Baker*, (N. Mex.) 13 Pac. Rep. 30; *Anderson v. Territory* (N. Mex.) 13 Pac. Rep. 21; *People v. Lam*, 41 N. Y. 360; *People v. Sullivan*, 7 N. Y. 396; *Shorter v. People*, 2 N. Y. 193; *People v. Lamb*, 54 Barb. (N. Y.) 342; s. c., 2 Keyes (N. Y.) 260; *Patterson v. People*, 46 Barb. (N. Y.) 625; *People v. Shorter*, 4 Barb. (N. Y.) 460; *People v. Harper*, 1 Edm. (N. Y.) Sel. Cas. 180; *People v. McLeod*, 1 Hill (N. Y.) 377; s. c., 37 Am. Dec. 328; *Uhl v. People*, 5 Park. Cr. Cas. (N. Y.) 410; *Pfomer v. People*, 4 Park. Cr. Cas. (N. Y.) 558; *People v. Tannan*, 4 Park. Cr. Cas. (N. Y.) 514; *People v. Cole*, 4 Park. Cr. Cas. (N. Y.) 35; *People v. Austin*, 1 Park. Cr. Cas. (N. Y.) 154; *State v. Brittain*, 89 N. C. 481; *State v. Matthews*, 78 N. C. 532; *State v. Harman*, 78 N. C. 515; *State v. Dixon*, 75 N. C. 275; *State v. Merrill*, 2 Dev. (N. C.) L. 269; *State v. Roane*, 2 Dev. (N. C.) L. 58; *State v. Hill*, 4 Dev. & B. (N. C.) L. 491; s. c., 34 Am. Dec. 396; *State v. Ruth-erford*, 1 Hawks (N. C.) L. 457; s. c., 9 Am. Dec. 658; *State v. Ingold*, 4 Jones (N. C.) L. 216; s. c., 67 Am. Dec. 283; *State v. Harris*, 1 Jones (N. C.) L. 190; *State v. Medlin*, 1 Winst. (N. C.) L. 99; *Darling v. Williams*, 35 Ohio St. 58; *Erwin v. State*, 29 Ohio St. 186; s. c., 23 Am. Rep. 733; *Stoffer v. State*, 15 Ohio St. 47; s. c., 86 Am. Dec. 477; *Stewart v. State*, 1 Ohio St. 66; *Good-all v. State*, 1 Oreg. 333; s. c., 80 Am. Dec. 396; *Pistorius v. Com.*, 84 Pa. St. 158; s. c., 2 Am. Cr. Rep. 284; *Murray v. Com.*, 79 Pa. St. 311; *Com. v. Drum*, 58 Pa. St. 9; *Logue v. Com.*, 38 Pa. St. 265; s. c., 80 Am. Dec. 481; *Com. v. Carey*, 2 Brewst. (Pa.) 404; *Com. v. Crawford*, 8 Phila. (Pa.) 490; *State v. Jones*, (S. C.) 7 S. E. Rep. 296; *State v. Jacobs*, (S. C.) 4 S. E. Rep. 799; *State v. Beckham*, 24 S. C. 283; *State v. Hicks*, 27 Mo. 588; *Jackson v. State*, 6 Baxt. (Tenn.) 452; *Rippy v. State*, 2 Head (Tenn.) 217; *Williams v. State*, 3 Heisk. (Tenn.) 376; s. c., 1 Green Cr. L. Rep. 255; *Young v. State*, 11 Humph. (Tenn.) 200; *Copeland v. State*, 7 Humph. (Tenn.) 479; *Grainger v. State*, 5 Yerg. (Tenn.) 459; s. c., 26 Am. Dec. 278; *Bean v. State*, (Tex.) 8 S. W. Rep. 278; *Alexander v. State*, (Tex.) 7 S. W. Rep. 867; *Bonnard v. State*, (Tex.) 7 S. W. Rep. 862; *Lynch v. State*, (Tex.) 6 S. W. Rep. 190; *White v. State*, (Tex.) 3 S. W. Rep. 710; *Gilleland v. State*, 44 Tex. 356; *James v. State*, 44 Tex. 314; *Tiner v. State*, 44 Tex. 128; *Horback v. State*, 43 Tex. 254; *Irwin v. State*, 43 Tex. 236; *Agitone v. State*, 41 Tex. 501; *Myers v. State*, 33 Tex. 525; *Parker v. State*, 31 Tex. 132; *Johnson v. State*, 27 Tex. 758; *Stockton v. State*, 25 Tex. 772; *Isaacs v. State*, 25 Tex. 174; *Hinton v. State*, 24 Tex. 454; *Wall v. State*, 18 Tex. 682; s. c., 70 Am. Dec. 302; *Lander v. State*, 12 Tex. 462; *Alexander v. State*, (Tex. App.) 7 S. W. Rep. 867; *Allen v. State*, (Tex. App.) 6 S. W. Rep. 187; *Tillery v. State*, (Tex. App.) 5 S. W. Rep. 842; *Shert v. Com.*, (Tex. App.) 4 S. W. Rep. 810; *May v. State*, (Tex. App.) 4 S. W. Rep. 591; *Williams v. State*, 22 Tex. App. 497; *Orman v. State*, 22 Tex. App. 604; s. c., 58 Am. Rep. 662; *Speaman v. State*, 23 Tex. App. 154; *Patillo v. State*, 22 Tex. App. 586; *Roach v. State*, 21 Tex. App. 249; *Thuston v. State*, 21 Tex. App. 245; *Hunnicut v. State*, 20 Tex. App. 632; *Hill v. State*, 20 Tex. App. 445; *Penland v. State*, 19 Tex. App. 365; *Arto v. State*, 19 Tex. App. 226; *Paper v. State*, 18 Tex. App. 72; *Bell v. State*, 17 Tex. App. 578; *Risby v. State*, 17 Tex. App. 517; *Smith v. State*, 15 Tex. App. 338; *Branch v. State*, 15 Tex. App. 96; *Cartwright v. State*, 14 Tex. App. 486; *King v. State*, 13 Tex. App. 277; *Jordan v. State*, 11 Tex. App. 435; *Foster v. State*, 11 Tex. App. 105; *Sims v. State*, 9 Tex. App. 586; *Holt v. State*, 9 Tex. App. 571; *Kendall v. State*, 8 Tex. App. 569; *Babb v. State*, 8 Tex. App. 173; *Pharr v. State*, 7 Tex. App. 472; *Richardson v. State*, 7 Tex. App. 486; *Marnoch v. State*, 7 Tex. App. 269; *Hudson v. State*, 6 Tex. App. 565; s. c., 32 Am. Rep. 593; *Bode v. State*, 6 Tex. App. 424; *May v. State*, 6 Tex. App. 101; *Peck v. State*, 5 Tex. App. 611; *Edwards v. State*, 5 Tex. App. 593; *Blake v. State*, 3 Tex. App. 149; *Wasson v. State*, 3 Tex. App. 481; *Lister v. State*, 3 Tex. App. 17; *Williams v. State*, 2 Tex. App. 271; *West v. State*, 2 Tex. App. 260; *Plasters v. State*, 1 Tex. App. 673; *Stevens v. State*, 1 Tex. App. 591; *Honesty v. Com.*, 81 Va. 283; *Stoneman v. Com.*, 25 Gratt. (Va.) 887; *Vaiden v. Com.*, 12 Gratt. (Va.) 717; *State v. Maier*, 22 W. Va. 800; *State v. Cain*, 20 W. Va. 679; *State v. Abbott*, 8 W. Va. 471; *Clifford v. State*, 58 Wis. 477; *State v. Martin*, 30 Wis. 216; s. c., 11 Am. Rep. 567;

This proposition is sustained by the weight of authority; but it has also been held that to excuse a homicide on the ground of self-defence the jury must be satisfied that the defendant killed the deceased when he was, in fact, in imminent danger of losing his life, or of suffering great bodily harm at the hands of the deceased.¹ And, again, it has been decided, most favorably to defendant, that the existence of the reasonable apprehension of actual or apparent danger is to be considered from the standpoint of the defendant at the time of the homicide, and not from the stand-point of the jury in the light of the facts proved.²

By imminent danger is meant immediate danger, such as must be instantly met, and cannot be guarded against by calling upon others for assistance, or upon the law for protection.³

U. S. v. Mingo, 2 Curt. C. C. 1; U. S. v. Outerbridge, 5 Sawy. C. C. 620; U. S. v. Wiltberger, 3 Wash. C. C. 575; U. S. v. King, 34 Fed. Rep. 302.

1. See *State v. Vires*, 1 Houst. Cr. Cas. (Del.) 424; *State v. Newcomb*, 1 Houst. Cr. Cas. (Del.) 66; *State v. Hollis*, 1 Houst. Cr. Cas. (Del.) 24.

2. *Pond v. People*, 8 Mich. 150; *Logue v. Com.*, 38 Pa. St. 265; s. c., 80 Am. Dec. 481; *Com. v. Carey*, 2 Brewst. (Pa.) 404; *Patillo v. State*, 22 Tex. App. 586; *Bell v. State*, 20 Tex. App. 455.

Somnambulist.—If the defendant, a somnambulist, when he fired the first shot at one who roughly and suddenly awakened him, was so far unconscious that he supposed that he was resisting a dangerous assault by one who had threatened him, regained his consciousness before he fired the second, his guilt or innocence was *held* to depend on the fact whether he honestly believed that he was then in danger of great bodily injury. *Fain v. Com.*, 78 Ky. 183; s. c., 39 Am. Rep. 213.

What is the Correct Standpoint.—Wharton in his article entitled "Fear: Its Legal Limitations" (15 Cent. L. J. 262), says: "A similar question arises in the criminal law, and is discussed by me in detail in the eighth edition of my work on that branch of jurisprudence. Is the danger that excuses the homicide of an assailant to be viewed (1) from the defendant's standpoint; or (2) from the standpoint of the jury, with all the facts before them; or (3) from the standpoint of an ideal reasonable man? No doubt we have very high authority to the effect that unless the defendant's fear is 'reasonable' in one of the two latter senses, it should not avail. It is certainly clear that an erroneous idea of danger, when negligently adopted, so far from being an absolute defence to

an indictment for homicide, perpetrated under the influence of such fear, would be ground for a verdict of manslaughter. On the other hand, I apprehend that the great weight of authority now is to the effect that an honest non-negligent belief of danger to life will be an excuse to a homicide committed under such fear. The leading case on this topic, that of Levett, was that of a man suddenly roused from his sleep by a noise in the kitchen, and supposing a burglar to be in the house, killing the supposed burglar, who was in fact only a visitor of one of the servants. This was *held* to be an excusable homicide, though Foster properly says, in his criticism of the case, that if Levitt had negligently come to this conclusion, the case was one of manslaughter. This case has been followed by many others in which this, which may be called the subjective test, is followed, and in which it is *held* that the reality of the fear is to be determined from the standpoint of the party accused. In Pennsylvania, in particular, very able judges, masters of criminal law, have laid down this position with great emphasis, it being there *held* that the issue is, not what the jury, with all the evidence before them, would believe, or what would an ideal reasonable man believe, but what was the belief of the defendant himself. It is true if he negligently believed in extreme danger, he should be convicted of manslaughter. But if he non-negligently came to this belief, and killed his assailant under this conviction, the belief being that this was the only way of saving his own life, or of preventing a great felony on his person, then the case is one for an acquittal.

3. U. S. v. Outerbridge, 5 Sawy. C. C. 620.

By the term "great bodily harm" is meant great personal injury.¹

The question whether, under all the circumstances, there are grounds for a reasonable belief in the mind of the slayer that a necessity existed for taking the life of the other is one for the determination of the jury, in the solution of which the condition of both the parties at the time is a legitimate subject for consideration.²

(b) *Grounds for Belief of Danger*.—No general rule, applicable to all cases, can be laid down as to what is, as a matter of law, sufficient ground to cause a reasonable belief of imminent danger, but the question must depend, to a great degree, upon the facts and circumstances of each particular case. It may safely be said, however, that the bare fact that a man intends to commit murder or other atrocious felony, without any overt act indicative of any such intention, will not excuse the killing of such person by way of prevention. There must be some overt act indicative of imminent danger at the time.³

(b') *Words or Threats*.—Mere words or threats uttered by deceased, however abusive or violent, without any overt act or other indication of an intent to follow up the words with an assault to carry out the threats, are not sufficient grounds for the reasonable belief of imminent danger which is necessary to sustain the plea of self-defence on a trial for criminal homicide.⁴

1. See *Territory v. Baker*, (N. Mex.) 13 Pac. Rep. 30.

2. *Johnson v. State*, 17 Ala. 618; *State v. Bohan*, 19 Kan. 28, 55; *Cotton v. State*, 31 Miss. 504; *Pfomer v. People*, 4 Park. Cr. Cas. (N. Y.) 558; *State v. Harris*, 1 Jones (N. C.) L. 190; *Goodall v. State*, 1 Oreg. 333; s. c., 80 Am. Dec. 396; *Jackson v. State*, 6 Baxt. (Tenn.) 452; *Lister v. State*, 3 Tex. App. 17; *State v. Cain*, 20 W. Va. 679.

3. See *Stoneman v. Com.*, 25 Gratt. (Va.) 887.

4. *Jackson v. State*, 77 Ala. 471; *Taylor v. State*, 48 Ala. 180; *Mize v. State*, 36 Ark. 653; *People v. Tamkin*, 62 Cal. 468; *People v. Scoggins*, 37 Cal. 676; *People v. Lombard*, 17 Cal. 316; *U. S. v. Knowlton*, 3 Dak. 58; *U. S. v. Leighton*, 3 Dak. 29; *Roberts v. State*, 65 Ga. 430; *Malone v. State*, 49 Ga. 210; *Gilmore v. People*, (Ill.) 15 N. E. Rep. 758; *Parsons v. Com.*, 78 Ky. 102; *Edwards v. State*, 47 Miss. 581; *State v. Elliott*, 90 Mo. 350; *State v. Rider*, 90 Mo. 54; *State v. Harris*, 73 Mo. 287; *Anderson v. Territory*, (New Mex.) 13 Pac. Rep. 21; *State v. Merrill*, 2 Dev. (N. C.) L. 269; *Jackson v. State*, 6 Baxt. (Tenn.) 452; *Rippy v. State*, 2 Head (Tenn.) 217; *Williams v. State*, 3 Heisk. (Tenn.) 376; *Wall v.*

State, 18 Tex. 682; s. c., 70 Am. Dec. 302; *Lynch v. State*, (Tex. App.) 6 S. W. Rep. 190; *Penland v. State*, 19 Tex. App. 365; *Peck v. State*, 5 Tex. App. 611; *Williams v. State*, 2 Tex. App. 271; *U. S. v. Outerbridge*, 5 Sawy. C. C. 620; *U. S. v. Wiltberger*, 3 Wash. C. C. 515. See *Lauder v. State*, 12 Tex. 462; *Johnson v. State*, 27 Tex. 758; *Sims v. State*, 9 Tex. App. 586. Compare *Myers v. State*, 33 Tex. 525.

The Rule in Texas.—Texas Penal Code, art. 608, provides that threats afford no justification for homicide, unless, at the time, the person killed manifested, by some act then done, an intention to execute the threat. Defendant, being on his way to the post-office, with a double-barreled gun, was met by one with whom he had had trouble. In reply to a question by defendant, deceased said: "If I get my gun, I will show you what I am in a hurry for." His gun was in the house, some forty yards away. Defendant shot him, and at the trial asked the court to charge that if the deceased was advancing towards his house to get his gun to kill the defendant, or do him some serious injury, he had the right to act in advance and make the attack. The court charged that the threats would furnish

(b⁷) *Former Acts or Attempts*.—A homicide is not excusable on the ground of self-defence because of previous hostile acts or injuries, however violent, committed or inflicted by the person killed, without any overt act showing danger to the slayer at the time of the killing.¹ Thus, the killing will not be excused by proof that deceased had lain in wait and shot at defendant at some time previous to the killing.² But where the acts of the person killed, his character and antecedent conduct, and the circumstances of the meeting, afford reasonable ground for belief that to kill a person who has previously assaulted the slayer is the only mode of protection, the homicide is excusable.³

(b⁷) *Conspiracy*.—A conspiracy to take life, even coupled with a previous unsuccessful attempt to carry it into effect, and knowledge thereof by the intended victim, will not constitute sufficient ground for a reasonable belief of imminent danger to justify the killing of the conspirators or one of them, in the absence of anything going to show an intention to carry out the conspiracy, at the time of the homicide.⁴

(b⁷) *Gestures and Menaces*.—No mere gestures or menaces which do not constitute an assault, however irritating or provoking they may be, will ordinarily excuse a homicide,⁵ unless they show unequivocally an intent of the party making them to use a deadly weapon against the slayer.⁶

no justification, unless the deceased, by some act done at the time, manifested "an immediate intention to execute the threats." *Held*, that the instruction as given was correct. *Lynch v. State*, (Tex.) 6 S. W. Rep. 190.

1. *Gladden v. State*, 12 Fla. 562; *Cahill v. People*, 106 Ill. 621; *Farris v. Com.*, (Ky.) 1 S. W. Rep. 729; *People v. McLeod*, 1 Hill (N. Y.) 377; s. c., 37 Am. Dec. 328; *Jackson v. State*, 6 Baxt. (Tenn.) 422. See *Oder v. Com.*, 80 Ky. 32.

2. *Parsons v. Com.*, 78 Ky. 102.

3. *Oder v. Com.*, 80 Ky. 32.

4. *Henderson v. State*, 77 Ala. 77; *Simmons v. State*, (Ga.) 4 S. E. Rep. 894.

5. *Lewis v. State*, 51 Ala. 1; *Wortham v. State*, 70 Ga. 336; *Roberts v. State*, 65 Ga. 430; *Malone v. State*, 49 Ga. 201; *State v. Elliott*, 90 Mo. 350; 2 S. W. Rep. 411.

Raising a Stick.—The mere raising a stick to strike, though the stick be capable of producing death, was *held* in this case not to justify killing the assailant. *Wortham v. State*, 70 Ga. 336.

6. *De Arman v. State*, 71 Ala. 351; *Bailey v. State*, 70 Ga. 617; *State v. St. Geme*, 31 La. An. 303; *Guice v. State*,

60 Miss. 714; *Bang v. State*, 60 Miss. 571; *Tillery v. State*, 24 Tex. App. 251.

Attempting to Draw a Pistol.—Upon a trial for murder, there was evidence to show that deceased bore enmity against defendant, and had threatened to kill him. They met while riding, and a controversy arose, when deceased turned in his saddle towards defendant, and placed his right hand to his right side as if to draw a pistol, whereupon defendant shot him. A pistol was found on the body of the deceased on the right side. *Held*, that the issue of self-defence was properly submitted to the jury. *Tillery v. State*, 24 Tex. 251.

Killing after Threats by Deceased.—On a trial for murder, proof that after the deceased had threatened the accused with great bodily harm, they met without design, and the motions of the deceased gave the accused reasonable ground to believe that he was about to execute the threat, and the killing was done under the belief that it was necessary in self-protection, will justify an acquittal. *State v. St. Geme*, 31 La. An. 302.

Insulting Words on Threatening Movement.—Where defendant addressed deceased in a peaceable manner, and the latter replied angrily and insulting-

(b*) *Possession of Weapons*.—The fact that a person has deadly weapons, or even that he presents them, is not an excuse for killing him unless he manifestly intends to use them against the slayer;¹ but where such an intention plainly appears, it affords ground for reasonable belief of imminent danger which will justify the killing.²

ly, and approached him with his hand on his pistol pocket as though to draw and fire. *Held*, that defendant was justified in firing first, though it subsequently appeared that deceased had no weapon. *De Arman v. State*, 71 Ala. 351.

Reasonable Appearance Sufficient.—To justify a homicide the danger need not be actual, if the accused acted on a reasonable appearance and belief of danger. So *held*, where J, finding his hogs attacked by H's dogs, procured his gun and on approaching and asking H if he was going to kill his, J's, hogs, was answered by H: "No, damn you, I'm going to kill you," and saw H put his hand behind him; but after H was shot by J, it was found that H had no weapon except a shut pocket-knife, and had no hip pocket. *Jordan v. State*, 11 Tex. App. 435.

What is not Sufficient.—The fact of deceased putting his hand to his hip as though to draw a pistol when he was driving by a store and saw defendants in the doorway, *held*, not to justify their following the wagon and firing upon him, and when he jumped to the ground, shooting and stabbing him till he died, as the apprehension caused by the threatening gesture must have been dissipated ere the killing. *Guice v. State*, 60 Miss. 714.

1. *Roberts v. State*, 65 Ga. 430; *State v. Brittain*, 89 N. C. 481; *Goodall v. State*, 1 Oreg. 333; s. c., 80 Am. Dec. 396; *Bode v. State*, 6 Tex. App. 424; See *State v. Mahan*, 68 Iowa 304.

Deadly Weapon—A Stone.—Where, on a trial for murder, it appeared that the only unusual danger to defendant was in the fact that deceased had a stone in his hand, *held*, that an instruction that unless the stone was a dangerous weapon, or, to a reasonable person in defendant's position, appeared to be, he was not justified in striking the fatal blow, was proper. *State v. Mahan*, 68 Iowa 304.

2. *People v. Anderson*, 44 Cal. 65; *People v. Payne*, 8 Cal. 341; *State v. Rhodes*, 1 Houst. Cr. Cas. (Del.) 476; *State v. Potter*, 13 Kan. 414; *State v.*

Mullen, 14 La. An. 570; *Lamar v. State*, 64 Miss. 428; *State v. Eaton*, 75 Mo. 486.

If a Gun be Pointed at One in a Threatening Manner, under such circumstances as to induce a reasonable belief that it is loaded and will be discharged, and thereby produce death or inflict great bodily injury on the person threatened, such person will be justified in using whatever force may be necessary to avert that apparent danger; and his right is not affected by the fact that the gun was not loaded. *People v. Anderson*, 44 Cal. 65; *State v. Mullen*, 14 La. An. 570.

Threats by Deceased and Attempt to Draw Pistol.—If A has repeatedly threatened to shoot B, and B kills A in the act of drawing a pistol upon him, instantly, where he has no other probable means of protecting himself or getting out of the way, it is a case of justifiable homicide. *State v. Rhodes*, 1 Houst. Cr. Cas. (Del.) 476.

Real Intention Immaterial.—There being evidence that deceased was a turbulent character, that defendant had had a quarrel with him, and that deceased had seized his pistol when the homicide was committed, *held*, that defendant was entitled to an instruction that he was justified in killing deceased if he had reasonable ground to apprehend immediate danger, though in fact deceased intended no harm. *State v. Eaton*, 75 Mo. 586.

Several Persons Armed.—Defendant with several others created a disturbance in a town, and finally shot a man, after which they retired to a place a hundred yards from the business portion of the town, where they amused themselves firing off their pistols. H and other citizens armed themselves, and went where defendant and his companions were, and told them not to come back and create further disturbance; and H was killed by defendant. *Held*, that a refusal to charge that if H and others so exhibited their weapons during the interview as to raise a reasonable apprehension in the mind of defendant that they were about to make

(b^o) *Assault*.—If an assault is made under circumstances which create a just apprehension of imminent danger of death or great bodily harm to another, it is adequate ground for that reasonable fear of immediate danger which will justify the killing of the assailant; ¹ but an assault, without a weapon, apparently causing peril of a mere indignity to the person, or of a mere battery, from

a deadly assault upon him, he should be acquitted, was a reversible error. *Lamar v. State*, 64 Miss. 428.

Dispute as to Title of Land.—The title to a piece of land being in dispute, the defendant placed upon the premises some posts, intending to build a fence. The deceased went with the other claimant of the land and began to remove the posts, being armed with a pistol, which he drew upon defendant, who then shot him. *Held*, that the homicide was justifiable. *People v. Payne*, 8 Cal. 341.

1. See *Carroll v. State*, 23 Ala. 28; s. c., 58 Am. Dec. 282; *People v. Scott*, 69 Cal. 69; *Murphy v. People*, 37 Ill. 447; *DeForest v. State*, 21 Ind. 23; *State v. Perigo*, 70 Iowa 657; *Com. v. Riley*, 1 Thach. C. C. (Mass.) 471; *Com. v. Crawford*, 8 Phila. (Pa.) 490; *Copeland v. State*, 7 Humph. (Tenn.) 479; *Alexander v. State*, (Tex.) 7 S. W. Rep. 867.

Assault after Deadly Threats.—There was evidence that a few days before the homicide deceased had threatened to kill defendant; that such threat had been communicated to him; that the general reputation of the deceased was that of a dangerous man, likely to execute the threat; that deceased, who was a powerful man, violently assaulted defendant with a stick, and that defendant then began shooting at him while he was continuing the assault. *Held*, that proof of such facts established a case of self-defence, and the court should have charged accordingly. *Alexander v. State*, (Tex.) 7 S. W. Rep. 867.

Assault with Hickory Stick.—If a person is going his own road, in a laudable pursuit, and is assailed in that road by another, with a hickory stick of dangerous character, and thereupon slays his adversary with a knife, this is homicide in self-defence. *Copeland v. State*, 7 Humph. (Tenn.) 479.

Defendant Excluded from His Own House.—If a man, on returning to his own house, find himself barred out therefrom by another, and then repeatedly demands and is denied admission, he has a legal right to break in

the door; and if he encounters resistance on thus entering, and be first stricken by the unlawful occupant with a deadly weapon, and then, meeting force with force, he take the life of such occupant, such killing would seem to be excusable homicide, committed in self-defence. *De Forest v. State*, 21 Ind. 23.

False Statement by Defendant as to His Weapon.—Defendant, engaged in an altercation with H, on being approached by the latter with a pitchfork, drew his revolver and warned him not to approach. H thereupon stopped, and defendant drew away, but after going a short distance defendant stopped, and stated to H that he had scared him with an empty revolver. H then assaulted defendant, who shot and killed him. *Held*, that defendant was not precluded from availing himself of the plea of self-defence by reason of his statement that the revolver was unloaded, although deceased was induced thereby to make the assault, unless his purpose in making the statement was to create an excuse for taking the life of deceased. *State v. Perigo*, 70 Iowa 657.

One of the Judges of Election being Violently Assaulted by persons who broke into the room, where the board was assembled, shot one of his assailants, who was in the act of hurling a missile at him. *Held*, justifiable homicide. *Com. v. Crawford*, 8 Phila. (Pa.) 490.

Killing at Gaming Table.—At the trial of an information for murder, the evidence showed that the homicide occurred at a gambling table, with reference to money placed in the gambling pot by defendant and subsequently withdrawn; that deceased demanded of defendant to return it, having at the time a knife in his hand; and that defendant drew a pistol, which deceased seized, and in the struggle which ensued deceased was shot, whether by design or accident was uncertain. The court instructed the jury that if defendant had agreed to return the money and could have avoided any necessity for killing deceased by doing so, and

which great bodily harm cannot reasonably be apprehended, will not excuse a resistance so violent as to take the life of the assailant, even though such peril cannot be escaped by retreat, or the danger may be thereby increased.¹

by so doing he would have been in no danger to life or of bodily harm from deceased, and yet, with full knowledge of this situation, and after he had agreed to return the money, by doing which all danger to him would have been avoided with safety to himself, he shot the deceased in a cool and deliberate manner, then such killing would be murder; and that if defendant, prior to the fatal shot, if he fired it, could have avoided the necessity of killing deceased by replacing the money if he agreed to do so, it was his duty so to do, and as between complying with such promise and slaying deceased, it was his duty to adopt that course which would have avoided any occasion for the shooting, if such course could be pursued with safety to defendant. *Held*, that these instructions were erroneous; the withdrawing of his money by defendant, or refusing to replace it, even after a promise so to do, would not justify any act or demonstration of hostility on the part of deceased, or modify defendant's right to repel such act or demonstration by adequate and proper means. *People v. Scott*, 69 Cal. 69.

Defendant Aided by Bystander.—Where, in an affray, A knocked down and beat B, and C, a bystander, believing that the life of B was in danger, gave him a knife to defend himself to prevent further mischief, and B killed A with the knife, it was *held*, that C was justified in giving B the knife. *Com. v. Riley*, Thach. C. C. (Mass.) 471.

1. See *Myers v. State*, 62 Ala. 599; *Eiland v. State*, 52 Ala. 322; *Duncan v. State*, 49 Ark. 543; *Davis v. People*, 88 Ill. 350; *State v. Middleham*, 62 Iowa 150; *State v. Kennedy*, 20 Iowa 569; *State v. Thompson*, 9 Iowa 188; s. c., 74 Am. Dec. 342; *State v. Rogers*, 18 Kan. 78; s. c., 26 Am. Rep. 754; *Ex parte Hamilton*, (Miss.) 3 So. Rep. 241; *Hall v. State*, (Miss.) 1 So. Rep. 351; *State v. Rider*, 90 Mo. 54; *Shorter v. People*, 2 N. Y. 193; s. c., 51 Am. Dec. 286; *Stewart v. State*, 1 Ohio St. 66; *Com. v. Drum*, 58 Pa. St. 9; *Isaacs v. State*, 25 Tex. 174; *Honesty v. Com.*, 81 Va. 283.

Stroke with Light Cane.—Defendant insulted and threatened the deceased, and, when warned against ap-

proaching, took hold of him, whereupon deceased struck defendant lightly with a light cane. Defendant then struck deceased a murderous blow. *Held*, on the trial for murder, that there was no legal provocation. *Honesty v. Com.*, 81 Va. 283.

Assault with Fists.—One pursued and violently threatened by an assailant with his fists, being at the time crippled by a fracture of his ribs, was *held* not to be justified in the use of a concealed deadly weapon, resulting in the death of the assailant. *State v. Thompson*, 9 Iowa 188; s. c., 74 Am. Dec. 342.

Provoking Assault.—Where the accused, a tenant of the deceased, had habitually annoyed girls passing by his shop, and after the deceased had thrown his tools out of the shop, had drawn a dagger on him while he, the deceased, was tacking a cloth on the window, and having made a declaration in broken English relative to the transaction containing the word kill, a few hours afterwards approached the deceased with abusive epithets, shook his fists in his face until deceased struck him with a stick, and, after retreating about twenty feet, returned upon the deceased with a drawn dagger, and upon being knocked upon his knees by a second and a third blow of the stick, collared the deceased and stabbed him, of which stab he died, *held*, that the homicide was not justified on the ground of self-defence, that it was at least manslaughter, and, if manslaughter, from its other circumstances it became, under the penal code, murder because of the use of the dagger. *Isaacs v. State*, 25 Tex. 174.

Assault in Heat of Passion.—The doctrine that where a person attacked has reasonable cause to believe that his assailant is approaching him with intent to take his life, or to commit some aggravated felony on his person, and that the danger is imminent, he may kill his assailant without retreating, provided he has first done all he could to avoid the difficulty, if a rule at law at all, is not applicable to a homicide committed in resisting an assault made in the heat of passion, suddenly aroused in the course of a quarrel, by one man upon another,

(c) *The Slayer Must be Without Fault.*—One who kills another under an apprehension of death or great bodily harm from an assault, must have been free from fault in bringing on the difficulty, if he would contend that the homicide was excusable;¹ but if the assailant by his conduct had, before the homicide was com-

the relations between whom had theretofore been of a friendly character. *Duncan v. State*, 49 Ark. 543.

What Provocation Sufficient to Justify.

—H and E were charged with the murder of G, and it appeared that some weeks before, G had assailed H's character in his paper; that on the night of the homicide, just before G's train returned, H and E drove to the depot and looked into the cars; that no vehicle was seen going from the depot immediately before the shooting; H's pistol made a louder report than G's; that the loud report was heard first, then the cry of murder from a person as if taken by surprise, then rapid shooting, too fast for only two pistols; that the flashes came from several directions to the point where G was found; that immediately afterwards the parties charged were near the spot; that some men got out of a vehicle, commenced shooting, and G shot back; that the marks indicated that more than two did the shooting. Other witnesses testified that the flashes indicated that only two were shooting; that the smaller report was heard twice, then the louder, then rapid shooting; that H's pistol had six empty chambers, G's five; G was hit three times; H twice; that H frequently went to the depot or hotels near, and took friends home with him; that E was in his employ, and accustomed to attend him; that, when the shooting commenced, the vehicle was going rapidly. E testifies that a shot was fired into the vehicle; that H and he jumped out, and, upon seeing H and G shoot at each other he ran away; that no one else was with them until afterwards. The driver testified to about the same facts, and that his horse ran away when the shooting commenced. H stated that he did the killing without assistance; that, while in the vehicle, he was shot at and hit; that he jumped out, advanced on G, shooting till he emptied his pistol; and that G was knocked down by his shots, raised and fired, when he struck him with his pistol and beat him down. H's physician testified that the ball in his stomach went first through his arm, and from its position must have been shot

while in a sitting posture. Upon habeas corpus proceedings, *held*, that H alone participated in the killing, and that he acted on provocation insufficient in law, and bail should be denied him; but that E should be either bailed or discharged. *Ex parte Hamilton*, (Miss.) 3 So. Rep. 241.

1. *Jackson v. State*, 81 Ala. 33; *Baker v. State*, 81 Ala. 38; *Tesney v. State*, 77 Ala. 33; *Leonard v. State*, 66 Ala. 461; *Judge v. State*, 58 Ala. 406; s. c., 29 Am. Rep. 757; *Eiland v. State*, 52 Ala. 322; *Murphy v. State*, 37 Ala. 142; s. c., 1 Ala. Sel. Cas. 48; *People v. Lamb*, 17 Cal. 323; *People v. Stonecipher*, 6 Cal. 405; *Stiles v. State*, 57 Ga. 183; *Roach v. State*, 34 Ga. 78; *Lingo v. State*, 29 Ga. 470; *Haynes v. State*, 17 Ga. 465; *Kinney v. People*, 108 Ill. 519; *Adams v. People*, 47 Ill. 376; *Story v. State*, 99 Ind. 413; *State v. Neeley*, 20 Iowa 108; *State v. Peak*, 85 Mo. 190; *State v. Hudson*, 56 Mo. 135; *State v. Linney*, 52 Mo. 40; *State v. Starr*, 38 Mo. 270; *Shorter v. People*, 2 N. Y. 193; s. c., 51 Am. Dec. 286; *Stewart v. State*, 1 Ohio St. 66; *State v. Beckham*, 24 S. C. 283; *Thuston v. State*, 21 Tex. App. 244; *Vander v. Com.*, 12 Gratt. (Va.) 717.

Preparing Weapon.—Where the evidence tends to show that defendant had a difficulty with deceased, on the morning of the day of the killing, about the latter having whipped the former's younger brother, and defendant fired at deceased, who returned the fire; that during the day the deceased made threats that he would kill defendant, which came to the latter's ears; and that defendant then with a gun in his hands, in position for instant use, met deceased, asked him if he had made such threats, who, without reply, fired at defendant, who returned the fire with both barrels of his gun, killing deceased, who, before he fell, seemed to try to fire again, the theory of self-defence is not tenable. *Baker v. State*, 81 Ala. 38.

Pointing Pistol.—If A points a loaded pistol at B, and B grapples with him to prevent the shooting, A cannot then shoot B, and allege that he did so in self-defence. *Clifford v. State*, 58 Wis. 477.

mitted, given notice of his desire to withdraw from the combat, and had really and in good faith endeavored to decline any further struggle, and the homicide was necessary to save himself from great bodily harm, it might be excusable.¹

The right of self-defence is not impaired by mere preparation for a wrongful act; but such preparation must be accompanied by some demonstration, either verbal or otherwise, indicative of the wrongful purpose.² Neither will the right be created by the use of words, however opprobrious; for if an assault by the person slain, made because of such words directed to him by the slayer, is so violent as to be out of all proportion to the provocation given, such extreme violence may constitute an excuse for the homicide.³ Nor will the fact that defendant was trespassing upon the property of the deceased at the time of the homicide preclude him from pleading self-defence where the assault by deceased was with a deadly weapon, and endangered defendant's life.⁴ But where the killing was done in mutual combat, entered willingly, and in the knowledge of its liability to cause death to one or the other of the combatants, he cannot plead self-defence to an indictment for killing his opponent in the fight.⁵

While the slayer must use all reasonable means to avoid doing the fatal act, yet, where it is plainly apparent that he is about to be assaulted with a deadly weapon, and he is not in a position to avoid it, the law does not require him to wait until his assailant gains a position equal to his own, and is upon equal terms with him in all respects; but he may lawfully slay him so soon as it appears, from the acts of the assailant, that a mortal combat is unavoidable.⁶

(d) The Killing Must Appear to be the Last Resort for Safety.

—In order to justify a homicide on the ground of self-defence, a person must employ all means within his power, consistent with his safety, to avoid the danger and avert the necessity; and he

The Fact that Deceased was Intoxicated by Liquor Sold to Him by Defendant did not deprive defendant of the right to protect himself against the assault of deceased; and evidence thereof is properly received. *Nichols v. Winfrey*, 90 Mo. 403.

1. *People v. Gonzales*, 71 Cal. 569; s. c., 9 Cr. L. Mag. 307; *People v. Robertson*, 67 Cal. 646; *People v. Bush*, 65 Cal. 129; *People v. Wong Ah Teak*, 63 Cal. 544; *People v. Westlake*, 62 Cal. 303; *People v. Simons*, 60 Cal. 72; *Stiles v. State*, 37 Ga. 183; *Hittner v. State*, 19 Ind. 48; *State v. Perigo*, 70 Iowa 657; *State v. Archer*, 69 Iowa 420; *Terrell v. Com.*, 13 Bush (Ky.) 246; *Com. v. Riley*, Thach. C. C. (Mass.) 471; *State v. Partlow*, 90 Mo. 608; s. c., 59 Am. Rep. 31; *State v. Smith*, 10 Nev. 106; *State v. Hill*, 2

Dev. & B. (N. C.) L. 491; s. c. 34 Am. Dec. 396; *Stoffer v. State*, 15 Ohio St. 47; s. c., 86 Am. Dec. 470; *Bonnall v. State*, (Tex. App.) 7 S. W. Rep. 862; *White v. State*, 23 Tex. App. 154; *Roach v. State*, 21 Tex. App. 249; *Cartwright v. State*, 14 Tex. App. 486.

2. *Cartwright v. State*, 14 Tex. App. 486.

3. *Brown v. State*, 58 Ga. 212.

4. *State v. Perigo*, 70 Iowa 657. See *State v. Archer*, 69 Iowa 420.

5. *People v. Tannan*, 4 Park. Cr. Cas. (N. Y.) 514; *Gilleland v. State*, 44 Tex. 356. Compare *State v. Ingalls*, 4 Jones (N. C.) L. 216; s. c., 67 Am. Dec. 283.

6. *Bohannon v. Com.*, 8 Bush (Ky.) 487; s. c., 8 Am. Rep. 474; *Fortenberry v. State*, 55 Miss. 405.

must retreat, if retreat be practicable.¹ But a person assaulted in his dwelling-house is not bound to retreat.²

1. *Morrison v. State*, (Ala.) 4 So. Rep. 402; *Finch v. State*, 81 Ala. 41; *Ingram v. State*, 67 Ala. 67; *Pierson v. State*, 12 Ala. 149; *Duncan v. State*, (Ark.) 6 S. W. Rep. 164; *Levells v. State*, 32 Ark. 585; *McPherson v. State*, 29 Ark. 225; *People v. Campbell*, 30 Cal. 312; *People v. Gatewood*, 20 Cal. 146; *People v. Hurley*, 8 Cal. 390; *Darbey v. State*, (Ga.) 3 S. E. Rep. 663; *Stiles v. State*, 57 Ga. 183; *Mitchell v. State*, 22 Ga. 211; s. c., 63 Am. Dec. 498; *Davison v. People*, 90 Ill. 221; *Greschia v. People*, 53 Ill. 295; *Maher v. People*, 24 Ill. 241; *Schnier v. People*, 23 Ill. 17; *State v. Donnelly*, 69 Iowa 705; s. c., 58 Am. Rep. 234; *State v. Shelton*, 64 Iowa 333; *Pond v. People*, 8 Mich. 150; *State v. Rheams*, 34 Minn. 18; *State v. Shippey*, 10 Minn. 223; s. c., 88 Am. Dec. 70; *State v. Partlow*, 90 Mo. 608; s. c., 59 Am. Rep. 31; *State v. Johnson*, 76 Mo. 121; *Parrish v. State*, 14 Neb. 60; *State v. Wells*, 1 N. J. L. (Coxe) 424; s. c., 1 Am. Dec. 211; *People v. Sullivan*, 7 N. Y. 396; *People v. Harper*, 1 Edm. (N. Y.) Sel. Cas. 180; *Com. v. Drum*, 58 Pa. St. 9; *Logue v. Com.*, 38 Pa. St. 265; s. c., 80 Am. Dec. 481; *Hinton v. State*, 24 Tex. 454; *U. S. v. Wiltberger*, 3 Wash. C. C. 518; *U. S. v. King*, 34 Fed. Rep. 302. See *Watson v. State*, 82 Ala. 10; *Dolan v. State*, 81 Ala. 11; *Jones v. State*, 76 Ala. 8; *People v. Gonzales*, 71 Cal. 569; s. c., 9 Cr. L. Mag. 307; *Haynes v. State*, 17 Ga. 465; *Runyan v. State*, 57 Ind. 80; s. c., 26 Am. Rep. 52; *Creek v. State*, 24 Ind. 154; *State v. Thompson*, 9 Iowa 188; s. c., 74 Am. Dec. 342; *Tweedy v. State*, 5 Iowa 433; *Marcum v. Com.*, (Ky.) 4 S. W. Rep. 786; *Halloway v. Com.*, 11 Bush (Ky.) 344; *Bohannon v. Com.*, 8 Bush (Ky.) 481; s. c., 8 Am. Rep. 474; *Phillips v. Com.*, 2 Duv. (Ky.) 328; *State v. Harman*, 78 N. C. 515; *State v. Dixon*, 75 N. C. 275; *Erwin v. State*, 29 Ohio St. 186; s. c., 23 Am. Rep. 733; *May v. State*, 22 Tex. App. 595; *Williams v. State*, 22 Tex. App. 497; *Orman v. State*, 22 Tex. App. 604; s. c., 58 Am. Rep. 662; *Hunnicut v. State*, 20 Tex. App. 632; *Bell v. State*, 17 Tex. App. 578; *King v. State*, 13 Tex. App. 277; *Foster v. State*, 11 Tex. App. 105; *Kendall v. State*, 8 Tex. App. 569.

Duty to Retreat.—L and defendant while riding together quarreled, and

the former persuaded defendant to dismount, which he did; L then also dismounted, and cut a stick and with it and his knife attacked defendant, who in turn fought and killed L. *Held*, that if defendant could have safely and conveniently retreated when attacked, without putting himself to disadvantage, it was his duty to do so, although he would have been compelled to let loose the mule he was driving. *Finch v. State*, 81 Ala. 41.

Same.—In *Runyan v. State*, 57 Ind. 80; s. c., 26 Am. Rep. 52, the court say: "The ancient doctrine as to the duty of a person assailed to retreat as far as he can before he is justified in repelling force by force, has been greatly modified in this country, and has a much narrower application than formerly. The real question is, did the defendant, when assaulted, believe, and have reason to believe, that the use of a deadly weapon was necessary to his own safety."

Under Texas Code, articles 569, 574, if A violently attacks B, and no purpose of serious injury is reasonably indicated, B, or C interfering for B, must, before killing A, resort to all other means of prevention though not bound to retreat. If A attacks B's property, C is not justified in killing A unless the life or person of B is in peril from the attack. The phrase "all other means" does not import all possible means, but all means reasonably proper and effective under the circumstances. *Kendall v. State*, 8 Tex. App. 569.

2. *Dolan v. State*, 81 Ala. 11; *Jones v. State*, 76 Ala. 8; *Pond v. People*, 8 Mich. 150; *State v. Harman*, 78 N. C. 515.

Firing Fatal Shot from Shop.—Where the evidence shows that the defendant, when he fired the fatal shot, was standing at the door of his shop, with one foot on the lower step, a charge that to make out a case of self-defence the evidence must show that the difficulty was not provoked or encouraged by him; that he was, or appeared to be, so menaced as to create a reasonable apprehension of danger to his life, or of grievous bodily harm, and that there was no reasonable mode of escape from such peril, does not antagonize the principle that a man is not bound to retreat from his own domicile. *Watson v. State*, 82 Ala. 10.

(e) *Right to Pursue Assailant.*—Where one is attacked by another who manifestly attempts by violence to take his life or do him great bodily harm, and under such circumstances that no retreat is practicable, he is not only not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing it is justifiable self-defence. But the right, even in the most extreme case, to pursue and kill a retreating assailant, is one which ceases as soon as the assailed has reasonable ground for believing the danger had ceased to be immediate and impending.¹

(2) *Defence of Others.*—Under the common law the right of self-defence extends to the relationship of husband and wife, parent and child, master and servant; and where a person kills another in the necessary defence of one to whom he bears any one of such relationships, he is excusable, the same as though he had committed the homicide in defence of his own person;² but such a homicide is excused only under the same circumstances which would excuse the killing in self-defence. The danger must be apparent and imminent, and the killing must be the only means

Altercation Between Partners in Place of Business.—The right of a person when attacked in his own house not to retreat is applicable in case of an altercation between partners in their place of business. *Jones v. State*, 76 Ala. 8.

Killing Paramour of Wife.—Where the husband, on entering the house, detects his wife in suspicious circumstances with a paramour, and thereupon enters into a fight with him, standing not entirely on the defensive, and kills him, it is at the most manslaughter, or, if he stands on the defensive, and does not fight until he is attacked and threatened with death or great bodily harm, when, to save himself, he kills his assailant, it is excusable homicide, even if the other does not turn and flee out of the house. *State v. Harman*, 78 N. C. 515.

1. *Luby v. Com.*, 12 Bush (Ky.) 1. See *Holloway v. Com.*, 11 Bush (Ky.) 344; *Bohannon v. Com.*, 8 Bush (Ky.) 481; s. c., 8 Am. Rep. 474; *Carico v. Com.*, 7 Bush (Ky.) 124; *Young v. Com.*, 6 Bush (Ky.) 312; *Philips v. Com.*, 2 Duv. (Ky.) 328; *Pond v. People*, 8 Mich. 750; *West v. State*, 2 Tex. App. 460.

2. See *Smurr v. State*, 105 Ind. 125; *Patten v. People*, 18 Mich. 314; s. c., 100 Am. Dec. 173; *Pond v. People*, 8 Mich. 150; *Staten v. State*, 30 Miss. 419; *State v. Brittain*, 89 N. C. 482; *Parker v. State*, 31 Tex. 132; *State v. Greer*, 22 W. Va. 800; *Handcock v.*

Baker, 2 B. & B. 260; 1 Hale P. C. 484; *Reg. v. Harrington*, 10 Cox C. C. 370.

Defending Concubine.—The fact that a man and woman live together in a relation of concubinage, does not, of itself, justify a man in taking life in defence of the person of the woman, and it is not error, upon the evidence of such fact, to instruct the jury that the law of justification does not apply. *Parker v. State*, 31 Tex. 132.

Defending Mother.—On a trial for homicide resulting directly from a riotous assembly, there was evidence showing that the mother of the accused was in the house at the time when it was surrounded by the rioters, and being in feeble health, there was sufficient cause to apprehend her speedy death if the conduct of the rioters was allowed to continue. *Held*, that to render this available as an excuse for killing one of the rioters, there must be proof that the rioters were informed of the condition of the mother, or that every reasonable and practicable effort had been made to notify them of the facts, and that if such was the case, the accused would have been excused to the same extent as if the danger to the life of his mother had resulted from an actual attack upon her person or the like danger to the accused from an attack upon him. That is, he could resort to such forcible means, even with a dangerous weapon, as he believed to be necessary for protection, and even if such means should

of avoiding it. Thus, where one of two brothers is in fault in bringing on an affray, the other has not the right to take life in his defence,¹ unless he first retreats as far as is practicable, and endeavors in good faith to avoid the conflict.²

b. IN DEFENCE OF PROPERTY.—(1) *Of the Habitation.*—Where a dwelling-house is assailed with the intent to take life or inflict great bodily harm, the owner or occupant may lawfully use such fatal means to protect himself and family as would be necessary if met by his assailant face to face in any other place. He is not bound to retreat, but may kill his assailant if it reasonably appears to be necessary for the protection of the dwelling.³

(2) *Of Other Property.*—The killing of another to prevent a mere trespass upon the property other than a habitation, and not to prevent a forcible felony, is not justifiable or excusable;⁴ but the owner of property is justified in using force to eject a tres-

result in the death of any of the supposed assailants. *Patten v. People*, 18 Mich. 314; s. c., 100 Am. Dec. 173.

1. *Smurr v. State*, 105 Ind. 125.

2. *State v. Greer*, 22 W. Va. 800.

3. *People v. Walsh*, 43 Cal. 447; *State v. McPherson*, 22 Ga. 478; *Hudgins v. State*, 2 Kelly (Ga.) 173; *State v. Dugan*, 1 Houst. Cr. Cas. (Del.) 563; *State v. Horskin*, 1 Houst. Cr. Cas. (Del.) 116; *Morgan v. Durfee*, 69 Mo. 469; *People v. Coughlin*, (Mich.) 35 N. W. Rep. 72; *Pond v. People*, 8 Mich. 150; *People v. Horton*, 4 Mich. 67; *State v. Peacock*, 40 Ohio St. 333; *State v. Patterson*, 45 Vt. 308; s. c., 12 Am. Dec. 200; *Stoneman v. Com.*, 25 Gratt. (Va.) 887.

Intent to Burn.—On the trial of S for the murder of E, *held*, that if S shot E under a reasonable apprehension that the deceased intended to burn the dwelling-house of his mother, or commit some other known felony, and that there was imminent danger of such design being carried into execution, he was justified in so doing, though such danger was unreal. *Stoneman v. Com.*, 25 Gratt. (Va.) 887.

What Attempt at Entry Justifies Killing.—Under the California crimes act, section 29, killing another is justifiable only when entry into a habitation is being made in a violent, riotous, or tumultuous manner, for the purpose of offering violence to some person therein, or for the purpose of committing a felony by violence. *People v. Walsh*, 43 Cal. 447.

Expulsion from Dwelling.—Where a person, after using gentle means to expel another from his house, resorts to violence, and is resisted, he may use

force enough to overcome such resistance. *State v. Dugan*, 1 Houst. Cr. Cas. (Del.) 563.

Entry Without Proper Consent.—The fact that the deceased was a mere trespasser in the house of another, having entered with the consent of one who had no right to give it, will not justify a homicide. *People v. Horton*, 4 Mich. 67.

What is a Dwelling.—A building thirty-six feet distant from a man's house, used for preserving the nets employed in the owner's ordinary occupation of a fisherman, and also a permanent dormitory for his servants, is in law a part of his dwelling, though not included with the house by a fence. A fence is not necessary to include buildings within the curtilage, if within a space no larger than that usually occupied for the purposes of the dwelling and customary outbuildings. *Pond v. People*, 8 Mich. 150.

"Root-house."—In a prosecution for murder, the defence was that the killing was done in self-defence. At the time of the homicide defendant was in his "root-house," or out-door cellar, and resisting an invasion of it. The court gave the same instructions as would have been applicable if this "root-house" had been defendant's dwelling-house. *Held*, no error. *People v. Coughlin*, (Mich.) 35 N. W. Rep. 72.

4. *Storey v. State*, 71 Ala. 329; *Simpson v. State*, 59 Ala. 1; s. c., 31 Am. Dec. 1; *Noles v. State*, 26 Ala. 31; s. c., 62 Am. Dec. 711; *Harrison v. State*, 24 Ala. 67; s. c., 60 Am. Dec. 450; *Carroll v. State*, 23 Ala. 29; s. c., 58 Am. Dec. 282; *Johnson v. State*, 17 Ala. 618; *People v. Henshell*, 10 Cal.

passer, and in killing him if necessary to protect his own life or person against an assault by the trespasser in resistance of the attempt to eject him.¹ Homicide in defence of property is excusable when necessary to defeat or prevent the commission of a forcible or atrocious felony thereon.²

83; *State v. Moore*, 31 Conn. 479; s. c., 83 Am. Dec. 159; *Monroe v. State*, 5 Ga. 85; *Davison v. People*, 90 Ill. 221; *McDaniel v. State*, 16 Miss. (8 Smed. & M.) 401; s. c., 47 Am. Dec. 93; *State v. Foresight*, 89 Mo. 667; *People v. Divine*, 1 Edm. Sel. Cas. (N. Y.) 594; *State v. Brandon*, 8 Jones (N. C.) L. 463; *State v. McDonald*, 4 Jones (N. C.) L. 19; *White v. Territory*, (Wash. Tr.) 19 Pac. Rep. 37. See *People v. Flanagan*, 60 Cal. 2; s. c., 44 Am. Rep. 52; *Weston v. Com.*, 111 Pa. 251.

Acting Under Legal Advice is no protection. *Weston v. Com.*, 111 Pa. 251.

Highway Commissioner, Breaking Fence.—On the trial of one for murder in shooting a highway commissioner who was attempting to pull down the defendant's fence, an instruction that the deceased was a trespasser, and that the defendant had the right to use force in preventing the trespass, *held*, to have been properly refused. *Davison v. People*, 90 Ill. 221.

1. *Ayres v. State*, 60 Miss. 709.

Right to Resist Trespass on Land.—

On a trial for murder it appeared that deceased, claiming to be owner of certain land in the actual and peaceable occupancy of defendant, armed himself and went upon the same to cut and take away the hay thereon; that defendant then armed himself with a revolver and went to where the deceased was, to prevent him from so doing and to warn him away, and in the affray that ensued killed him. *Held*, that the court improperly charged that the act of the deceased was lawful, while the act of defendant was unlawful, and that the latter was guilty as charged; the entry of deceased being a trespass, which defendant had a right to resist. *White v. Territory*, (Wash. Tr.) 19 Pac. Rep. 37.

2. *People v. Flanagan*, 60 Cal. 2; s. c., 44 Am. Rep. 52; *State v. Moore*, 31 Conn. 479; s. c., 83 Am. Dec. 159. See *People v. Payne*, 8 Cal. 341; *Roach v. People*, 77 Ill. 25; *Morgan v. Durfee*, 69 Mo. 469; s. c., 33 Am. Rep. 508; *Lilly v. State*, 20 Tex. App. 1; *Parish v. Com.*, 81 Va. 1.

Setting Spring-guns.—What a man may do directly he may not do indirectly. A man may not, therefore,

place instruments of destruction for the protection of his property, where he would not be authorized to take life with his own hand for its protection. In the absence of any statutory provision making it burglary to break and enter a shop in the night season with intent to steal, and by the early strict rules of the common law, a man may not take life in prevention of such a crime. The habits of the people and other circumstances, have, however, so greatly changed since this ancient rule was established, that it is very questionable whether, in view of the large amount of property now kept in warehouses, banks and other outbuildings, it should not be held lawful to place instruments of destruction for the protection of such property. Breaking and entering a shop in the night season with intent to steal, is by our law burglary; and the placing of spring-guns in such a shop for its defence, would be justified if a burglar should be killed by them. *State v. Moore*, 31 Conn. 479; s. c., 83 Am. Dec. 159.

The Common Law of England, Allowing the Owner of Property to Set Spring-guns to protect it from trespassers, has never obtained in Alabama. If, in the defence of property, other than the dwelling-house, life is taken with a deadly weapon—as here, a spring-gun—it is murder, although the homicide may be actually necessary to prevent the trespass. The law having defined the measure of protection of property and the force which may be employed in the defence thereof, neither the secrecy of the trespass nor the frequency of its repetition enlarges the one or the other. *Simpson v. State*, 59 Ala. 1; s. c., 31 Am. Rep. 1.

Forcible Breaking by Claimant of Property.—A violent and forcible attempt on A's part to break into defendant's tobacco house in the night time to remove a crop claimed by A, but which had not been divided, defendant denying A's right to any of it, was met by defendant shooting and killing A with a single-barreled fowling piece, loaded with small shot. *Held*, that the case was one of justifiable homicide. *Parrish v. Com.*, 81 Va. 1.

2. Homicide in Making Arrest.—An officer having a warrant of arrest is justifiable in killing one accused of felony if he resists or flies; and also without a warrant, on probable suspicion founded on his own knowledge, or the information of others.¹ But the slayer must show a felony actually committed by deceased, and that he avowed his object, and that deceased refused to submit.² In attempting to disperse an unlawful assemblage, it is also justifiable to kill if necessary to arrest the offender.³ Where an attempted arrest is for an ordinary misdemeanor or in a civil action, life can only be taken by the officer where the person arrested resists by force, and so endangers the life or person of the officer,⁴ as to make such killing necessary in self-defence.

Defence of Office.—A party has the right to use a deadly weapon in defence of his office, even to the extent of taking his assailant's life. *Morgan v. Durfee*, 69 Mo. 469; s. c., 33 Am. Rep. 508.

The Larceny of a Horse, though made a felony by statute, does not justify the killing of the felon, though necessary to the recapture of the horse. *Storey v. State*, 71 Ala. 329.

1. *Clements v. State*, 50 Ala. 117; *Williams v. State*, 44 Ala. 41; *State v. Roane*, 2 Dev. (N. C.) L. 581; *State v. Rutherford*, *Hawks* (N. C.) L. 456; s. c., 19 Am. Dec. 658; *State v. Garrett*, *Winst.* (N. C.) L. 144; s. c., 84 Am. Dec. 359; *Wolff v. State*, 18 Ohio St. 298; *U. S. v. Jailer*, 2 Abb. C. C. 265; *U. S. v. Rice*, 1 Hughes C. C. 560; *U. S. v. Travers*, 2 Wheel. Cr. Cas. 499, 510; *Rex v. Hagan*, 8 Car. & P. 167; *Reg. v. Dadson*, 2 Den. C. C. 35; 4 Bl. Com. 180; 1 East P. C. 298; 2 Hale P. C. 85; 1 Hale P. C. 498; 3 Inst. 118, 220, 221.

Who is an "Officer?"—Under Missouri Const., art. 14, § 6, requiring all officers under the authority of the state to take an oath of office, a deputy constable regularly appointed, who has not taken the oath of office, is not an officer *de jure*; but is an officer *de facto*, and others have no right to resist him in the performance of his duties as constable; and when such an officer is on trial under an indictment for murder for killing one who had resisted him while attempting to make an arrest, he should be treated as an officer, and the instruction to the jury should proceed on the theory that he is one. *State v. Dierberger*, 90 Mo. 369.

Killing Escaped Convict.—The right given an officer, having the custody of a prisoner convicted of a felony, to take life to prevent the escape of the prisoner, does not extend to an officer at-

tempting to re-arrest an escaped penitentiary convict. He has only such authority as belongs to an ordinary peace-officer in making an arrest. *Wright v. State*, 44 Tex. 645.

Killing Person Attempting a Rescue.

—If an officer, arresting a person under such circumstances that it is his duty to take him immediately before the mayor of the town, proceeds to take him to the lock-up instead, he will not be justified in killing a person who attempts to rescue the prisoner, unless he was acting, in making the arrest in that manner, according to his sense of right, and not merely under a pretext of duty. *State v. Bland*, 97 N. C. 438.

Question of Necessity, for Jury.—The law does not clothe an officer with authority to judge arbitrarily of the necessity of killing a person who attempts to rescue a prisoner. He cannot kill unless there is a necessity for it, and the jury must determine, upon the testimony, the existence or absence of the necessity. *State v. Bland*, 97 N. C. 438.

2. *State v. Roane*, 2 Dev. (N. C.) L. 58.

Asportation, through A county, of property stolen in B county, is not commission of a theft "in the presence or within the view" of one seeking without warrant to arrest the thief in A county; and consequently affords no justification for shooting the thief upon his trying to escape arrest. *Lacy v. State*, 7 Tex. App. 403.

3. *Pond v. People*, 8 Mich. 150; 1 Hale P. C. 495.

4. *Clements v. State*, 50 Ala. 117; *State v. Oliver*, 1 Houst. Cr. Cas. (Del.) 585; *Adams v. State*, 72 Ga. 85; *State v. Garrett*, *Winst.* (N. C.) L. 144; s. c., 84 Am. Dec. 359; *Redeau v. State*, 2 Lea (Tenn.) 720; s. c., 2 Am. Cr. Rep. 624; *U. S. v. Jailer of Fayette*

3. Homicide in Resisting Arrest.—One who is guilty of a felony has no right to kill one who pursues him if he has notice of the object of the pursuit, whether the pursuer be an officer or a private person, or whether he be with or without a warrant.¹

Every person has a right to resist an unlawful arrest, or an arrest unlawfully violent and dangerous, both when he is arrested and after he is in custody;² but the resistance must not be in enormous disproportion to the injury threatened. He has no right to kill to prevent a mere trespass which is unaccompanied by any imminent danger of great bodily harm, or felony, and which does not produce in his mind a reasonable belief of such danger.³ In determining the culpability of a homicide committed in resisting a supposed unlawful arrest, the lawfulness of the arrest, and not the information of the slayer respecting its legality, is the criterion in connection with the character of the means used to

County, 2 Abb. C. C. 265; Forster's Case, 1 Lew. C. C. 187; 1 East P. C. 302; Fost. 271; 1 Hale P. C. 481; 1 Russ. on Cr. (5th Eng. ed.) 643.

1. *People v. Pool*, 27 Cal. 572; *State v. Mowry*, (Kan.) 11 Cr. L. Mag. 23.

Statement of Object.—The killing of an officer by one who has committed a felony, while the officer is in fresh pursuit of the offender and when he suddenly comes upon him and, pointing a gun at him, says, "You are my prisoner—surrender," is not justifiable on the ground that the officer did not in terms state his official character, or the cause of the attempted arrest. *People v. Pool*, 27 Cal. 572.

2. *Seam v. State*, (Ala.) 4 So. Rep. 521; *Nobles v. State*, 26 Ala. 31; *Wright v. Com.*, (Ky.) 9 Cr. L. Mag. 331; *State v. Underwood*, 75 Mo. 230; *Dyson v. State*, 14 Tex. App. 454; *Alford v. State*, 8 Tex. App. 545; *James v. State*, 44 Tex. 314; *Tiner v. State*, 44 Tex. 128.

A Person Guilty of a Misdemeanor and Fired at by a policeman while avoiding arrest, may repel such attack, in self-defence, by returning the firing; and if, in so doing he kills the officer, such killing is not necessarily unlawful. *Tiner v. State*, 44 Tex. 128. Compare *James v. State*, 44 Tex. 314.

Breaking into House.—A party of armed men went in the night-time to defendant's house to arrest E, an inmate, on the charge of committing a misdemeanor, without any warrant for his arrest. After breaking down the door and firing into the house the party withdrew a short distance and stopped. *Held*, that the owner of the house and all the inmates, including E,

had the right to resist the breaking in with all the force necessary to prevent it, even to taking life of those present aiding and assisting, as well as those actually breaking and entering; and that after the withdrawal of the party the owner was not required to flee from his dwelling, but had still the right to fire on any member of the party, who he believed, from all circumstances, was about to again forcibly re-enter his house or to fire into it. *Wright v. Com.*, (Ky.) 9 Crim. L. Mag. 331.

The Right of Resistance to an Unlawful Arrest Continues throughout the Unlawful Detention, and may be exercised not only by the person detained, but by another in his behalf; homicide resulting therefrom is not culpable. *Alford v. State*, 8 Tex. App. 545.

3. *Nobles v. State*, 26 Ala. 31; *State v. Underwood*, 75 Mo. 230.

If One Merely Announces His Intention of Arresting a Person, such person is not justified in shooting him, although the former's official character is not known to the latter, and although in fact, the arrest would be unwarrantable. Otherwise, however, if the officer attempted to draw his pistol and called upon a third person to shoot defendant. *State v. Underwood*, 75 Mo. 230.

Dangerous Arrest.—A and B, his brother, were peaceably walking together, when C rushed up with a drawn pistol, and, with oaths and violence, attempted illegally to arrest A and drag him before a sheriff. A resisted, a scuffle ensued, C's pistol was discharged, and B drew a pistol and killed C. *Held*, that if it reasonably appeared to B that it was necessary to kill C in order to liberate A, the homicide was a justifi-

effect the arrest, upon the one hand, and those used to resist it upon the other.¹

4. Killing of Officer Dispersing Public Meeting.—While all persons have a right lawfully and peaceably to meet and assemble for any lawful purpose, yet the mere fact that an assembly, whether its manner or object be lawful or otherwise, is ordered by officers of the law to disperse, cannot afford any excuse or justification for the willful killing of such officers, or any of them.²

5. Reward Offered for Death.—In time of peace, no person, who is not guilty of a felony, can lawfully be deprived of life, because of a reward offered for his death.³

6. Homicide in Defence of a Woman's Chastity.—While homicide committed under the passion caused by the knowledge of criminal intimacy with a female under the protection or control of the slayer is not altogether excusable, yet it may be so, under some circumstances, when committed to prevent such criminal intimacy, or a criminal assault.⁴

fiable one. *Dyson v. State*, 14 Tex. App. 454.

1. *Alford v. State*, 8 Tex. App. 545.

2. *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829. In this case the court says: "If the police officers

had improperly intruded upon the meeting in question, such intrusion would have furnished no justification for the attack hereinafter mentioned. Persons injuriously affected by such improper intrusion or illegal dispersion had their remedies at law for damages sustained, for they could have demanded an investigation before the proper authorities, and, upon proving their charges, could have obtained the dismissal of officers guilty of infringement upon the rights of citizens. We cannot say, however, that in view of all the facts and circumstances surrounding the occasion, the police officers were justly chargeable with exceeding their authority in the premises. . . .

A rumor had come to their headquarters that it was the intention of parties at the . . . meeting to proceed to some neighboring freight house, where non-union laborers were employed, and blow them up. In addition to this, it was reported to the officer in command of the force . . . that the defendant, Fielden, who was then speaking, had just used the following language: 'You have nothing more to do with the law except to lay hands on it and throttle it until it makes its last kick . . . Keep your eye upon it, throttle it, kill it, stab it, do everything you can to wound it,' and that the use of these

words had produced great excitement, and caused noisy demonstrations."

3. It is no justification of the killing of an Indian in time of peace, that a state officer had issued a proclamation offering a reward therefor. *State v. Gut*, 13 Minn. 341.

4. Assault Upon Defendant's Wife.—A man may justifiably slay another if he have reasonable ground to apprehend a design to commit a felony on his wife (*Hutch. Code*, 957). It is error, therefore, to instruct the jury that if the deceased were killed by the defendant when there was no immediate danger to his wife, it was manslaughter, for the statute expressly gives the man the benefit of his apprehension. *Staten v. State*, 30 Miss. 619.

Upon a trial for murder, there being evidence of deceased's criminal intimacy with defendant's wife; that defendant had frequently appealed to him to let her alone; that deceased had repeatedly followed her up, and had just before the shooting gone up a dark alley with her on his arm, it is error to refuse an instruction that, if the killing was necessarily committed to prevent deceased having criminal intercourse with defendant's wife, it was for the jury to say whether the killing comes under Georgia Code, sections 4331, 4334, which, after enumerating various causes, enact that all other instances standing on like footing of reason and justice shall be justifiable homicide. *Cloud v. State*, (Ga.) 7 S. E. Rep. 641.

Killing After Attempted Seduction.—If the husband shoot one who has attempted the seduction of his wife, it is

7. **Adultery with Slayer's Wife.** — While the killing of a person taken in the act of adultery with the slayer's wife is manslaughter at common law, yet there are some statutes which excuse it altogether.¹

8. **Homicide from Necessity.** — Homicide from necessity may be defined as the killing of one of two or more persons by others, where it is apparent or extremely probable that the lives of all cannot be saved.² Homicide of this character can only be excused in cases of the direst necessity, and only when the life of one must be sacrificed. In such cases as shipwreck and extreme peril resulting therefrom, seamen have no right to sacrifice the lives of passengers for the sake of preserving their own; but all occupy like positions, and a decision by lot is to be resorted to, unless the peril is so instant and overwhelming as to leave no choice of means and no moment for deliberation.³ Thus, if two shipwrecked persons get upon the same plank and one of them, finding the plank not able to save them both, thrust the other from it and thereby he is drowned, the homicide is excusable;⁴ but if there be time for an impartial choice of the persons to be sacrificed, such choice must be made.⁵

for the jury to say whether the act be not justifiable under our penal code. That the husband had a difficulty with the seducer at night when he discovered the attempt, and shot him the next morning when he came down and sat near the wife at breakfast, does not make the shooting less justifiable. *Biggs v. State*, 29 Ga. 723; s. c., 76 Am. Dec. 730.

Homicide in Defence of a Woman's Chastity is not justified by a belief that the deceased had been using fraudulent means, as by administering drugs, to effect a seduction not accomplished at the time of the killing. *People v. Cook*, 39 Mich. 236; s. c., 33 Am. Rep. 380.

1. **Texas Penal Code, article 567**, makes homicide justifiable when committed by the husband on one "taken in the act of adultery" with the wife, provided the killing takes place before the parties to the act of adultery have separated. A husband suspected his wife and A. His wife left his house one night, and soon afterwards he followed and found his corn-pen door open. His wife came out and said no one was there, then A came out and the husband shot him. *Held*, that the case was within the statute. *Price v. State*, 18 Tex. App. 474; s. c., 51 Am. Rep. 322.

2. See Can. 11, Dist. I, *de consecrat*; 4 Bl. Com. 186; Whart. Hom. (2nd ed.) 558; 1 Whart. Cr. L. (9th ed.), § 511.

3. *U. S. v. Holmes*, 1 Wall., Jr., C. C. 1.

4. 4 Bl. Com. 186.

5. *U. S. v. Holmes*, 1 Wall., Jr., C. C. 1.

Throwing Passengers Overboard.—In this case a vessel, of which defendant was a seaman, was wrecked, and the passengers and crew took to the boats as the only means of safety. The boat which carried defendant being heavily laden, and the waves running high, it became apparent that it was in great danger of sinking, unless its load was lessened; and defendant, together with the other sailors, proceeded to throw overboard passengers until it appeared that sufficient weight had been removed. It was *held* that the choice of those whose sacrifice was necessary to the safety of the others should have been made by lot; and the defendant was convicted under the indictment, which was for manslaughter, and sentenced to a light imprisonment.

"The Mignonette Case."—In *Reg. v. Dudley (The Mignonette Case)*, where two sailors were on trial for the homicide of a boy, when all three were starving in a boat at sea, the court, in charging the grand jury, said: "It is impossible to say that the act of Dudley and Stephens was an act of self-defence. Parker, at the bottom of the boat, was not endangering their lives by any act of his. The boat could hold

9. Existence of War.—The existence of war is no excuse for a homicide, unless both the slayer and the slain be in a state of actual open warfare at the time of its commission.¹

10. Accident and Mistake.—No guilt attaches to a person who, when doing a lawful act, unconsciously and non-negligently kills another.²

them all, and the motive for killing him was not for the purpose of lightening the boat, but for the purpose of eating him, which they could do when he was dead, but not while living. What really imperilled their lives was not the presence of Parker, but the absence of food and drink. It could not be doubted for a moment that if Parker was possessed of a weapon of self-defence—say a revolver—he would have been perfectly justified in taking the life of the captain, who was on the point of killing him, which shows clearly that the act of the captain was unjustifiable. It may be said that the selection of the boy—as indeed Dudley seems to have said—was better, because his stake in society, having no children at all, was less than theirs; but if such reasoning is to be allowed for a moment, Cicero's test is that under such circumstances of emergency the man who is to be sacrificed is to be the man who would be the least likely to do benefit to the republic; in which case, Parker, as a young man, might be likely to live longer, and be of more service to the republic than the others. Such reasoning must be always more ingenious than true. Nor can it be urged for a moment that the state of Parker's health, which is alleged to have been failing in consequence of his drinking the salt water, would justify it. No person is permitted, according to the law of this country, to accelerate the death of another. Besides, if once this doctrine of necessity is to be admitted, why was Parker selected rather than any of the other three? One would have imagined that his state of health, with the misery in which he was at the time, would have obtained for him more consideration at their hands. However, it is idle to lose oneself in speculations of this description. I am bound to tell you that if you are satisfied that the boy's death was caused or accelerated by the act of Dudley, or Dudley and Stephens, this is a case of deliberate homicide, neither justifiable nor excusable, and the crime is murder, and you, therefore, ought to find a true bill for murder against one or both of the prisoners." Defendants

were convicted of murder and sentenced to be hung; but their punishment was commuted to imprisonment for a period of six months. For opinion in this case, see 31 Alb. L. J. 36.

1. See MURDER, *supra*.

Indian War.—The plea of an Indian war cannot avail to secure immunity for acts of treachery and murder committed by individual Indians belonging to tribes not engaged in the war, living among the whites, and in a part of the country not involved in hostilities. *Jim v. Territory*, 1 Wash. Tr. 76.

Upon the trial of a person charged with murder, it was *held* to be no defence that the deceased belonged to a tribe of Indians, with whom war existed, the deceased being a prisoner at the time. *State v. Gut*, 13 Minn. 341.

2. *State v. Dugan*, 1 Houst. Cr. Cas. (Del.) 563; *Aaron v. State*, 31 Ga. 167; *State v. Benham*, 23 Iowa 154; s. c., 92 Am. Dec. 416; *Ayres v. State*, 60 Miss. 709; *Plummer v. State*, 4 Tex. App. 310; s. c., 30 Am. Rep. 165; *Williamson v. State*, 2 Ohio Cir. Ct. Rep. 292; *U. S. v. Clark*, 31 Fed. Rep. 710; s. c., 10 Cr. L. Mag. 159; 4 Bl. Com. 188; 1 Russ. on Cr. (5th Eng. ed.) 656; *Whart. Hom.* (2nd ed.), § 470.

Accidentally Discharging Firearms.—Where a person is indicted for murder in the first degree, and in the trial there is evidence tending to show that the deceased came to his death from the discharge of a pistol, at the time in the hands of the defendant, but which pistol was not intentionally pointed or aimed at the deceased by the defendant, or voluntarily discharged by him, but that these facts were entirely accidental, and without fault on the part of the defendant, and while he was not in the commission of an unlawful act, it is the duty of the court, or the request of the defendant, to charge the jury that if such a state of the case was shown, he cannot be found guilty of any offence under said indictment. *Williamson v. State*, 2 Ohio Cir. Ct. Rep. 292.

Intentional Pointing Firearms.—If one points a loaded gun at another under circumstances which would not

11. Compulsion.—While the principle that an act done involuntarily and under duress or compulsion places no responsibility upon the person so doing it, but only upon the person commanding it to be done, applies to crimes of homicide as well as all other offences, yet the mere fear of threatened violence cannot excuse a man for a homicide at the instance of another man.¹ And the same is true where the slayer is under the lawful authority of the person committing the act of killing, for he is bound to obey only the lawful orders of his superior.²

12. Insanity and Drunkenness.—The insanity which will exempt from punishment a person who commits a homicide consists in such a depraved and deranged condition of the mental and moral faculties as to render him incapable of distinguishing between right and wrong with respect to that particular act, and, therefore, unconscious of its criminal nature. The insanity and the act of killing must be connected, and the latter must be the offspring of the former.³ If defendant knew the act to be wrong, it is no ex-

justify shooting him, and the one aimed at seizes and struggles for it to save himself from the menaced injury from it, and in the struggle the gun is accidentally discharged, causing the death of the person aimed at, the one pointing the gun cannot claim that the homicide was excusable; otherwise if the circumstances would justify the shooting. *State v. Benham*, 23 Iowa 154; s. c., 92 Am. Dec. 416.

Accidental Injury of Person.—The rule that one defending himself from bodily harm apparently threatened by another is not liable for accidentally injuring a third person,—applied to the act of a special officer shooting the wife of a person who in darkness was resisting arrest by shooting. *Plummer v. State*, 4 Tex. App. 310; s. c., 30 Am. Rep. 165.

R and J quarreled, and J drew a knife. R drew a pistol, and while his eyes were fixed on J, who had advanced toward him, the pistol was discharged accidentally, and killed a bystander who had been restraining R before he drew the pistol, but had released him. R was convicted of voluntary manslaughter. It seems, that the homicide was excusable. *Aaron v. State*, 31 Ga. 167.

By Military Guard—a Homicide was Committed by a Military Guard without Malice, and in the performance of his supposed duty as a soldier, is excusable, unless it was manifestly beyond the scope of his authority, or was such as a man of ordinary sense and understanding would know was illegal.

U. S. v. Clark, 31 Fed. Rep. 710; s. c., 10 Cr. L. Mag. 59.

Where a Party Points a Pistol at Another in an Angry Manner, and the pistol went off, causing death,—*Held*, that there was nothing to warrant a plea of accidental killing. *State v. Dugan*, 1 Houst. Cr. Cas. (Del.) 563.

1. Reg. v. Tyler, 8 Car. & P. 616.

2. **The Willful Killing of a Soldier** by the sergeant of the guard, while on his duty is not necessarily a justifiable homicide. A soldier is bound to obey only the lawful orders of his superior officers, and an order of a superior military officer to an inferior will not, of itself, justify the willful killing of another. *U. S. v. Carr*, 1 Wood C. C. 480.

3. *Williams v. State*, (Ark.) 9 S. W. Rep. 5; *State v. Reidell*, (Del.) 15 Atl. Rep. 968; *State v. Hockett*, 70 Iowa 442; s. c., 9 Cr. L. Mag. 208; *State v. Mowry*, 37 Kan. 369; s. c., 10 Cr. L. Mag. 23; *Bovard v. State*, 30 Miss. 600; *State v. Erb*, 74 Mo. 199; *State v. Redemeier*, 71 Mo. 175; s. c., 8 Mo. App. 1; *Huting v. State*, 21 Mo. 464; *Baldwin v. State*, 12 Mo. 223; *State v. Haywood*, Phill. (N. C.) L. 376; *Flanagan v. People*, 52 N. Y. 467; s. c., 11 Am. Rep. 731; *Cole's Trial*, 7 Abb. (N. Y.) Pr. N. S. 34; *People v. Kleim*, 1 Edm. Sel. Cas. (N. Y.) 13; *Dove v. State*, 3 Heisk. (Tenn.) 348; *Leache v. State*, 22 Tex. App. 279; s. c., 58 Am. Rep. 638; *Clark v. State*, 8 Tex. App. 350; *Dejarnette v. Com.*, 75 Va. 867; *U. S. v. McGlue*, 1 Curt. C. C. 1; s. c., 2 Cr. Def. 54.

cuse that he was driven to it by the irresistible impulse arising from an insane delusion;¹ neither is it an excuse that the reason was temporarily dethroned merely by passion or revenge or uncontrollable frenzy.²

Moral insanity, which consists of irresistible impulse co-existing with mental sanity, is not supported either in psychology or in law;³ but it has been held that a homicidal mania may constitute a valid defence to the charge of murder.⁴ So long as the sense of guilt of the quality of the act exists, mere mental weakness,

Instruction as to Meaning of Term "Insanity."—An instruction that "the term 'insanity,' under the statutes of the state, includes every species of organic mental derangement, whether of a mild or violent form, and excludes every other condition of mind; and it follows that in our state, as regards their mental condition in those respects we have but two classes of people the sane and the insane. Actual insanity is, consequently, with us, a defence, and not a mitigating circumstance, in a prosecution for crime," being more favorable to the accused than the law warrants, he has no cause to complain. *Warner v. State*, 114 Ind. 137.

Impulse Overriding Reason.—Before the jury can acquit on the ground of insanity, it must appear that, at the time of the commission of the offence the accused was affected with insanity to such a degree as to create an uncontrollable impulse to do the act charged, overriding his reason and judgment. *Dacey v. People*, 116 Ill. 555.

In *State v. Jones*, 50 N. H. 369; s. c., 9 Am. Rep. 242; 2 Cr. Def. 64, it was held that there was no legal test of insanity in a case of homicide, and an instruction was sustained, that if defendant committed the act in a manner that would be criminal and unlawful, if he is sane, he should be convicted on the ground of insanity, if the killing were the offspring or product of mental disease in the prisoner. See this case for an exhaustive review of the decisions on this subject.

1. *State v. Mowry*, 37 Kan. 369; s. c., 10 Cr. L. Mag. 23; *State v. Nixon*, 32 Kan. 205; *State v. Pagels*, 92 Mo. 300. Compare, *Stevens v. State*, 31 Ind. 485; s. c., 2 Cr. Def. 87; *State v. Newherter*, 46 Iowa 88; s. c., 2 Cr. Def. 102; *State v. Fetler*, 25 Iowa 67; s. c., 2 Cr. Def. 92.

In *State v. Nixon*, 32 Kan. 205, the court says: "It is possible that an insane impulse is sometimes sufficient to destroy criminal responsibility, but

this is probably so only when it destroys the power of the accused to comprehend rationally the nature, character, and consequences of the particular act or acts charged against him, and not where the accused still has the power of knowing the character of the particular act or acts, and that they are wrong. . . . The law will hardly recognize the theory that any uncontrollable impulse may so take possession of a man's faculties and powers as to compel him to do what he knows to be wrong and a crime, and thereby remove him from all criminal responsibility. Whenever a man understands the nature and character of an act, and knows that it is wrong, it would seem that he ought to be held legally responsible for the commission of it, if in fact he does commit it." But in *Boswell v. State*, 63 Ala. 307; s. c., 35 Am. Rep. 20, it was held, that the defence of insane delusion may prevail, when the imaginary state of facts would justify or excuse the act if it was real.

2. *Williams v. State*, (Ark.) 9 S. W. Rep. 5; *Guertig v. State*, 66 Ind. 94; s. c., 32 Am. Rep. 99; *Sanders v. State*, 94 Ind. 147; *State v. Stickley*, 41 Iowa 232; s. c., 2 Cr. Def. 108; *Cole's Trial*, 7 Abb. (N. Y.) Pr. N. S. 321.

3. *Boswell v. State*, 63 Ala. 307; s. c., 35 Am. Rep. 20. See *State v. Brandon*, 8 Jones (N. C.) L. 463; *People v. Finley*, 38 Mich. 482. Compare *Andersen v. State*, 43 Conn. 514; s. c., 21 Am. Rep. 669; 2 Cr. Def. 129; *Scott v. Com.*, 4 Met. (Ky.) 227; s. c., 2 Cr. Def. 136; *Lynch v. Com.*, 77 Pa. St. 205.

Moral Insanity.—"One who indulges that convenient form of insanity which lasts just long enough to enable him to commit an act of violence is just as responsible for his condition as a drunken man is." *People v. Finley*, 38 Mich. 482.

4. **Homicidal Mania** must not be confounded with reckless frenzy; and it should be shown to have evinced itself in more than a single instance. *Coyle*

where normally¹ or temporarily induced by peculiar circumstances,² or loss of memory,³ is no defence.

Insanity never operates as any mitigation of a homicide, as it goes only to the punishment, and not to the character of the act itself; and its only effect is to exempt the slayer from the punishment prescribed for the homicide, without exonerating him from the charge of committing it.⁴

If derangement or imbecility be proved or admitted at any particular period, it is presumed to continue until disproved, unless the derangement was accidental, being caused by the violence of a disease. But this presumption is rather a matter of fact than of law, or, at most, partly of fact and partly of law. No presumption of continuity obtains in cases of recurrent, fitful and exceptional attacks of insanity. On the contrary, the rule prevails that if an insane person has lucid intervals the law presumes the offence of such person to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper.⁵

Intoxication or drunkenness produced by the voluntary use of intoxicating liquors is no defence to a homicide;⁶ but the state

v. Com., 100 Pa. St. 573; *s. c.*, 45 Am. Rep. 397.

1. *Fitzpatrick v. Com.*, 81 Ky. 357.

2. **Weakness of Mind and Fear and Excitement Caused by the Deceased** to such an extent that the defendant did not know what the effect of his act would be with reference to the crime of murder, are no defences. *People v. Hurley*, 8 Cal. 390.

3. *State v. Stark*, 1 Strobb. (S. C.) L. 479.

4. *U. S. v. Lee*, 4 Mackey (D. C.) 489; *s. c.*, 54 Am. Rep. 293. Compare *Andersen v. State*, 43 Conn. 514; *s. c.*, 21 Am. Rep. 669; 2 Cr. Def. 129.

Insanity—Incapacity to Distinguish between Right and Wrong.—In *U. S. v. Lee*, 4 Mackey (D. C.) 489; *s. c.*, 54 Am. Rep. 293, an instruction was refused as follows: "If the jury are not satisfied from the evidence that the defendant, at the time he committed the act, was so mentally unsound as to render him incapable of distinguishing between right and wrong; yet, if the jury find from the evidence, that there was such a degree of mental unsoundness existing at the time of the homicide, as to render the defendant incapable of premeditation and of forming such an intent as the jury believe the circumstances of this case would reasonably impute to a man of sound mind, they may consider such degree of mental unsoundness in determining

the question, whether the act was murder or manslaughter;" and the court say: "If the prisoner was so far incapable of distinguishing between right and wrong as to be guilty of the crime of manslaughter, he surely was capable of distinguishing between right and wrong, in respect to the crime of murder of the identical party. There can be no recognition of the doctrine that a man is incapable of distinguishing between right and wrong, so as to determine that the case is not a case of murder, and yet capable of distinguishing between right and wrong so as to be guilty of manslaughter. There is no such doctrine, and nothing in the books that favor any such idea."

Incapacity to Deliberate.—But in *Andersen v. State*, 43 Conn. 514; *s. c.*, 21 Am. Rep. 669; 2 Cr. Def. 129, it was held that, although the total lack of responsibility, on the ground of insanity, be not taken, yet if the prisoner's mind was so far deranged as to render him incapable of a deliberate, premeditated murder, he should be convicted only of murder in the second degree.

5. *Leache v. State*, 22 Tex. App. 279; *s. c.*, 58 Am. Rep. 638.

6. *Morrison v. State*, (Ala.) 10 Cr. L. Mag. 428; *Morrison v. State*, (Ala.) 4 So. Rep. 402; *Williams v. State*, 81 Ala. 1; *s. c.*, 60 Am. Rep. 183; *Tidwell v. State*, 70 Ala. 33; *Beasley v. State*, 50 Ala. 149;

s. c., 20 Am. Rep. 292; 2 Cr. Def. 577; McKenzie v. State, 26 Ark. 335; s. c., 2 Cr. Def. 533; People v. Langton, 67 Cal. 427; People v. Williams, 43 Cal. 344; Estes v. State, 55 Ga. 31; Jones v. State, 29 Ga. 594; s. c., 2 Cr. Def. 612; Golden v. State, 25 Ga. 527; Choice v. State, 31 Ga. 424; s. c., 2 Cr. Def. 538; State v. Hurley, 1 Houst. Cr. Cas. (Del.) 28; Sanders v. State, 94 Ind. 147; State v. Sopher, 70 Iowa 494; s. c., 9 Cr. L. Mag. 218; State v. Mowry, 37 Kan. 369; s. c., 10 Cr. L. Mag. 223; Shannahan v. Com., 8 Bush (Ky.) 463; s. c., 8 Am. Rep. 465; 2 Cr. Def. 557; Blinn v. Com., 7 Bush (Ky.) 320; s. c., 2 Cr. Def. 675; Kriel v. Com., 5 Bush (Ky.) 362; Smith v. Com., 1 Duv. (Ky.) 224; People v. Finley, 38 Mich. 482; State v. Edwards, 70 Mo. 312; State v. Cross, 27 Mo. 332; s. c., 2 Cr. Def. 619; State v. Harlow, 21 Mo. 446; Kenny v. People, 31 N. Y. 330; s. c., 2 Cr. Def. 562; People v. Rodgers, 18 N. Y. 9; s. c., 2 Cr. Def. 624; Friery v. People, 54 Barb. (N. Y.) 319; affirmed in 2 Keyes (N. Y.) 424; People v. Robinson, 1 Park. Cr. Cas. (N. Y.) 649; People v. Hammill, 2 Park. Cr. Cas. (N. Y.) 223; Jones v. Com., 75 Pa. St. 403; Keenan v. Com., 44 Pa. St. 55; s. c., 84 Am. Dec. 414; Pennsylvania v. McFall, 1 Addis (Pa.) 255; Com. v. Platte, 11 Phila. (Pa.) 421; Pirtle v. State, 9 Humph. (Tenn.) 663; s. c., 2 Cr. Def. 645; Cartwright v. State, 8 Lea (Tenn.) 377; s. c., 2 Cr. Def. 652; Swan v. State, 4 Humph. (Tenn.) 136; s. c., 2 Cr. Def. 643; Lancaster v. State, 2 Lea (Tenn.) 575; s. c., 2 Cr. Def. 658; Cornwell v. State, 2 Mart. & Yerg. (Tenn.) 147; s. c., 2 Cr. Def. 583; Bennett v. State, 2 Mart. & Yerg. (Tenn.) 133; s. c., 2 Cr. Def. 571; Rather v. State, (Tex.) 9 S. W. Rep. 70; Carter v. State, 12 Tex. 500; s. c., 62 Am. Dec. 539; 2 Cr. Def. 588; Territory v. Catton, (Utah Tr.) 16 Pac. Rep. 209; State v. Tatro, 50 Vt. 483; Boswell's Case, 20 Gratt. (Va.) 860; s. c., 2 Cr. Def. 592; United States v. Drew, 5 Mason C. C. 28; Hopt v. People, 104 U. S. (14 Otto) 631; bk. 26 L. ed. 813; s. c., 2 Cr. Def. 664; U. S. v. King, 34 Fed. Rep. 302; Rex v. Thomas, 7 Car. & P. 851; Rex v. Carroll, 7 Car. & P. 145.

Irresistible Desire for Liquors; How Far an Excuse for Homicide.—In *Choice v. State*, 31 Ga. 424; s. c., 2 Cr. Def. 538, the court say: "Whether any one is born with an irresistible desire to

drink, or whether such thirst may be the result of accidental injury done to the brain, is a theory not yet satisfactorily established. For myself, I capitally doubt whether it ever can be. And if it were, how far this crazy desire for liquor would excuse from crime, it is not for me to say. That this controlling thirst for liquor may be acquired by the force of habit, until it becomes a sort of a second nature, in common language, I entertain no doubt. Whether even a long course of indulgence will produce a pathological or organic change in the brain, I venture no opinion. Upon this proposition, however, I plant myself immovably; and from it nothing can dislodge me but an act of the legislature, namely: that neither moral nor legal responsibility can be avoided in this way. This is a new principle sought to be engrafted upon criminal jurisprudence. It is neither more or less than this, that a want of will and conscience to do right will constitute an excuse for the commission of crime; and that, too, where this deficiency in will and conscience is the result of a long and persevering course of wrong doing.

. . . The fact is, responsibility depends upon the possession of will, not the power over it. Nor does the most desperate drunkard lose the power to control his will, but he loses the desire to control it. No matter how deep his degradation, the drunkard uses his will when he takes his cup. It is for the pleasure or the relief of the draught that he takes it. His intellect, his appetite, and his will, all work rationally, if not wisely, in his guilty indulgence, and were you to exonerate the inebriate from the responsibility you would do violence both to his consciousness and to his conscience; for he not only feels the self prompted use of every rational power, involved in accountability, but he feels also precisely what this new philosophy denies, his solemn and actual wrong-doing, in the very act of indulgence. Converse seriously with the greatest drunkard this side of actual insanity, just compose him so as to reach his clear, constant experience, and he will confess that he realizes his guilt, and therefore the responsibility of his conduct. A creature made responsible by God, never loses his responsibility, save by some sort of insanity. There have always existed amongst men a variety of cases, wherein the will of the transgressor is universally admitted

of mind produced by such use of intoxicating liquors may be taken into consideration in determining whether there was the intent necessary to constitute murder, and in fixing the degree, according to the presence or absence of deliberation and premeditation,¹

to have little or no power to dictate a return to virtue. But mankind have never, in any age of the world, exonerated the party from responsibility, except when they were considered to have lost rectitude of intellect by direct mental alienation."

1. *Williams v. State*, 81 Ala. 1; s. c., 60 Am. Rep. 133; *People v. Williams*, 45 Cal. 344; *State v. Johnson*, 40 Conn. 136; s. c., 2 Cr. Def. 603; *Jones v. State*, 29 Ga. 594; s. c., 2 Cr. Def. 612; *State v. Mowry*, 37 Kan. 369; s. c., 10 Cr. L. Mag. 23; *Shannahan v. Com.*, 8 Bush (Ky.) 463; s. c., 8 Am. Rep. 465; *Blimm v. Com.*, 7 Bush (Ky.) 320; s. c., 2 Cr. Def. 675; *Kriel v. Com.*, 5 Bush (Ky.) 362; *Smith v. Com.*, 1 Duv. (Ky.) 224; s. c., 2 Cr. Def. 669; *Roberts v. People*, 19 Mich. 401; *State v. Garvey*, 11 Minn. 154; *Pigman v. State*, 14 Ohio 555; s. c., 45 Am. Dec. 558; *Jones v. Com.*, 75 Pa. St. 403; s. c., 2 Cr. Def. 638; *Keenan v. Com.*, 44 Pa. St. 55; s. c., 84 Am. Dec. 414; *Com. v. Platte*, 11 Phila. (Pa.) 421; *Pirtle v. State*, 9 Humph. (Tenn.) 663; s. c., 2 Cr. Def. 645; *Swan v. State*, 4 Humph. (Tenn.) 136; s. c., 2 Cr. Def. 643; *Cartwright v. State*, 8 Lea (Tenn.) 377; s. c., 2 Cr. Def. 652; *Lancaster v. State*, 2 Lea (Tenn.) 575; s. c., 2 Cr. Def. 658; *Rather v. State*, (Tex.) s. c., 9 So. Rep. 70; *Territory v. Catton*, (Utah Tr.) s. c., 16 Pac. Rep. 902; *Hopt v. People*, 104 U. S. (14 Otto) 631; bk. 26 L. ed. 873; s. c., 2 Cr. Def. 664; *U. S. v. King*, 34 Fed. Rep. 302; *Rex v. Thomas*, 7 Car. & P. 851. See *Tidwell v. State*, 70 Ala. 33; *People v. Langton*, 67 Cal. 427. *Compare Morrison v. State*, (Ala.) s. c., 4 So. Rep. 402; *Estes v. State*, 55 Ga. 31; *State v. Edwards*, 71 Mo. 312; *State v. Cross*, 27 Mo. 332; s. c., 2 Cr. Def. 619; *People v. Rogers*, 18 N. Y. 9; s. c., 72 Am. Dec. 484; 2 Cr. Def. 624; *Friery v. People*, 54 Barb (N. Y.) 319; affirmed 2 Keyes (N. Y.) 424; *Nichols v. State*, 8 Ohio St. 435; s. c., 2 Cr. Def. 667; *Pennsylvania v. McFall*, Addis (Pa.) 255; *Haile v. State*, 11 Humph. (Tenn.) 154; s. c., 2 Cr. Def. 573; *State v. Tatro*, 50 Vt. 483; *Rex v. Carroll*, 7 Car. & P. 145.

Insanity as a Defence—Texas Doctrine.—Under the Texas Acts, 1881, p. 9, § 1, providing "that neither intoxication nor temporary insanity of mind, produced by the voluntary use of ardent spirits, shall constitute any excuse in this state for the commission of crime, nor shall intoxication mitigate insanity produced by such use of ardent spirits, but may be introduced by defendant in . . . cases of murder, for the purpose of determining the degree of murder," etc., on a trial for murder a charge defining insanity, as understood in criminal law, as when a person was, at the time of committing the act, laboring under such defect of reason as not to know the nature of the act; or, if he did know, that he did not know he was doing wrong; or, if he knew it was wrong, that he did not have the mental power to refrain from doing it; and instructing that intoxication produced by the voluntary recent use of intoxicants does not excuse crime or mitigate either the degree or the penalty; but that if defendant, at the time of the homicide, was so intoxicated, and such intoxication produced in his mind a state of insanity, as the term has been defined, he can be convicted of murder in the second degree, but not in the first, is proper. *Rather v. State*, (Tex. App.) 9 S. W. Rep. 70.

Same—Proof of Malice.—Under such section, on a trial for murder, an instruction that, in determining whether the homicide was committed with express malice, the state of defendant's mind at the time, in a state of excitement or passion, is none the less proper because such excitement or passion was produced in whole or in part by the use of intoxicants, is proper. *Rather v. State*, (Tex. App.) 9 South. Rep. 70.

Same—Instructions—"Gross Vice and Misconduct."—Upon trial for murder, the court instructed the jury that the law will not permit a person who commits a crime while intoxicated to avail himself of his own gross vice and misconduct as a justification; but that drunkenness, if proved, might be taken into consideration in determining whether the homicide was willful and premeditated, and that the weight to be

unless the homicide was designed before intoxication.¹ But *mania a potu*, or insanity occasioned by the use of intoxicating liquors, will, like other forms of the malady, exempt the slayer from punishment.² Drunkenness is no aggravation of a homicide.³

VIII. LIMITATION OF PROSECUTION.—At common law there is no limitation of the time in which a homicide must be prosecuted; but in most jurisdictions there are now statutes providing that indictments for homicide—generally the lesser grades of that offence—must be brought within a prescribed time, in order to subject the offender to conviction and punishment.⁴

1. Murder.—Murder is one of the gravest crimes known to the law; and, consequently, no time is usually prescribed within which the charge against the offender must be preferred, but he is continually liable to be apprehended and punished. There are, however, occasionally exceptions to this rule, but generally they limit the prosecution of the lower degrees of the crime.⁵ An accessory before the fact to the crime of murder is guilty of murder, and, therefore, the time for the prosecution of his offence is not limited in the absence of a limitation of the prosecution for murder.⁶

2. Manslaughter.—Statutes limiting the time within which to charge a person with the crime of manslaughter are found in many of the states;⁷ and a conviction for that offence will not be sustained by an indictment found after the expiration of the

given to such fact was for the jury, and that they should receive evidence thereof with caution, and carefully consider it, in connection with all the evidence in the case. *Held*, correct, the expression "gross vice and misconduct" being applied to a hypothetical case, and not necessarily to defendant. *Territory v. Catton*, (Utah Tr.) 16 Pac. Rep. 902.

What Intoxication is "Voluntary."—On the trial of an indictment for murder, where it appears that defendant was intoxicated at the time the killing was done, the intoxication was voluntary within the meaning of the law, although the liquor was furnished the defendant by, or at the request of the person killed. *State v. Sopher*, 70 Iowa 494; s. c., 9 Cr. L. Mag. 218.

The Extent of the Drunkenness is immaterial. *Lancaster v. State*, 2 Lea (Tenn.) 575; s. c., 2 Cr. Def. 658.

1. *Smith v. Com.*, 1 Duv. (Ky.) 224.

2. *State v. Hurley*, 1 Houst. Cr. Cas. (Del.) 28; *Bradley v. State*, 31 Ind. 492; *People v. Rogers*, 18 N. Y. 9; s. c., 72 Am. Dec. 484; 2 Cr. Def. 624; *Cornwell v. State*, 2 Mart. & Yerg. (Tenn.) 147; s. c., 2 Cr. Def. 583; *Carter v. State*, 12 Tex. 500; s. c.,

62 Am. Dec. 539; 2 Cr. Def. 588; *Boswell's Case*, 20 Gratt. (Va.) 860; s. c., 2 Cr. Def. 592.

3. *Haile v. State*, 11 Humph. (Tenn.) 154; s. c., 2 Cr. Def. 573.

4. For a discussion of this subject as relating to criminal prosecutions generally, see Tit. "Criminal Procedure," 4 Am. & Eng. Encyc. of L. 784.

5. **Murder in Third Degree.**—A conviction of murder in the third degree, although had on an indictment for murder, cannot be sustained where the offence was not prosecuted within two years next after it was committed, as provided in *Thomp. Fla. Dig.* 490; *Nelson v. State*, 17 Fla. 195.

When Statute Begins to Run—Louisiana Doctrine.—The prescription of one year for prosecution for murder runs from the death of the deceased, and not from the wounding of or the arrest. *State v. Taylor*, 31 La. An. 851.

6. *People v. Mather*, 4 Wend. (N. Y.) 229; s. c., 21 Am. Dec. 122.

7. *People v. Miller*, 12 Cal. 291; *State v. Freeman*, 17 La. An. 69; *People v. Burt*, 51 Mich. 199; *Riggs v. State*, 30 Miss. 635; *White v. State*, 4 Tex. App. 488.

prescribed time, dating from the commission of the offence, even though the indictment charges the crime of murder, for which offence the time of prosecution is not limited.¹

IX. JURISDICTION.—1. As to Place.—a. OF THE STATE COURTS.—The question as to the jurisdiction over a homicide committed in a particular place is governed by the same rules that apply to all other felonies in the jurisdiction where the question is raised. Where the political authorities of a state have actually claimed and exercised jurisdiction over a particular locality in which a homicide has been committed, the courts of the state are thereby concluded, and will respect such decision, and act accordingly without questioning the validity of such claim.² Where a question is raised as to whether the precise locality in which a homicide, alleged to have been committed, is within the jurisdiction of the court, the judge before whom the question is raised may, in addition to the matters of which he will take judicial notice, such as legislative enactments, ancient charters and geographical position, refresh his recollection and guide his judgment by reference to the records of the courts in the county where he sits, general histories, written by deceased authors of established reputation, and the records of the census of the inhabitants of the county taken under the laws of the United States by its officers.³

Whenever a homicide is committed partly in and partly out of the jurisdiction where the charge is made, the power to punish it depends upon the question whether so much of the act as operates in the county or state in which the offender is indicted and tried, has been declared to be punishable by the law of that jurisdiction.⁴ A statute providing a punishment for murder or manslaughter in cases where the wound was inflicted or the poison administered at a place out of the state, but the death ensues, and the accused is brought to trial within the state, is valid.⁵

1. *People v. Miller*, 12 Cal. 291; *State v. Freeman*, 17 La. An. 69; *People v. Burt*, 51 Mich. 199; *Riggs v. State*, 30 Miss. 635; *White v. State*, 4 Tex. App. 488.

Limitation for Manslaughter—Texas Doctrine.—A conviction for manslaughter, though had on an indictment for murder, cannot be sustained unless the indictment was presented within the prescribed three years' limitation. *White v. State*, 4 Tex. App. 488.

Same—By the Laws of Mississippi.—Indictments for manslaughter must be brought within at least twelve months after the act. *Riggs v. State*, 30 Miss. 685.

Same—In Louisiana.—Under the act of March 14, 1855, no person can be tried for any offence, except willful murder, arson, robbery, forgery, and counterfeiting, unless an indictment is found against him within a year after

the offence is made known to the prosecuting officer. *Held*, that a conviction for manslaughter, on an indictment found more than a year after the offence became known to the prosecuting officer, must be set aside, although the courts had been closed, on account of the war, for a part of the time, there being no averment of the kind in the indictment. *State v. Freeman*, 17 La. An. 69.

2. *State v. Wagner*, 61 Me. 178.

3. *State v. Wagner*, 61 Me. 178.

4. *Com. v. Macloon*, 101 Mass. 1; s. c., 100 Am. Dec. 89.

5. *Com. v. Macloon*, 101 Mass. 1; s. c., 100 Am. Dec. 89; *Tyler v. People*, 8 Mich. 320.

Wounds Inflicted Without the State Causing Death Within the State.—Under such a statute, a British subject may be convicted of manslaughter, although the acts causing the death

At common law it was never well settled whether, when the death took place in a county other than the one where the injury was inflicted, the offence could be prosecuted in either county; but the weight of authority seems to have favored the opinion that the jurisdiction attached only in the county where the blow was inflicted.¹ But this doubt has been resolved in some states by statutory provision, that a homicide so committed may be prosecuted in either county.²

b. OF THE FEDERAL COURTS.—The jurisdiction of the federal courts extends to all homicides committed on the high seas, or in any river, haven, basin or other like place out of the jurisdiction of particular states, or in any fort, magazine, arsenal, dockyard or other place or district of country under the sole and exclusive authority of the United States;³ and the death, as well as the

were committed on board a British vessel on the high seas, provided the injured person died within the state where the accused is brought to trial, and no objection to the jurisdiction of state courts, in such a cause, arises from the fact that the acts of violence were committed on the high seas. It is sufficient to render the perpetrator amenable to the justice of the state for the homicide that the person killed was, at the time of his death, within the jurisdiction and protection of the state under whose laws the person who killed him was indicted. *Com. v. Macloon*, 101 Mass. 1; s. c., 100 Am. Dec. 89.

Wounds Inflicted Within the State Causing Death Elsewhere.—If a person is stabbed in Virginia, and dies of his wounds in another state, he cannot be tried for the murder in any county in Virginia, but he may be tried for stabbing in the county where the blow was inflicted. *Com. v. Linton*, 2 Va. Cas. 205.

1. See *Green v. State*, 66 Ala. 40; s. c., 41 Am. Rep. 744; *People v. Gill*, 7 Cal. 356; *Archer v. State*, 106 Ind. 426; *Com. v. Macloon*, 101 Mass. 1; s. c., 100 Am. Dec. 89; *Com. v. Parker*, 19 Mass. (2 Pick.) 550; *Tyler v. People*, 8 Mich. 320; *State v. Gessert*, 21 Minn. 369; *Steerman v. State*, 10 Mo. 503; *Hunter v. State*, 40 N. J. L. (11 Vr.) 695; *Riley v. State*, 9 Humph. (Tenn.) 657; 1 East P. C. 361; 1 Hale P. C. 426.

2. See *Archer v. State*, 106 Ind. 426; *Nash v. State*, 2 G. Greene (Iowa) 286; *Com. v. Parker*, 19 Mass. (2 Pick.) 549; *Dula v. State*, 8 Yerg. (Tenn.) 511; *State v. Pauley*, 12 Wis. 537.

The Massachusetts Statute of 1795, c. 45, providing that where the cause of death happened in one county, and death in another, an indictment there-

for may be found in the latter, was not repugnant to the declaration in the constitution that "in criminal prosecutions verification of facts in the vicinity where they happen, is one of the greatest securities of the life," etc., of the citizens. *Com. v. Parker*, 19 Mass. (2 Pick.) 549.

In Wisconsin.—Rev. Sts. 1858, ch. 172, §§ 4 and 7, providing that where a mortal blow is struck in one county, and death ensues in another, prosecution may be in either county, is not contrary to Const. art. 1, § 7, entitling the accused to trial in the county where the offence was committed. *State v. Pauley*, 12 Wis. 537.

Same — Jurisdiction Concurrent.—Where the accused gave a mortal blow in C county, and death ensued in E county, upon prosecution in E county, *held*, that it was not the duty of the court to grant his application for a change of venue to C county, as the courts of the two counties had concurrent jurisdiction, and that first attaching became exclusive. *State v. Pauley*, 12 Wis. 537.

Where the Purpose to Kill was Formed in M County, and the plan of carrying it into execution in O county was then resolved upon, and so far executed in M county as to there deprive deceased of his liberty, and bring him within the power of those who design to slay him and who carried out their purpose after removing him to O county, the circuit court of M county has jurisdiction, under R. S. 1881, section 1580, of an indictment for murder against those who seized the deceased in M county. *Archer v. State*, 106 Ind. 426.

3. Const. of U. S., art. 1, § 8; U. S. v. *Holmes*, 18 U. S. (5 Wheat.) 412, bk. 5 L. ed. 122; U. S. v. *Pirates*, 18 U. S.

cause, must occur at one of the designated places.¹

2. As to the Person.—A citizen of a foreign state or country who is charged with the commission of a homicide is within the jurisdiction of the court, and may be tried and punished in the same manner as a citizen of the state where the offence is committed.²

3. As to the Court.—All homicides are usually triable by the same courts and in the same manner as are other felonies.³

(5 Wheat.) 184, bk. 5 L. ed. 64; U. S. v. Wiltberger, 18 U. S. (5 Wheat.) 76; bk. 5 L. ed. 37; U. S. v. Bevens, 16 U. S. (3 Wheat.) 336, bk. 4 L. ed. 404; U. S. v. McGill, 4 U. S. (4 Dall.) 426, bk. 1 L. ed. 894; U. S. v. Grush, 5 Mason 290; U. S. v. Clark, 31 Fed. Rep. 710; s. c., 10 Cr. L. Mag. 59. See Com. v. Peters, 53 Mass. (12 Metc.) 389; Tyler v. People, 8 Mich. 320.

Manslaughter in Foreign Country—Jurisdiction of Federal Courts.—The courts of the United States have no jurisdiction under the act of April 30, 1790, § 121, over a manslaughter committed on board a United States vessel in the river of a foreign country. Such a place is not on the high seas within the meaning of that section. U. S. v. Wiltberger, 18 U. S. (5 Wheat.) 76; bk. 5 L. ed. 37.

Place Gives Jurisdiction.—Under the Act of Congress of 1790, § 8, providing for the punishment of murder, etc., committed upon the high seas or in a river, haven, basin, or bay out of the jurisdiction of any state, it is not the offence committed, but the bay, etc., in which it is committed, which must be out of the jurisdiction of the state in order to give jurisdiction to courts of the United States. The fact that the state could not punish the offence would make no difference, if the place was in its jurisdiction. Murder committed on board a ship of war lying within the harbor of Boston is not cognizable in the circuit court of the United States. U. S. v. Bevens, 16 U. S. (3 Wheat.) 336; bk. 4 L. ed. 404.

Homicide Committed on Boundary Line.—Manslaughter, committed by a mortal blow given on the River St. Clair, beyond the boundary line between the United States and the province of Canada, and within a county in said province, from which blow death ensued upon land, is not within the Crimes Act of Congress of March, 3, 1857, and the circuit court of the United States has no jurisdiction of the same. Tyler v. People, 8 Mich. 320.

Homicide Committed on Military Reservation.—The United States circuit court has jurisdiction of a homicide committed by one soldier upon another within a military reservation of the United States. U. S. v. Clark, 31 Fed. Rep. 710; s. c., 10 Cr. L. Mag. 59. 1. U. S. v. McGill, 4 U. S. (4 Dall.) 426; bk. 1 L. ed. 894.

2. British Subject.—A homicide committed within the territory of the United States by a subject of Great Britain, in time of peace, may be prosecuted in our courts as murder, though avowed to be under the direction of the local authorities of Great Britain. People v. McLeod, 1 Hill (N. Y.) 377; s. c., 37 Am. Dec. 328.

Indians.—A member of the "United Tribes," who commits a homicide, not shown by the record to be within any Indian reserve, is not exempt from prosecution therefor in the state courts. Hunt v. State, 4 Kan. 60.

3. A Court of Oyer and Terminer has jurisdiction to try all cases of murder committed within the county; and a murder committed by a soldier in the military services of the United States, in time of war, insurrection, or rebellion, forms no exception. People v. Gardiner, 6 Park. Cr. Cas. (N. Y.) 143.

The Courts of Sessions have no power to arraign a defendant and receive a plea to an indictment for murder. People v. McCraney, 21 How. (N. Y.) Pr. 149.

Under the New Judicial System of Ohio, original jurisdiction has not been given the district court to try cases of murder; it has that jurisdiction only in such cases as are pending in the old supreme court. Robbins v. State, 8 Ohio St. 131; Parks v. State, 3 Ohio St. 101.

Election by Defendant.—A prisoner under indictment for murder in the first degree, has no right, under the new constitution, to elect to be tried in the district court, that court having no jurisdiction of capital offences. Robbins v. State, 8 Ohio St. 131.

X. PRELIMINARY EXAMINATION.—No person may be imprisoned upon a charge of felonious homicide except upon the warrant of a judicial officer, and after a judicial inquiry as to his probable guilt. Therefore, when a person is apprehended before an indictment is found against him, he is entitled to an immediate examination of the charge before a magistrate, whose duty it is to commit him to await the action of the grand jury, if there appear to be reasonable grounds for a belief of his guilt, and if not, to immediately release him.¹ Preliminary examinations are usually conducted by justices of the peace,² or persons having the same general jurisdiction, such as mayors or police justices in cities;³ but a coroner's inquest is in the nature of a preliminary examination, and that officer has power to commit persons of whose guilt the evidence adduced before him gives cause for reasonable belief in their guilt.⁴

XI. INDICTMENT AND INFORMATION.—1. **Matters Pertaining to the Finding of the Indictment.**—The rules which govern the finding and presenting of an indictment for any grade of homicide are the same that apply to that part of the prosecution for all other felonies. This applies to the qualifications of grand jurors, as well as to the procedure itself; and, therefore, kinship between a grand juror and a person charged with murder will not vitiate the indictment.⁵ The full number of grand jurors prescribed by law must be drawn,⁶ and the jury must be regularly impanelled, un-

1. See *People v. McCurdy*, 68 Cal. 576; *People v. Mellor*, 2 Colo. 705; *Murphy v. Com.*, 11 Bush (Ky.) 217; *Com. v. McNeill*, 36 Mass. (19 Pick.) 127; *Com. v. Linton*, 2 Va. Cas. 205; *Bailey's Case*, 1 Va. Cas. 258; *Sorrell's Case*, 1 Va. Cas. 253; *Com. v. Myers*, 1 Va. Cas. 188; *Ex parte Bollman*, 8 U. S. (4 Cr.) 75, 129; bk. 2 L. ed. 554; *U. S. v. Hand*, 6 McL. C. C. 274.

An Examining Court, in Virginia, has no power to acquit a person, charged before them with murder, of the murder with which he so stands charged, and to remand him to be tried for manslaughter only; and, if it makes such discrimination, the prisoner is not thereby discharged, but may be indicted for murder in the superior court. *Com. v. Myers*, 1 Va. Cas. 188. See, also, *Sorrell's Case*, 1 Va. Cas. 253; *Bailey's Case*, 1 Va. Cas. 258.

Examination a Prerequisite.—If a man is examined, by the examining court, for feloniously stabbing another, and remanded for trial for that offence, and the party stabbed afterwards die, the accused cannot be indicted for murder, without an examination for the murder. *Com. v. Linton*, 2 Va. Cas. 205.

Prosecution by Information.—A defendant cannot be prosecuted by in-

formation until after an examination and commitment by a magistrate; but it does not follow that an information will be set aside for mere irregularities in the examination or commitment. *People v. McCurdy*, 68 Cal. 576.

2. *Murphy v. Com.*, 11 Bush (Ky.) 217; *Com. v. McNeill*, 36 Mass. (19 Pick.) 127.

3. See *Santo v. State*, 2 Iowa 165; s. c., 63 Am. Dec. 487; *Com. v. Leight*, 1 B. Mon. (Ky.) 107; *Holmes v. State*, 44 Tex. 631.

4. *Bass v. State*, 29 Ark. 142; *People v. Bridge*, 4 Park. Cr. Cas. (N. Y.) 519; *Wormeley v. State*, 10 Gratt. (Va.) 658; *Reg. v. Taylor*, 9 Car. & P. 672.

5. **Kinship of Grand Juror.**—It is not a good plea to an indictment for murder that a member of the grand jury, which found such indictment, was a nephew of the person who was murdered. The nephew is not "exempt from serving as juror," within *Swan & S. Ohio Stat.* 410, prescribing qualifications of grand jurors. If kinship were a disqualification, the grand jury might have to be changed for each case. *State v. Easter*, 30 Ohio St. 542.

6. **Number of Jurors.**—When only fourteen grand jurors are drawn to serve at the term in which an indictment

less the accused be in custody awaiting its action.¹ It is sometimes allowable for a person in custody on a charge of homicide to exercise the right of challenge in the impanelling of a grand jury; but a failure to allow him this opportunity is no ground for setting aside the indictment.²

The grand jury after its organization is governed in its proceedings by common law rules, and an indictment is not vitiated by the improper discharge of a juror if the number necessary to find an indictment remains.³

It is sometimes provided that a charge once dismissed by a grand jury cannot subsequently be made the foundation for an indictment without leave of court; but this rule cannot be applied where the former charge dismissed was for an offence of a different character, although growing out of the same act.⁴

Witnesses who are not competent to testify against defendant upon the trial should not be allowed to testify before the grand jury to facts relating to the same offence; but where they are erroneously allowed so to testify, an objection to the indictment on that account is too late when made for the first time after trial.⁵

No persons other than the grand jurors, except the prosecuting officer, should be allowed in the grand jury room during the consideration of the charge; but where another person is present, the setting aside of the indictment on that account will be a matter largely within the discretion of the court, looking to the capacity in which such person was wrongfully present, as well as

for murder is found, the indictment is fatally defective. *Gladden v. State*, 12 Fla. 562.

1. Special Impanelling of Grand Jury After Commission of Offence in a Murder Case.—*Held*, that there was no error in a special order of court impanelling the grand jury, after the offence had been charged against the prisoner, and when he was in custody. *People v. Moice*, 15 Cal. 329; *People v. Cuin-tano*, 15 Cal. 327.

And it is of no consequence that such order was not regularly served on the sheriff, or that he summoned bystanders. *People v. Moice*, 15 Cal. 329.

2. Want of Opportunity to Challenge Grand Juror.—That the accused had no opportunity to interpose a challenge to any grand juror or to the panel, is not a ground for setting aside an indictment for homicide,—especially if the record shows that his counsel were in court at the time the grand jury were sworn and then made no objection. *State v. Hoyt*, 13 Minn. 132.

3. *Gladden v. State*, 12 Fla. 562.

Challenge of Grand Jury—Indictment by Remainder.—When three, out of a grand jury of sixteen, were challenged by the defendant and excused, and the remaining thirteen found an indictment for murder, it was *held* good. *People v. Gatewood*, 20 Cal. 146.

4. Where the Former Charge Was Assault.—Where, during the life of a party assaulted, the grand jury, upon the case being presented to them, fail to find an indictment against the assailant, an indictment for manslaughter, found after the party assaulted had died from the injuries, is not defective because found without leave of court, as provided in N. Y. Code Crim. Proc. § 270 (a charge once dismissed by a grand jury cannot again be submitted without direction of the court), the offences not being the same. *People v. Warren*, 109 N. Y. 615.

5. Indictment on Evidence of Wife.—On the trial of an indictment for murder, an objection that the defendant's wife testified against him before the grand jury. *Held*, to come too late, raised in the first instance after con-

to the other circumstances of the incident.¹

2. Caption.—The caption of an indictment is the first part of its body, and its purpose is to show the authority by which the charge is presented, and the jurisdiction of the court to entertain it. No general form can be laid down, as it must vary according to the jurisdiction of the courts.²

3. Charging the Offence.—*a. GENERAL RULES.*—An indictment for any degree of homicide must aver the existence of every material fact or circumstance which is a necessary element in the offence charged, and an omission of any such necessary averment is fatal,³ even after verdict;⁴ and it must be directly averred that the defendant did the act with which he is charged.⁵ In an indictment for murder it is usually considered that the word

viction. *State v. Houston*, 50 Iowa 512.

1. Presence of Deputy District-Attorney.—Defendant, under an indictment for murder, asked leave to withdraw his plea of not guilty, for the purpose of moving to set aside the indictment, on the ground that one S, was present in the grand jury room while the charge was in consideration. S was at the time assistant district-attorney, though not disclosed as such by the record. *Held*: that the granting of leave was within the discretion of the court, and that the circumstances did not show that a refusal to grant it was an abuse of this discretion. *People v. Lee*, 17 Cal. 76.

2. See *Goodloe v. State*, 60 Ala. 93; *Reeves v. State*, 20 Ala. 33, 36; *Bass v. State*, 17 Fla. 685; *Mills v. State*, 52 Ind. 187; *Lovell v. State*, 45 Ind. 550; *State v. Jackson*, 73 Me. 91; s. c., 40 Am. Rep. 343; *State v. Hurley*, 71 Me. 354; *State v. Bartlett*, 55 Me. 200; *State v. Conley*, 39 Me. 78; *Keithler v. State*, 18 Miss. (10 Smed. & M.) 192, 196; *Dowling v. State*, 13 Miss. (5 Smed. & M.) 664; *Carpenter v. State*, 5 Miss. (4 How.) 163; s. c., 34 Am. Dec. 116; *Woodside v. State*, 3 Miss. (2 How.) 655; *State v. Freeman*, 21 Mo. 481, 483; *State v. Zule*, 10 N. J. L. (5 Halst.) 348; *People v. Thurston*, 2 Park. Cr. Cas. (N. Y.) 49; *Turner v. Com.*, 86 Pa. St. 54; s. c., 27 Am. Rep. 623; *State v. Long*, 1 Humph. (Tenn.) 386; *Mitchell v. State*, 8 Yerg. (Tenn.) 514; *Mitchell v. State*, 1 Tex. App. 725; *Benedict v. State*, 12 Wis. 313; *U. S. v. Wilson*, Bald. C. C. 78; *U. S. v. Williams*, 1 Cliff. C. C. 5; *U. S. v. Dawson*, 1 Hempst. C. C. 643; *U. S. v. Keefe*, 3 Mason C. C. 475; cited 2 Hale P. C. 32; *Holloway v. Reg.*, 2 Den. C.

C. 287; *Rex v. Townley*, 18 How. St. Tr. 322; *Broome v. Reg.*, 12 Q. B. 834; *Rex v. Fearnley*, 1 T. R. 316; *Rex v. Brooks*, Trem. P. C. 151.

Naming the Finding Body.—An indictment for murder on the high seas is not defective because it states that it is found by "the jurors of the United States of America," instead of saying "grand jurors." *U. S. v. Williams*, 1 Cliff. C. C. 5.

It is not a valid objection to an indictment for a capital offence, that in its caption one of the justices of the peace before whom it was found, is described as "in and for the county of—" whereas justices are town officers. *People v. Thurston*, 2 Park. Cr. Cas. (N. Y.) 49.

Showing the Jury to Have Been Sworn.—In an indictment for murder in Tennessee, it need not appear in the caption that the jury were sworn, if such fact appear in the body of the indictment returned by them. *State v. Long*, 1 Humph. (Tenn.) 386.

3. *State v. Verrill*, 54 Me. 408.

4. *People v. Cox*, 9 Cal. 32; *People v. Wallace*, 9 Cal. 30.

5. An Information for Murder which informs the court that F is in custody on the charge of felony, without indictment, "said charge being described as follows:" and followed by a description of murder in the second degree, is insufficient, because it does not allege directly, in proper form, that F did the act with which he is charged. *Flinn v. State*, 24 Ind. 286.

Substitution of the Name of the Deceased, for that of E, the defendant, thus alleging that O mortally wounded himself. *Held*, to render an indictment for murder fatally defective. *State v. Edwards*, 70 Mo. 480.

"murder" is an essential which cannot be supplied by any other word.¹ But it may be generally said that it is sufficient if a man of ordinary intelligence can understand from the indictment that, under such circumstances as show a felonious intent, a mortal wound or injury was inflicted by defendant upon the deceased, of which wound or injury the latter died within a year and a day from the time of its infliction.² And the presence in the indictment of words which are irrelevant and harmless is no cause for reversal of a conviction.³

b. AS AT COMMON LAW.—At common law homicide can be prosecuted only by indictment, and this still remains the general rule; but prosecutions by information are sometimes allowed.⁴ In the federal courts prosecutions for homicide must be by indictment, because all grades of homicide are infamous crimes,⁵ but the provision of the federal constitution limiting such prosecutions to this form is not applicable to the States.⁶

An indictment charging the offence substantially as at common law is usually sufficient,⁷ and it has been said that the particularity required at common law is not now requisite, if the indictment otherwise contains all that is substantially necessary to inform the defendant of the charge against him;⁸ and a common law indictment for murder, not specifying the degree, is sufficient to sustain a conviction of murder in any degree defined by the statute under which the prosecution is had.⁹

1. *Dias v. State*, 7 Blackf. (Ind.) 20; s. c., 39 Am. Dec. 448; *State v. Harris*, 12 Nev. 414. Compare *State v. O'Neil*, 23 Iowa 272.

2. *People v. Lloyd*, 9 Cal. 54; *People v. Davis*, 73 Cal. 355.

Form of Indictment.—Rule Under California Penal Code.—Sections 950, 959, prescribing the requisites of indictments and informations, and requiring a statement of the facts constituting the offence, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended, an information for murder is sufficient if it charges that the defendant did unlawfully, feloniously and of his malice aforethought, kill the deceased, naming him, and stating the appropriate time and place. *People v. Davis*, 73 Cal. 355.

Same.—In Washington Territory.—An indictment presented by the grand jury of the Territory of Washington, county of K., charging defendant in said county with purposely and maliciously killing deceased by shooting and mortally wounding said deceased with a pistol, from which mortal wound deceased instantly died, is sufficient in form. *Timmerman v. Territory*, (Wash. Tr.) 17 Pac. Rep. 624.

9 C. of L.—40.

3. *Fahnestock v. State*, 23 Ind. 231; *People v. White*, 22 Wend. (N. Y.) 167; *Pennsylvania v. Bell*, 1 Addis (Pa.) 156.

4. See *Noles v. State*, 24 Ala. 672; *People v. Giancoli*, (Cal.) 16 Pac. Rep. 510.

5. "No person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury." Constitution of United States, Amend. 5.

6. *Noles v. State*, 24 Ala. 672.

7. *People v. Dolan*, 9 Cal. 576; *People v. Lloyd*, 9 Cal. 54. See *Gehrke v. State*, 13 Tex. 568.

In Manslaughter.—At common law the indictment for manslaughter is not sufficient therefor under Texas Penal Code, article 593, defining the offence "voluntary homicide, committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law." *Jennings v. State*, 7 Tex. App. 350. Compare *Shrivers v. State*, 7 Tex. App. 450.

8. *People v. Dolan*, 9 Cal. 576.

9. *McAdams v. State*, 25 Ark. 405; *Redus v. People*, 10 Colo. 208; *Green v. Com.* 94 Mass. (12 Allen) 155; *Cargen v. People*, 39 Mich. 549; *People*

c. IN THE LANGUAGE OF THE STATUTE.—An indictment for any grade of homicide which charges the offence committed in the form prescribed by the statute is usually sufficient in all respects.¹

d. AVERMENT THAT THE ACT WAS UNLAWFUL.—The indictment need not generally use the word "unlawful" or "unlawfully" in the description of the act charged, it being sufficient if the act be shown to be unlawful without any set word or words.² If the indictment is for murder, the allegation that the killing was with malice aforethought, is a sufficient showing of the unlawfulness of the act causing death;³ and where it is not charged that the killing was with malice, the statement of facts showing an unlawful act is sufficient.⁴

v. Willett, 102 N. Y. 251; *Taylor v. State*, 11 Lea (Tenn.) 708; *Hines v. State*, 8 Humph. (Tenn.) 597; *Mitchell v. State*, 5 Yerg. (Tenn.) 340; s. c., 8 Yerg. (Tenn.) 514; *Wall v. State*, 18 Tex. 682; s. c., 70 Am. Dec. 302; *Cluverius v. Com.*, 81 Va. 787; *Livingston's Case*, 14 Gratt. (Va.) 592. See *State v. Millain*, 3 Nev. 409; *People v. Tenorio*, 1 N. Mex. 279; *People v. Enoch*, 13 Wend. (N. Y.) 159; s. c., 27 Am. Dec. 197; *McConnell v. State*, 22 Tex. App. 354; s. c., 58 Am. Rep. 647; *State v. Cameron*, 2 Chand. (Wis.) 172. Compare *Fouts v. State*, 4 G. Greene (Iowa) 500.

1. See *People v. De La Cour Soto*, 63 Cal. 165; *People v. Murray*, 10 Cal. 309; *People v. Dolan*, 9 Cal. 54; *Nichols v. State*, 46 Miss. 284; *Graves v. State*, 45 N. J. L. (16 Vr.) 203; *O'Kelly v. Territory*, 1 Oreg. 51; *Cathcart v. Com.*, 37 Pa. St. 108; *Peterson v. State*, 12 Tex. App. 650; *Nickolls v. State*, 12 Tex. App. 535.

Charging Crime in Language of Statute—New Jersey Doctrine.—An indictment charging murder in the language of the N. J. Crim. Proc., § 45, sufficiently sets forth the "nature and cause of the accusation" within the constitution; the words "deliberately and of malice aforethought" sufficiently indicate the grade. *Graves v. State*, 45 N. J. L. (16 Vr.) 203.

Same—Rule in Texas.—An indictment following the form prescribed by Texas act of March 26, 1881, is sufficient in charging that defendant "did, with malice aforethought, kill B by striking him with a scantling, against the peace and dignity of the State." *Dwyer v. State*, 12 Tex. App. 535; *Peterson v. State*, 12 Tex. App. 650.

Words of Statute Necessary in Manslaughter.—An indictment for man-

slaughter was held insufficient, for not following the words of the statute in charging the killing. *Nichols v. State*, 46 Miss. 284.

2. *Beasley v. People*, 89 Ill. 571; *Beavers v. State*, 58 Ind. 530; *State v. Leepers*, 70 Iowa 748; *Jackson v. State*, 22 Tex. App. 442; *Bean v. State*, 17 Tex. App. 60; *Thompson v. State*, 36 Tex. 326. See *Willey v. State*, 46 Ind. 363; *Sutcliffe v. State*, 18 Ohio 469; s. c., 51 Am. Dec. 459. Compare *Henry v. State*, 33 Ala. 89.

3. *Beavers v. State*, 58 Ind. 530; *Jackson v. State*, 22 Tex. App. 442; *Bean v. State*, 17 Tex. App. 60; *Thompson v. State*, 36 Tex. 326.

4. *Beasley v. People*, 89 Ill. 71; *State v. Leeper*, 70 Iowa 748. See *State v. Lay*, 93 Ind. 341; *Willey v. State*, 46 Ind. 363. Compare *Henry v. State*, 33 Ala. 89.

Murder in Producing Abortion.—An indictment for murder in producing an abortion contained two counts, in one of which it was charged that the defendant attempted to produce a miscarriage on the deceased by means of a certain instrument, and in the other that he administered to the deceased a "certain noxious and abortifacient drug," with the intent to produce such miscarriage; and in both counts it was alleged that it was not then and there necessary to cause such miscarriage for the preservation of the life of the deceased. *Held*, that an exception in the statute providing for the punishment, etc., "unless the same were done as necessary for the preservation of the mother's life," was sufficiently negated by the indictment, and that, although the language used in the indictment negated more than the statute required, this formed no valid objection to the same, since it imposed on the prosecu-

c. INTENT.—(1) *Simple Averment of Intent to Kill.*—As a general rule, a purpose to kill must be specifically averred in an indictment for murder in a description of the offence;¹ but such an averment is not necessary where the homicide is charged to have been committed while the slayer was engaged in the commission of a felony,² nor where it is charged to have been committed by means of poison unlawfully administered.³ The averment need not be in the words of the statute, but is sufficient if in language which plainly shows the deadly purpose.⁴

(2) *Willfully, Feloniously, and with Malice Aforethought.*—Malice aforethought is a necessary ingredient in the crime of murder, and should be specifically alleged in the indictment, either expressly or by words which necessarily import malice aforethought.⁵ Malice aforethought and intention to kill are not

tion the necessity for stricter proof. *Beasley v. People*, 89 Ill. 571. An indictment for the crime of murder, committed by producing the miscarriage of a pregnant woman, showed that the acts alleged were done with the design and intention to produce a miscarriage which, it was averred, was not necessary to save the life of the woman. *Held*, that it was sufficient under the statute defining the offence. *Iowa Code*, § 3864; *State v. Leeper*, 70 Iowa 748.

Involuntary Manslaughter.—An indictment for involuntary manslaughter must show that the defendant was in the commission of some unlawful act, and that the death resulted therefrom. Alleging in such case that the death resulted from using unlawfully, willfully, and feloniously, an instrument upon a pregnant female, for the purpose of producing a miscarriage, the use of such instrument not being necessary to preserve the life of the woman is sufficient. *Willey v. State*, 46 Ind. 363.

1. *Shaffer v. State*, (Neb.) 35 N. W. Rep. 384; *Loeffner v. State*, 10 Ohio St. 598; *Hagan v. State*, 10 Ohio St. 459; *Kain v. State*, 8 Ohio St. 306; *Fouts v. State*, 8 Ohio St. 98. See *Snyder v. State*, 59 Ind. 105; *Com. v. Hersey*, 84 Mass. (2 Allen) 173; *Morman v. State*, 24 Miss. 54; *Cox v. People*, 80 N. Y. 500; *State v. Slagle*, 83 N. C. 630; *Robbins v. State*, 8 Ohio St. 131.

Averment Not Aided by Conclusion.—Where the purpose to kill is not averred by way of description of the offence, the omission cannot be aided by the ordinary formal conclusion of the indictment which avers that "so" the

jurors do find and say that the accused "did in manner and form aforesaid, feloniously, purposely, and of his deliberate and fraudulent malice, kill and murder" the deceased. Such allegation being nothing more than a legal conclusion arising from the facts previously stated, cannot cure any defects in the premises on which it assumes to be predicated. *Shaffer v. State*, (Neb.) 35 N. W. Rep. 384.

Variance.—Where the intent was averred to be "to kill and murder," and the intent found by the jury was "to commit manslaughter," another and distinct felony, the variance is fatal. *Morman v. State*, 24 Miss. 54.

2. *Cox v. People*, 80 N. Y. 500.

3. *Com. v. Hersey*, 84 Mass. (2 Allen) 273; *Compare Robbins v. State*, 8 Ohio St. 131.

Administering Poison—Knowledge of Noxious Character.—In an indictment for murder by poison, an averment that defendant knew of its noxious properties is not essential. *State v. Slagle*, 83 N. C. 630.

4. *Loeffner v. State*, 10 Ohio St. 589.

"Purposely Gave a Mortal Wound."—An averment that the accused "purposely gave a mortal wound," sufficiently alleges a purpose to kill. *Loeffner v. State*, 10 Ohio St. 589.

5. *Edwards v. State*, 25 Ark. 444; *Anderson v. State*, 5 Ark. 444; *People v. Davis*, 73 Cal. 355; *People v. Schmidt*, 63 Cal. 28; *People v. Bonilla*, 38 Cal. 699; *People v. Vance*, 21 Cal. 400; *People v. Urias*, 12 Cal. 325; *Redus v. People*, 10 Colo. 208; *Territory v. Evans*, (Idaho) 17 Pac. Rep. 139; *Finn v. State*, 5 Ind. 400; *State v. Thurman*, 66 Iowa 693; *State v. Neeley*, 20 Iowa 108; *Fouts v. State*, 4 G.

Greene (Iowa) 500; *State v. Fooks*, 29 Kan. 425; *Jane v. Com.*, 3 Met. (Ky.) 18; *State v. Williams*, 37 La. An. 576; *State v. Bradford*, 33 La. An. 921; *State v. Thomas*, 29 La. An. 601; *State v. Florenza*, 28 La. An. 945; *State v. Harris*, 27 La. An. 572; *State v. Forney*, 24 La. An. 191; *State v. Phelps*, 2 La. An. 493; *Territory v. Manton*, (Mont.) 14 Pac. Rep. 637; *State v. Holong*, (Minn.) 37 N. W. Rep. 587; *State v. Johnson*, (Minn.) 35 N. W. Rep. 373; *State v. Lowe*, 93 Mo. 547; *State v. Eaton*, 75 Mo. 586; *Shaffer v. State*, (Neb.) 35 N. W. Rep. 384; *State v. Pike*, 49 N. H. 399; s. c., 6 Am. Rep. 533; *Fitzgerald v. People*, 37 N. Y. 413; *Loeffner v. State*, 10 Ohio St. 459; *Sharp v. State*, 19 Ohio 379; *State v. Wimberly*, 3 McC. (S. C.) 190; *Witt v. State*, 6 Coldw. (Tenn.) 5; *Riddle v. State*, 3 Heisk. (Tenn.) 401; *Williams v. State*, 3 Heisk. (Tenn.) 376; *Fisher v. State*, 10 Lea (Tenn.) 151; *Rather v. State*, (Tex. App.) 9 S. W. Rep. 69; *Banks v. State*, (Tex. App.) 7 S. W. Rep. 327; *Henrie v. State*, 41 Tex. 573; *McConnell v. State*, 22 Tex. App. 354; s. c., 58 Am. Rep. 647; *Shay v. State*, 17 Tex. App. 486; *Bohannon v. State*, 14 Tex. App. 271; *Territory v. Halliday*, (Utah Tr.) 17 Pac. Rep. 118; *Com. v. Gibson*, 2 Va. Cas. 70; *State v. Duvall*, 26 Wis. 416. *Compare* *State v. Fooks*, 29 Kan. 425; *State v. Scott*, 38 La. An. 387; *Com. v. Hersey*, 84 Mass. (2 Allen) 173; *Com. v. Chapman*, 65 Mass. (11 Cush.) 422.

Express or Implied Malice.—An indictment for murder need not charge the act as done with express or implied malice. It is sufficient to charge it as committed with malice aforethought. *Henrie v. State*, 41 Tex. 573.

"Maliciously" and "Malice Aforethought" may be used interchangeably. *People v. Vance*, 21 Cal. 400; *Fisher v. State*, 10 Lea (Tenn.) 151.

Phrase Construed.—An indictment under the Wisconsin statute charged that defendant, "contriving and intending to kill and murder one E D, with malice aforethought, and from premeditated design to effect the death of her, the said E D," etc., "then and there a large quantity of a certain deadly poison called strychnine, knowingly, willfully, and feloniously did give and administer," etc. *Held*, that the words "with malice aforethought" properly qualified the words "did give," etc., and

not the words "contriving and intending," etc., and the charge was therefore sufficient. *State v. Duvall*, 26 Wis. 416.

Murder in Second Degree.—In an indictment for murder in the second degree, the use of the words "feloniously, intentionally, willfully, maliciously, and deliberately," implies necessarily, to the common understanding, malice aforethought, and this is all that is required to render the indictment sufficient. *State v. Neeley*, 20 Iowa 108.

"Lay in Wait."—To charge that the defendant did lay in wait with intent to "murder"; or did feloniously "kill, slay and murder" sufficiently implies malice aforethought. *State v. Forney*, 24 La. An. 191; *State v. Phelps*, 2 La. An. 493.

Not Necessary to Charge Malice as to the Act.—In an indictment for murder the crime is sufficiently charged under the averment that the accused "did willfully and feloniously shoot and wound . . . with the intent . . . willfully, feloniously, and of his malice aforethought, to kill," etc. The charge of malice in the shooting, as well as in the intent to kill, is not indispensable. *State v. Bradford*, 33 La. An. 921.

Death by Exposure.—An indictment charged that defendant was the husband of deceased, and as such owed her the duty of protection; that she was feeble, sick, and unable to walk; that defendant had the ability to take care of her, but left her exposed in the night time to the cold and inclemency of the weather, refusing to provide her with clothing and shelter; that he did this feloniously, willfully, purposely, premeditatedly, and of his malice aforethought, and that she, "languishing of such exposure, leaving, and of such neglecting, omitting, and refusing to provide clothing and shelter, . . . did die;" and that thus the defendant feloniously, willfully, purposely, premeditatedly, and of his malice aforethought, did kill and murder her. *Held*, that it sufficiently charged the offence of murder in the second degree, under Rev. Stat. Mont. p. 358, § 18, defining murder as "the unlawful killing of a human being, with malice aforethought, either expressed or implied," and providing that "the unlawful killing may be effected by any of the various means by which death may be occasioned." *Territory v. Manton*, (Mont. Tr.) 14 Pac. Rep. 637.

necessarily identical; an averment of intent to kill is not alone sufficient.¹ It must be also charged that the homicide was committed "feloniously,"² and unlawfully.³

Manslaughter being a homicide committed without malice, an averment that the killing was with malice aforethought is unnecessary;⁴ and so also is the word "feloniously."⁵

(3) *Premeditation and Deliberation*.—An indictment for murder in the first degree, which is not charged to have been committed in the perpetration or an attempt to perpetrate a forcible felony, must aver, not only that the killing was done "willfully, feloniously and with malice aforethought," but also that it was done with deliberation and premeditation.⁶ The deliberation and pre-

1. *People v. Urias*, 12 Cal. 325.

2. *Edwards v. State*, 25 Ark. 444. See *Anderson v. State*, 5 Ark. 444; *Fitzgerald v. People*, 49 Barb. (N. Y.) 122; *Witt v. State*, 6 Coldw. (Tenn.) 5. Compare *Riddle v. State*, 3 Heisk. (Tenn.) 401; *Williams v. State*, 3 Heisk. (Tenn.) 376; *Chase v. State*, 50 Wis. 510.

3. *State v. Williams*, 37 La. An. 776 (overruling *State v. Harris*, 27 La. An. 572); *State v. Scott*, 38 La. An. 387; *State v. Thomas*, 29 La. An. 601. See *People v. Davis*, 73 Cal. 355; *Redus v. People*, 10 Colo. 208; *Territory v. Evans*, (Idaho) 17 Pac. Rep. 139; *Finn v. State*, 5 Ind. 400; *State v. Neeley*, 20 Iowa 108; *Fouts v. State*, 4 G. Green (Iowa) 500; *State v. Bradford*, 33 La. An. 931; *State v. Florenza*, 28 La. An. 945; *State v. Forney*, 24 La. An. 191; *State v. Phelps*, 2 La. An. 493; *State v. Lowe*, 93 Mo. 547; s. c., 5 S. W. Rep. 889; *State v. Eaton*, 75 Mo. 586; *Territory v. Mantion*, (Mont. Tr.) 14 Pac. Rep. 637; *Shaffer v. State*, (Neb.) 35 N. W. Rep. 384. Compare *Com. v. Hersey*, 84 Mass. (2 Allen) 173; *Com. v. Chapman*, 65 Mass. (11 Cush.) 422; *Chase v. State*, 50 Wis. 510.

Allegation as to the Acts.—An indictment for murder is not defective because the "striking," "penetrating" and "wounding" are not alleged to have been willfully done, and the word willfully occurring a number of times in other connections. *State v. Eaton*, 75 Mo. 586.

4. *State v. Sundheimer*, (Mo.) 6 S. W. Rep. 52; *Baldwin v. State*, 12 Neb. 61.

5. *State v. Wimberly*, 3 McCord (S. C.) 190.

6. *Wiggins v. State*, (Fla.) 1 So. Rep. 693; *Finn v. State*, 5 Ind. 400; *State v. Shelton*, 64 Iowa 333; *State v.*

Boyle, 28 Iowa 522; *State v. Watkins*, 27 Iowa 415; *McCormick v. State*, 27 Iowa 402; *Fouts v. State*, 4 G. Green (Iowa) 500; *State v. McGaffin*, 36 Kan. 315; *State v. Brown*, 21 Kan. 38; *State v. Jones*, 20 Mo. 58; *Loeffner v. State*, 10 Ohio St. 598; *Hagan v. State*, 10 Ohio St. 459; *Kain v. State*, 8 Ohio St. 306; *Fouts v. State*, 8 Ohio St. 98; *Poole v. State*, 58 Tenn. 288; *White v. State*, 16 Tex. 206; *Leonard v. Territory*, 2 Wash. Tr. 381. See *State v. Hamlin*, 47 Conn. 95; s. c., 36 Am. Rep. 54; *State v. Perigo*, 70 Iowa 657; *State v. Whitaker*, 35 Kan. 731; s. c., 9 Cr. L. Mag. 42; *State v. Duvall*, 26 Wis. 416. Compare *People v. Bonilla*, 38 Cal. 699; *People v. Murray*, 10 Cal. 309; *People v. Lloyd*, 9 Cal. 54; *Redus v. People*, 10 Colo. 208; *Hill v. People*, 1 Colo. 436; *State v. Johnson*, 8 Iowa 525; s. c., 74 Am. Dec. 321; *Green v. Com.*, 94 Mass. (12 Allen) 155; *State v. Johnson*, 37 Minn. 493; *State v. Lessing*, 16 Minn. 75; *State v. Crozier*, 12 Nev. 300; *State v. Thompson*, 12 Nev. 140; *Kennedy v. People*, 39 N. Y. 249; *Fitzgerrold v. People*, 37 N. Y. 415; s. c., 49 Barb. (N. Y.) 122; *Mitchell v. State*, 8 Yerg. (Tenn.) 514; *Bohannon v. State*, 14 Tex. App. 271; *Livingston's Case*, 14 Gratt. (Va.) 592; *Bull's Case*, 14 Gratt. (Va.) 613; *Brannigan v. People*, 3 Utah 488; *Chase v. State*, 50 Wis. 510.

The decisions above which refuse to recognize this rule, notwithstanding the fact that the phrase "malice aforethought" does not, in its strict legal sense, import a premeditated intention to kill the individual, are based on the grounds that the statute creates no new offence; that the murder of the first and the murder of the second degree are not two distinct crimes, the statute merely dividing murder into two degrees; that the punishment for the higher grade of the crime is not changed; that all

meditation must be predicated directly of the killing; and an indictment is not sufficient which avers only that the act from which death resulted was committed with deliberation and premeditation.¹ And the omission is not supplied by the conclusion, "and so the jurors do say that" the prisoner, "in the manner and by the means aforesaid, purposely and of deliberate and premeditated malice did kill and murder" the deceased.²

f. SPECIFYING THE DEGREE.—The degree of murder of which defendant may be guilty is a conclusion of law to be drawn from the facts averred and proved, and, therefore, it is not necessary that it be specified in the indictment;³ but it is not error to set out the degree,⁴ as such a statement may be rejected as surplusage.⁵

Where an indictment charges the defendant with the crime of manslaughter, and then proceeds to state facts which constitute the crime of murder, the error is favorable to him, and he cannot complain.⁶

g. KILLING WHILE COMMITTING ANOTHER OFFENCE.—Where the indictment avers facts sufficient to constitute murder

which the statute does is to provide the milder punishment of imprisonment for murder of the second degree, all murder having before been punishable by death; that the statute only specifies certain things, which, if found by the jury, shall require them to bring in a verdict subjecting the prisoner to death; while if they are not so found the verdict shall be one authorizing imprisonment merely.

1. *State v. Brown*, 21 Kan. 38; *Kain v. State*, 8 Ohio St. 306; *Fouts v. State*, 8 Ohio St. 98; *Leonard v. Territory*, 2 Wash. Tr. 381. Compare *State v. Shelton*, 64 Iowa 333.

Predicating Killing.—An indictment charging that the defendant, of deliberate and premeditated malice, did shoot against the body of B, and thereby give to B one mortal wound, of which mortal wound B died. *Held*, not to be good for murder in the first degree. *State v. Brown*, 21 Kan. 38.

Information Sufficient.—An information for murder in the first degree alleged, among other things, that M, C and W did then and there unlawfully, feloniously, purposely, and of their deliberate and premeditated malice, make an assault upon T, that M did purposely discharge and shoot off against T a double-barreled shot-gun, giving him a mortal wound, of which he died a few hours thereafter; that C and W then and there, by the means and in manner aforesaid, aided, abetted, and assisted M to do the acts set forth; that M, C and

W, in the manner and by the means stated, purposely, and of their deliberate and premeditated malice, did kill and murder T. *Held*, that the information taken together alleged that the killing of T was willful, deliberate and premeditated. *State v. Whitaker*, 35 Kan. 731; s. c., 9 Cr. L. Mag. 42.

2. *Kain v. State*, 8 Ohio St. 316; *Fouts v. State*, 8 Ohio St. 98.

3. *People v. King*, 27 Cal. 507; s. c., 87 Am. Dec. 95; *People v. Dolan*, 9 Cal. 576; *People v. Lloyd*, 9 Cal. 54; *State v. Dumphey*, 4 Minn. 438; *Territory v. O'Donnell*, (N. Mex.) 12 Pac. Rep. 743; *Williams v. State*, 3 Heisk. (Tenn.) 37; *Wicks v. Com.*, 2 Va. Cas. 387; *Com. v. Miller*, 1 Va. Cas. 310; *Leschl v. Territory*, 1 Wash. Tr. 23. Compare *Smith v. State*, 50 Conn. 193.

Alleging Degree—Rule.—Under Connecticut General Statute, p. 498, section 1, providing that in all indictments for murder, "the degree of the crime charged shall be alleged," it is sufficient if, after stating the crime of the common law form, an averment be added that the accused did thereby commit murder in the first degree; the distinguishing facts need not otherwise be set out. *Smith v. State*, 50 Conn. 193.

4. *People v. King*, 27 Cal. 507; s. c., 87 Am. Dec. 95; *People v. Dolan*, 9 Cal. 576. See *People v. Vance*, 21 Cal. 400.

5. *People v. King*, 27 Cal. 507; s. c., 87 Am. Dec. 95.

6. *Camp v. State*, 25 Ga. 689.

in the first degree, the defendant may be convicted upon proof that the homicide was committed in perpetrating or attempting to perpetrate arson, rape, burglary or robbery, although the indictment makes no reference to that fact.¹ But if the commission of such an offence is made the basis of the charge, it must be pleaded with the same formality and particularity as if the defendant were charged solely with that crime. An averment that defendant committed the homicide in attempting to perpetrate a specified offence, without showing his acts upon that occasion, states a mere conclusion of law, and is fatally defective.²

h. MEANS AND MANNER OF THE HOMICIDE.—(1) *Averment that the Injury Charged Caused the Death.*—It is indispensably necessary that an indictment for homicide shall directly aver that the death of deceased ensued in consequence of the act of the defendant charged;³ but no particular word or phrase need be used if such fact is made plainly to appear.⁴

(2) *The Instrument or Means Used.*—The indictment must set forth or describe the weapon or other instrument or means by which the killing is charged to have been done, or the manner in which such means were used,⁵ or should aver that the means, in-

1. *Francis v. Porter*, 7 Ind. 213; *Titus v. State*, 49 N. J. L. (20 Vr.) 36; s. c., 9 Cr. L. Mag. 352. See *State v. Jenkins*, 14 Rich. (S. C.) L. 215; s. c., 94 Am. Dec. 132.

2. *Murder in Committing Rape.*—An indictment for murder charged that defendant, at a stated time and place, "in and upon one S. . . . did commit rape, and in attempting to commit rape and in committing rape in and upon her, the said S, did kill the said S, contrary," etc. *Held*, that it was fundamentally defective, for if it was necessary to show a rape as one of the constituents of the offence of murder, such crime should have been pleaded with the same formality as is requisite when it forms the sole basis of an indictment. *Titus v. State*, 49 N. J. L. (20 Vr.) 36; s. c., 9 Cr. L. Mag. 353.

3. *People v. Lloyd*, 9 Cal. 54; *State v. Prather*, 54 Ind. 63; *Shepherd v. State*, 54 Ind. 25; *West v. State*, 48 Ind. 483; *State v. Conley*, 39 Me. 78; *State v. Morgan*, 86 N. C. 732; *State v. Rinehart*, 75 N. C. 58; *Lutz v. Com.*, 29 Pa. St. 441; *State v. Wimberly*, 3 McC. (S. C.) L. 190; *Edmondson v. State*, 41 Tex. 496; *Gibson v. Com.*, 2 Va. Cas. 111. See *People v. Ybarra*, 17 Cal. 166; *People v. Steventon*, 9 Cal. 273.

4. *A Mortal Injury.*—An indictment for murder, charging that the defendant, by means stated, inflicted "a mortal injury, to wit, a fracture three

inches long on the head of" A, "of which said mortal injury, or fracture, the said" A "then and there died," sufficiently shows what caused the death of the deceased. *West v. State*, 48 Ind. 483.

Omission of Word "Wound."—Omission of the word "wound" from the clause, "of which said mortal (wound) he, the said T, then and there died." *Held*, not a ground for arrest of judgment. *State v. Rinehart*, 75 N. C. 58.

"Of Which he . . . did Die."—If, in an indictment for murder, it is alleged that the accused, with a dangerous weapon, did strike and beat the deceased and gave him mortal wounds, of which he afterwards did languish and die, it is unnecessary to add "by the stroke or strokes aforesaid." *State v. Conley*, 39 Me. 78.

"Giving One Mortal Wound."—In an indictment for murder, where there is a possible averment of a stab, etc., with a dirk, it sufficiently appears that a mortal wound was given thereby under the words, "giving one mortal wound," etc. *Gibson v. Com.*, 2 Va. Cas. 111.

5. *Haney v. State*, 34 Ark. 263; *Edwards v. State*, 27 Ark. 493; *People v. Cox*, 9 Cal. 32; *People v. Wallace*, 9 Cal. 30; *State v. Taylor*, 1 Houst. Cr. Cas. (Del.) 436; *People v. Townsend*, 1 Houst. Cr. Cas. (Del.) 337; *Guedel v. People*, 43 Ill. 226; *White v. Com.*, 9 Bush (Ky.) 178; *State v. Owen*, 1 Murph. (N. C.) L. 452; s. c., 4 Am.

Dec. 571; *State v. Jenkins*, 14 Rich. (S. C.) L. 215; s. c., 94 Am. Dec. 132; *Witt v. State*, 6 Coldw. (Tenn.) 5; *State v. Williams*, 36 Tex. 352; *Drye v. State*, 14 Tex. App. 185. See *Redd v. State*, 69 Ala. 255; *Rodgers v. State*, 50 Ala. 102; *People v. Choiser*, 10 Cal. 310; *Peterson v. State*, 47 Ga. 524; *Coates v. State*, 72 Ill. 303; *Warner v. State*, 114 Ind. 137; *Dennis v. State*, 103 Ind. 142; *Epps v. State*, 102 Ind. 539; *Merrick v. State*, 63 Ind. 327; *Veatch v. State*, 56 Ind. 584; s. c., 26 Am. Rep. 44; *Meires v. State*, 56 Ind. 336; *Willey v. State*, 46 Ind. 363; *Ward v. State*, 8 Blackf. (Ind.) 101; *State v. Dillon*, (Iowa) 38 N. W. Rep. 525; *State v. Smith*, 32 Me. 369; s. c., 54 Am. Dec. 578; *Com. v. Martin*, 125 Mass. 394; *Com. v. Stafford*, 66 Mass. (12 Cush.) 619; *Com. v. Webster*, 59 Mass. (5 Cush.) 295; s. c., 52 Am. Dec. 711; *Turns v. Com.*, 47 Mass. (6 Metc.) 224; *State v. Lautenschlager*, 22 Minn. 514; *Bilansky v. State*, 3 Minn. 422; *Goodwyn v. State*, 12 Miss. (4 Smed. & M.) 520; *State v. McDaniel*, 94 Mo. 30; *State v. Payton*, 90 Mo. 220; *Lester v. State*, 9 Mo. 658; *Territory v. Young*, 5 Mont. Ter. 242; *Long v. State*, 23 Neb. 33; s. c., 36 N. W. Rep. 310; *Olive v. State*, 11 Neb. 1; *State v. Burke*, 54 N. H. 92; *State v. Fox*, 25 N. J. L. (1 Dutch.) 566; *Cox v. People*, 80 N. Y. 500; *People v. Colt*, 3 Hill (N. Y.) 432; *Shay v. People*, 4 Park. Cr. Cas. (N. Y.) 363; *Colt v. People*, 1 Park. Cr. Cas. (N. Y.) 611; *State v. Gould*, 90 N. C. 658; *State v. Parker*, 65 N. C. 453; *State v. Williams*, 7 Jones (N. C.) L. 448; s. c., 78 Am. Dec. 248; *State v. Smith*, Phil. (N. C.) L. 340; *State v. Freeman*, 1 Speers (S. C.) L. 57; *Williams v. State*, 42 Tex. 392; *Gonzales v. State*, 5 Tex. App. 584; *Puryear v. Com.*, (Va. App.) 1 S. E. Rep. 512; *Gibson v. Com.*, 2 Va. Cas. 111; *U. S. v. Holmes*, 1 Wall., Jr., C. C. 1. Compare *People v. Hong Ah Duck*, 61 Cal. 387; *People v. Cronin*, 34 Cal. 191; *People v. King*, 27 Cal. 507; s. c., 87 Am. Dec. 95; *People v. Steventon*, 9 Cal. 273; *Dukes v. State*, 11 Ind. 557; *State v. Bartley*, 34 La. An. pt. 1, 147; *State v. Shay*, 30 La. An. pt. 1, 114; *State v. Morrissey*, 70 Me. 401; *People v. Bemis*, 51 Mich. 422; *Newcomb v. State*, 37 Miss. 383; *State v. Kilgore*, 70 Mo. 546; *State v. McLane*, 23 Nev. 345; *Tenorio v. Territory*, 1 N. Mex. 279; *Volkavitch v. Com.*, (Pa.) 12 Atl. Rep. 84; *Goersen v. Com.*, 99 Pa. St. 388; *State v. Sloan*, 65 Wis. 647.

Charging Different Means.—When an indictment for murder charges in a single count that the mortal injuries were inflicted by different means or instruments, as by shooting, striking, and burning, the prosecution cannot be forced to elect upon which of them a conviction will be sought. *Gonzales v. State*, 5 Tex. App. 584.

Alleging Weapon in Defendant's Hand.—An indictment for murder need not allege that at the time of the killing the weapon was in the defendant's hand. *Territory v. Young*, 5 Mont. Tr. 242.

Same-Omission of "His."—An indictment for murder alleged that the defendant, with a certain gun which he in both hands then and there held, etc., feloniously did shoot, etc. *Held*, that the omission of the word "his," before the word "hands," was no objection to the indictment. *Ward v. State*, 8 Blackf. (Ind.) 101.

Same-Omission of "With."—An indictment charged "that the said S,—a certain knife which the said S in his right hand then, etc., then and there willfully, etc., did beat, stab, etc., giving unto the said J L then and there with the knife aforesaid in and upon the forehead of him, the said J L, one mortal wound," etc., etc. *Held*, on error, that the clerical omission of the word "with" before the words "a certain knife," did not vitiate the indictment, the offence being sufficiently charged in the other clauses. *Shay v. People*, 4 Park. Cr. Cas. (N. Y.) 363.

The Word Percussit (did strike) is not technical in an indictment for murder; but where the blow is made with a dirk, the words "stab, stick and thrust" are equivalent thereto. *Gibson v. Com.*, 2 Va. Cas. 111.

"Did Shoot Off."—An indictment for murder alleged that the prisoner did make an assault with a gun, etc., charged with gunpowder and two leaden bullets, which said gun he "did shoot off and discharge." *Held*, that there was a sufficient averment that the gun was shot off, and the contents discharged. *State v. Freeman*, 1 Speers (S. C.) L. 57.

Same—Necessity of Averment.—An indictment which charges that the defendant "did unlawfully . . . kill and murder J B, with a gun loaded with gunpowder and leaden balls, and held in the hand" of said defendant, is fatally defective in failing to indicate the manner of killing. *Haney v. State*, 34 Ark. 263.

struments and weapons are to the jurors unknown;¹ but it is now the weight of opinion that the proof need not conform strictly to the averment, either as to the means used, or the manner of using them.² But it need not be averred that the weapon was deadly

Weapon Loaded.—To aver, in so many words, that the pistol used was loaded with powder and ball, or that the fatal wound was inflicted with a ball, is not necessary. *Peterson v. State*, 47 Ga. 524.

An indictment describing the weapon as a "loaded pistol" is sufficient. *People v. Choiser*, 10 Cal. 310.

Stick or Bludgeon.—In an indictment for murder, it is sufficient to describe the weapon as "certain wooden stick of no value," without stating its length or thickness, so as to show that it was a deadly weapon. *State v. Smith*, Phil. (N. C.) L. 340.

Where the indictment charged the murder to have been committed with a "bludgeon," and the testimony left it in doubt as to whether death was produced by a blow with a bolt or club, a charge that if death was produced with a blow with a bludgeon, bolt or club, would be sufficient as to the manner of producing death, is correct. *Long v. State*, (Neb.) 36 N. W. Rep. 310.

An indictment for killing with a club is not bad for failing to allege that defendant held the club in his hands. *Dennis v. State*, 103 Ind. 142.

Strangulation.—An indictment charging that defendant "unlawfully, with malice aforethought, did kill Lucy Lee by strangulation, in this, to wit, that he choked her to death," *held*, sufficiently descriptive of the means. *Redd v. State*, 69 Ala. 255.

Poison.—An indictment charging murder by the administration of arsenic need not state the quantity used. *Epps v. State*, 102 Ind. 539; *Puryear v. Com.*, (Va. App.) 1 S. E. Rep. 512.

Under the Minnesota statute, a charge of a willful and premeditated killing, by giving poison, is sufficient, without charging that the poison was taken into the stomach of the deceased, whereof he, at a specific time, died. *Bilansky v. State*, 3 Minn. 427.

1. *Willey v. State*, 46 Ind. 363; *Com. v. Martin*, 125 Mass. 394; *Com. v. Webster*, 59 Mass. (5 Cush.) 295; s. c., 52 Am. Dec. 711; *Olive v. State*, 11 Nev. 1; *State v. Burke*, 54 N. H. 92; *Cox v. People*, 80 N. Y. 500; *Colt v. People*, 1 Park. Cr. Cas. (N. Y.) 611.

"To the Jury Unknown."—An indictment charged that C, while committing a grand larceny, assaulted H, and "in some way and manner, and by the use of some means and instruments to the jury unknown," killed her. There was evidence that H died from fright, caused by C's violence, and so the jury found. *Held*, that a conviction thereon was proper without proof that actual personal violence was the sole and immediate cause of the death, nor was it necessary to charge that death was by fright occasioned by the acts of violence. *Cox v. People*, 80 N. Y. 500.

An indictment charging in one count that the murder was committed with a knife, and in another that it was committed with a sharp instrument to the grand jury unknown, is not bad because the charge is not made in the alternative. *State v. Dillon*, (Iowa) 38 N. W. Rep. 525.

Separate Counts.—Where a count for manslaughter charges the killing "by some means, instruments and weapons to the jurors unknown," and the killing by the accused is established, with no evidence of the particular means of death, the jury may properly convict on the count, although another count charges a killing with a hammer. *Com. v. Martin*, 125 Mass. 394.

2. *Rodgers v. State*, 50 Ala. 102; *State v. Smith*, 32 Me. 369; s. c., 54 Am. Dec. 578; *State v. Lautenschlager*, 22 Minn. 514; *State v. Fox*, 25 N. J. L. (1 Dutch.) 256; *People v. Colt*, 3 Hill (N. Y.) 432; *State v. Gould*, 90 N. C. 380. *Compare Guedel v. People*, 43 Ill. 226; *State v. Taylor*, 1 Houst. Cr. Cas. (Del.) 436; *State v. Townsend*, 1 Houst. Cr. Cas. (Del.) 337; *State v. Kilgore*, 70 Mo. 546; *Witt v. State*, 6 Coldw. (Tenn.) 5.

Where an Indictment Alleged that the Prisoner Killed the Deceased "by Cutting his Head off with a Knife, or with an ax," and the proof was, that the deceased came to his death by some sort of cutting about the neck, *held*, that a charge to the jury that if they were convinced, beyond a reasonable doubt, that the deceased "came to his death by the hands of the defendant, it matters not what sort of weapon he was killed with, or how the weapon was

or dangerous, or was one recognized by the law to be deadly or dangerous.¹

Where the indictment contains an averment of malice aforethought, it is not necessary to state that the wound was not inflicted while deceased was undergoing a surgical operation;² and it is not necessary to mention a disease which would soon have practically caused the death of deceased.³

(3) *Description of Wound*.—It is not necessary to designate the part of the body of deceased upon which the alleged mortal blow was inflicted;⁴ and where it is designated the proof need not strictly conform to the averment, it being competent to show that

used," was not erroneous. *Rodgers v. State*, 50 Ala. 102.

Lying in Wait not Alleged.—One may be convicted of murder on proof that he lay in wait and killed the deceased, although the lying in wait is not alleged in the indictment. *State v. Kilgore*, 70 Mo. 546.

Description of Shot.—An allegation, in an indictment for murder, that the deceased came to his death by "one leaden bullet discharged from said shot-gun," etc., is supported by evidence that he came to his death by means of the discharge, by the accused, of a shot-gun loaded with duck shot. *Goodwyn v. State*, 12 Miss. (4 Smed. & M.) 520.

Striking with Gun.—Under an indictment charging murder, committed by shooting from a gun by means of powder and shot, the people cannot be permitted to prove a murder committed by striking the deceased with a gun upon the head. *Guedel v. People*, 43 Ill. 226.

1. *State v. McDaniel*, 94 Mo. 301.

Alleging Weapon to be Deadly.—In an indictment for murder it is not necessary to allege that the weapon used was a "deadly" or "dangerous" weapon, except where the defendant is charged with murder in the fifth degree under that part of the New Mexico statute, in which those words are used in defining the crime, when the words of the statute must be followed. *Tenorio v. Territory*, 1 New Mex. 279.

2. *Merrick v. State*, 63 Ind. 327.

3. *Com. v. Fox*, 73 Mass. (7 Gray) 585.

4. *People v. Judd*, 10 Cal. 313; *People v. Steventon*, 9 Cal. 273; *Jones v. State*, 35 Ind. 122; *Whelchell v. State*, 23 Ind. 89; *Cordell v. State*, 22 Ind. 1; *Dukes v. State*, 11 Ind. 557; s. c., 71 Am. Dec. 370; *State v. Yordi*, 30 Kan. 221; *State v. Sanders*, 76 Mo. 35; *State v. Blan*, 69 Mo. 317; *State v. Edmund-*

son, 64 Mo. 398; *State v. Moses*, 2 Dev. (N. C.) L. 452; *Sanchez v. People*, 22 N. Y. 147; s. c., 4 Park. Cr. Cas. (N. Y.) 535; *Alexander v. State*, 3 Heisk. (Tenn.) 475; *Wilkerson v. State*, 2 Tex. App. 255. *Compare People v. Aro*, 6 Cal. 207; s. c., 65 Am. Dec. 503; *Bryan v. State*, 19 Fla. 864; s. c., 85 Am. Dec. 595; *Dias v. State*, 7 Blackf. (Ind.) 20; s. c., 39 Am. Dec. 448; *Wise v. State*, 2 Kan. 419; s. c., 85 Am. Dec. 585; *Com. v. Woodward*, 102 Mass. 155; *State v. Waller*, 88 Mo. 402; *State v. Ramsey*, 82 Mo. 133; *State v. Henson*, 81 Mo. 384; *State v. Jones*, 20 Mo. 58; *State v. Carter*, N. C. Conf. 210; *State v. Owen*, 1 Murph. (N. C.) 452; s. c., 4 Am. Dec. 571; *State v. Jenkins*, 14 Rich. (S. C.) L. 215; s. c., 94 Am. Dec. 132; *Nelson v. State*, 1 Tex. App. 41.

Averment of Part of Body Assaulted.

—Averments in an indictment for murder that the striking and wounding were at the heart, and that the mortal wound so given was through the body, *held*, not repugnant. *State v. Henson*, 81 Mo. 384.

An Allegation in an indictment for murder in the first degree that defendant "did strike, stab, and thrust in and upon the right side of him, the said F, and also in and upon the back near the left shoulder of the body, giving to the said F, then and there, with the knife aforesaid, in and upon the right side and also upon the back near the left shoulder of him, the said F, one mortal wound," held, to sufficiently locate the wound, and not to be bad for repugnancy. *State v. Ramsey*, 82 Mo. 133.

Inconsistency of Allegation.—A count in an indictment for murder, charging that the prisoner did strike the deceased on the left temple giving him a mortal wound on the right temple, etc., is inconsistent and void. *Dias v. State*, 7 Blackf. (Ind.) 20; s. c., 39 Am. Dec. 448.

the wound was inflicted upon any part of the body of the deceased,¹ neither is it necessary to state the dimensions of the wound or bruise.²

1. TIME.—(1) *Of the Act of Causing Death.*—The indictment must set forth the time of the alleged acts causing the death;³ but where it alleges the time of making the assault, the averment need not be repeated with specific reference to the mortal blow.⁴ A clerical error in stating the time, which is clearly apparent, and not prejudicial to defendant, will not be ground for an arrest of judgment.⁵ And it is a general rule that the proof need not

1. *Bryan v. State*, 19 Fla. 864; *State v. Waller*, 88 Mo. 402; *State v. Edmundson*, 64 Mo. 198; *State v. Jenkins*, 14 Rich. (S. C.) L. 215; s. c., 94 Am. Dec. 232; *Nelson v. State*, 1 Tex. App. 41. Compare *State v. Hoyt*, 13 Minn. 132.

Variance.—An indictment charged a murder to have been committed by shooting in the left breast. It appeared that three shots were fired, one immediately after the other; that the wound inflicted by either would have been mortal; but that death ensued at once from the shot which took effect in the head. *Held*, that the variance was immaterial. *Bryan v. State*, 19 Fla. 864.

2. *People v. Steventon*, 9 Cal. 273; *Stone v. People*, 3 Ill. (2 Scam.) 326; *Dias v. State*, 7 Blackf. (Ind.) 20; s. c., 39 Am. Dec. 448; *West v. State*, 48 Ind. 483; *Jones v. State*, 35 Ind. 122; *Dukes v. State*, 11 Ind. 557; s. c., 71 Am. Dec. 370; *Dillon v. State*, 9 Ind. 408; *State v. Conley*, 39 Me. 78; *Com. v. Chapman*, 65 Mass. (11 Cush.) 422; *State v. Sanders*, 76 Mo. 35; *State v. Blan*, 69 Mo. 317; *State v. Owen*, 1 Murph. (N. C.) L. 152; s. c., 4 Am. Dec. 571; *Smith v. State*, 43 Tex. 643; *Gherke v. State*, 13 Tex. 568; *Lazier v. Com.*, 10 Gratt. (Va.) 708; *Turner's Case*, 1 Lew. C. C. 177.

3. See *People v. Cox*, 9 Cal. 32; *People v. Wallace*, 9 Cal. 30; *Thomas v. State*, 71 Ga. 44; *Welch v. State*, 104 Ind. 347; *State v. Kane*, 33 La. An. 1269; *State v. Polite*, 33 La. An. 1016; *State v. Hobbs*, 33 La. An. 226; *State v. Conley*, 39 Me. 78; *Com. v. Barker*, 66 Mass. (12 Cush.) 186; *State v. Ryan*, 13 Minn. 371; *Woodsides v. State*, 3 Miss. 655; *State v. McDaniel*, 94 Mo. 301; *State v. Sundheimer*, 93 Mo. 311; *State v. Eden*, 75 Mo. 586; *State v. Ward*, 74 Mo. 253; *State v. Testerman*, 68 Mo. 408; *State v. Mayfield*, 66 Mo. 125; *State v. Sides*, 64 Mo. 385; *State v.*

Taylor, 21 Mo. 477; *Lester v. State*, 9 Mo. 658; *State v. Huff*, 11 Nev. 17; *State v. Haney*, 67 N. C. 467; *State v. Shepherd*, 8 Fred. (N. C.) L. 195; *State v. Baker*, 1 Jones (N. C.) L. 267; *State v. Cherry*, 3 Murph. (N. C.) L. 7; *State v. Stewart*, 26 S. C. 125; *State v. Huggins*, 12 Rich. (S. C.) L. 402; *Edmondson v. State*, 41 Tex. 496; *O'Connell v. State*, 18 Tex. 343; *Hardin v. State*, 4 Tex. App. 355; *Livingston's Case*, 14 Gratt. (Va.) 592; *Lazier v. Com.*, 10 Gratt. (Va.) 708; *Allstock's Case*, 3 Gratt. (Va.) 650. Compare *People v. Aro*, 6 Cal. 207; s. c., 65 Am. Dec. 503; *People v. Kelly*, 6 Cal. 10; *State v. Williams*, 30 La. An. pt. II, 843.

4. *Com. v. Barker*, 66 Mass. (12 Cush.) 186; *State v. Cherry*, 3 Murph. (N. C.) L. 7. See *Welch v. State*, 104 Ind. 347; *Woodsides v. State*, 3 Miss. 655; *State v. Taylor*, 21 Mo. 477; *State v. Stewart*, 26 S. C. 125; *State v. Huggins*, 12 Rich. (S. C.) L. 402.

5. *State v. McDaniel*, 94 Mo. 301; *Allstock's Case*, 3 Gratt. (Va.) 650.

Error in Stating Year.—The indictment found in May, 1886, charged that defendant assaulted and cut deceased on December 25th, 1866, and that deceased died on December 25th, 1885. Mo. Rev. Stat. § 1821, provides that no indictment shall be deemed invalid, or judgment thereon arrested, for stating the offence to have been committed on a day subsequent to the finding of the indictment. *Held*, that as it was clear that the insertion of 1886 for 1885, was a clerical error, judgment on it would not be arrested. *State v. McDaniel*, 94 Mo. 301.

Error in Stating Month.—An indictment for murder stated that the mortal wound was inflicted on the 7th November, 1845, and that the deceased languished on until the 8th of November in the year aforesaid, and then said, "on which 9th day of May, in the year aforesaid, the deceased died." To

strictly conform to the averment.¹

(2) *Of the Death.*—The date of death should be set forth as well as the date of the killing, in order to show that the death took place within a year and a day from the commission of the act causing it.² An averment that defendant killed deceased upon a certain day sufficiently implies that the latter died on the day named;³ and so does a statement, coming after the averment of the time of the act causing the death, that deceased "did then and there die," or "did then and there instantly die;"⁴ or

this indictment the prisoner pleaded not guilty. *Held*, that the insertion of May for November was a mistake, apparent on the face of the indictment, and would not exclude proof of the death subsequent to the 7th of November, or be cause for arresting the judgment. *Ailstock's Case*, 3 Gratt. (Va.) 650.

1. *O'Connell v. State*, 18 Tex. 343. See *State v. Kane*, 33 La. An. 1269; *State v. Polite*, 33 La. An. 1016; *Livingston's Case*, 14 Gratt. (Va.) 592.

Variance in Proof.—An appeal from a conviction for murder was taken to the supreme court, and the sole ground relied upon for the reversal of the sentence was, that the indictment charged the crime to have been committed March 19, 1880, while the evidence showed it to have been committed March 19, 1881. *Held*, that the court had no jurisdiction to review the evidence, as this would be trying the case as to the facts on the appeal, but that, in any event, the variance was of no amount. *State v. Polite*, 33 La. An. 1016.

An indictment for murder alleged that the injury was inflicted on the 14th of March, 1856, and that the deceased died on the 19th of the same month. The government proved that the injury was inflicted on the 8th of March, and that the death ensued on the 13th of the same month. *Held*, that the variance was immaterial. *Livingston's Case*, 14 Gratt. (Va.) 592.

2. *People v. Cox*, 9 Cal. 32; *People v. Wallace*, 9 Cal. 30; *People v. Conley*, 39 Me. 78; *Lester v. State*, 9 Mo. 658; *State v. Sundheimer*, 93 Mo. 311; *State v. Mayfield*, 66 Mo. 125; *State v. Huff*, 11 Nev. 17; *Edmondson v. State*, 41 Tex. 496. See *Thomas v. State*, 71 Ga. 64; *State v. Ryan*, 13 Minn. 376; *State v. Ward*, 74 Mo. 252; *State v. Testerman*, 68 Mo. 408; *State v. Sides*, 64 Mo. 385; *State v. Haney*, 67 N. C. 467; *State v. Baker*, 1 Jones (N. C.) L. 267; *Hardin v. State*, 4 Tex. App. 355;

Lazier v. Com., 10 Gratt. (Va.) 708. Compare *State v. Hobbs*, 33 La. An. 276.

Surplusage.—An indictment for murder charged the wound to have been inflicted on the 9th of December, of which wound, she, on the said 14th December, died. *Held*, that the word "said" was a surplusage, but that it did not affect the indictment. *Lazier v. Com.*, 10 Gratt. (Va.) 708.

3. *Thomas v. State*, 71 Ga. 44; *State v. Ryan*, 33 Minn. 371. Compare *State v. Huff*, 11 Nev. 17.

4. *Woodside v. State*, 3 Miss. 655; *State v. Ward*, 74 Mo. 253; *State v. Taylor*, 21 Mo. 477; *State v. Haney*, 67 N. C. 467; *State v. Baker*, 1 Jones (N. C.) L. 267; *State v. Huggins*, 12 Rich. (S. C.) L. 402.

Alleging Time of Death in Indictment.—An indictment for murder did not allege the time of the death, nor that it occurred within a year and a day from the time when the wound was inflicted, but used these words: "of which said mortal wound the said J H did languish, and then and there did die." *Held*, that the charge of the indictment was not defective for want of showing sufficiently that the death took place within a year and a day from the time of the wound. *State v. Haney*, 67 N. C. 467.

Same—Twelve Hours After.—An indictment of murder, charging the infliction of a wound on a certain day, and that the deceased "did then and there instantly die," is supported by showing that death ensued twelve hours after the shooting and on the same day. *State v. Ward*, 74 Mo. 253.

Same—Twenty Days.—Where an indictment charged that the blow was given on the 27th of December, and that the deceased then and there instantly died, and the evidence was that he lived for twenty days, it was *held* that the variance was not material. *State v. Baker*, 1 Jones (N. C.) L. 267.

that he "languished, and languishing, immediately did die;"¹ but an averment that "of said mortal wounds," the deceased "did immediately languish, and languishing, did die," fails to show how long after the mortal injury the death occurred, and, therefore, renders the indictment fatally defective.²

j. PLACE.—(1) *Of the Act Causing Death.*—The indictment must aver that the killing took place within the county where the charge is brought,³ if such be the case; but where the mortal injury was given in one county, and the death took place in another, the indictment must show in which county the charge is brought, if it be allowable to bring it where the death took place.⁴ It is not necessary to state the precise locality within the county.⁵

An indictment under the federal statutes must contain averments sufficient to show that the act was committed in or upon some particular place or vessel within the jurisdiction of the federal courts.⁶

"Then and There."—The common law requirement of an allegation that death resulted from the injury within a year and a day, was *held* to be sufficiently complied with by the words: "Giving the said W then and there two mortal wounds, of which mortal wounds so given as aforesaid, the said W did instantly die." The words "so," etc., obviate any need of repeating "then and there" before "instantly." *Hardin v. State*, 4 Tex. App. 355.

1. *State v. Testerman*, 68 Mo. 408.

2. *State v. Sides*, 64 Mo. 383.

3. *People v. Robinson*, 17 Cal. 363; *Studdstill v. State*, 7 Ga. 2; *Jackson v. People*, 18 Ill. 269; *State v. Gessert*, 21 Minn. 369; *State v. Waller*, 88 Mo. 402; *State v. Taylor*, 21 Mo. 477; *State v. Outerbridge*, 82 N. C. 617; *State v. Lamon*, 3 Hawks (N. C.) L. 75. Compare *Noles v. State*, 24 Ala. 672.

Charging Place of Commission of Crime.—An indictment charged defendant with committing the crime of murder, by feloniously, etc., inflicting upon D, etc., on August 28, 1874, in W county, a stab or wound, of which, upon the same day, said D died in the county of P. *Held*, that it charged the commission of the offence in the county of W. *State v. Gessert*, 21 Minn. 369.

Same—Rule in North Carolina.—An indictment for murder in North Carolina, which stated that A B, late of Bladen county, etc., with force and arms, in the county aforesaid, etc., contains a sufficient description of the place where the murder was alleged to have been committed. *State v. Lamon*, 3 Hawks (N. C.) L. 175.

The Omission of the Word "County" after name of county, is cured by Mo. Rev. Stat., § 1821. *State v. Waller*, 88 Mo. 402.

Aiding and Abetting.—Where, in an indictment for aiding, etc., the commission of a murder, there was no time and place to the averment of the aiding, etc., but time and place were alleged to the assault, stroke, and death, and it was then averred that the prisoners were then present aiding and abetting, it was *held*, that the *venue* was sufficiently laid. *State v. Taylor*, 21 Mo. 477. See *Woodside v. State*, 3 Miss. 655.

Presumption.—An allegation that the killing was committed in the county of the indicting court is presumed to be true, if not denied by plea in abatement, under Bat. N. C. Rev. Stat. ch. 33, § 70. *State v. Outerbridge*, 82 N. C. 617.

Allegation of Place of Crime—Dispensed with Statute.—It is competent for the legislature, by statute, to dispense with the averment in an indictment for murder, that the offence was committed within the body of the county in which the indictment was found, and to require that fact to be shown by the evidence. *Noles v. State*, 24 Ala. 672.

4. *Rex v. Hargraves*, 5 Car. & P. 170.

5. *People v. Robinson*, 17 Cal. 363.

6. **Sufficiency of Indictment in Federal Court.**—An indictment against a captain of a steamboat, under section 5344, U. S. Rev. Stat., which alleges that the steamboat was, at the time, navigating the Chesapeake bay between

(2) *Of the Death.*—The indictment must show the place of death, as well as the place of the act causing it;¹ and where it is stated that the assault and the death occurred at the same place, the indictment is not supported by proof that deceased died at a different place.² An averment, coming after the description of the assault, stating that deceased "did then and there instantly die," sufficiently shows the place of death;³ but not so if the words "then and there" are omitted from such sentence.⁴

k. *AVERMENT OF DEATH.*—The indictment must aver directly and in the most unequivocal terms, that the person with whose homicide the defendant is charged, is dead. A charge that the defendant murdered the deceased is not sufficient; it must also be averred that he killed him.⁵ The expression "killed," or "did kill," is not, however, essential, if other words of equivalent import which convey the same idea, are used;⁶ but an averment that defendant "did murder" deceased "by shooting him with a gun," is not an averment that defendant killed deceased, and is insufficient.⁷

l. *DESCRIPTION OF DECEASED.*—It is not now necessary for an indictment for felonious homicide to charge that the deceased was "in the peace of the state;"⁸ nor is it necessary to aver that deceased was "a human being," or "a reasonable creature in being."⁹

Baltimore and Annapolis, in substance alleges that the steamboat was being used on navigable waters of the United States. *U. S. v. Beacham*, 29 Fed. Rep. 284.

Alleging Nationality of Vessel.—In an indictment for murder, under section 8 of act of congress of April 30, 1790, it is sufficient to allege that the crime was committed on a vessel owned by American citizens, without alleging that the vessel was American. *U. S. v. Demarchi*, 5 Blatchf. C. C. 84.

In an Indictment for Piratical Murder, where the court has jurisdiction over the crime, when committed on board a vessel having no nationality, the nationality or the vessel need not be alleged, nor its possible foreign nationality negated. *U. S. v. Demarchi*, 5 Blatchf. C. C. 84.

1. *People v. Wallace*, 9 Cal. 30; *People v. Cox*, 9 Cal. 32; *State v. Cummings*, 5 La. An. 330; *Chapman v. People*, 39 Mich. 357; *Riggs v. State*, 26 Miss. 51; *State v. Steele*, 65 Mo. 218; s. c., 27 Am. Rep. 271; *State v. Lakey*, 65 Mo. 217; *State v. Coleman*, 17 S. C. 473. Compare *State v. Roach*, 34 Ga. 78; *State v. Potter*, 15 Ind. 302; *State v. Bowen*, 16 Kan. 475.

Death Within County.—An indictment for murder must allege with that

degree of certainty which excludes every other intendment, that the murdered person died in the county where the indictment was found. *Riggs v. State*, 26 Miss. 51.

2. *Chapman v. People*, 39 Mich. 357.

3. *State v. Steele*, 65 Mo. 218; s. c., 27 Am. Rep. 271.

4. *State v. Lakey*, 65 Mo. 217.

5. *Pierce v. State*, 21 Tex. App. 669. See *People v. Sanford*, 43 Cal. 29.

6. "Deprive of Life" Equivalent to "Kill."—In an indictment for murder, the words "deprive of life" are equivalent to the word "kill." *Walker v. State*, 14 Tex. App. 609.

7. *Strickland v. State*, 19 Tex. App. 518.

8. *Dumas v. State*, 63 Ga. 600; *Com. v. Murphy*, 65 Mass. (11 Cush.) 472.

9. *Reed v. State*, 16 Ark. 499; *Merrick v. State*, 63 Ind. 327; *State v. Stanley*, 33 Iowa 526; *Perryman v. State*, 36 Tex. 321; *Wade v. State*, 23 Tex. App. 308; *Bean v. State*, 17 Tex. App. 60; *Ogden v. State*, 15 Tex. App. 454; *Bohannon v. State*, 14 Tex. App. 271.

Alleging Reasonable Creature—"Smutty, My Darling."—An indictment for murder alleged that defendant killed "Smutty, My Darling." *Held*, sufficient, the question of whether the deceased

The name in the indictment may be that by which the deceased was usually known, as well as his proper name, if the two be different.¹ But the proof must conform strictly to the averment in this respect;² to sustain an indictment for murder, it must be shown that the Christian name of the person killed, as given in the indictment, was his true name, or one by which he was to a considerable extent called and known among those who were acquainted with him,³ or prove the name so closely as to bring the difference within the principle of *idem sonans*;⁴ but a variance in

was a "reasonable creature in being," being a matter of proof and not of pleading, and it being immaterial that the name of the deceased was a peculiar one. *Wade v. State*, 23 Tex. App. 308.

1. *People v. Freeland*, 6 Colo. 96; *Kriel v. Com.*, 5 Bush (Ky.) 362; *Com. v. Desmarteau*, 82 Mass. (16 Gray) 1; *O'Brien v. People*, 48 Barb. (N. Y.) 274; *State v. Bell*, 65 N. C. 313; *State v. Gardiner*, *Wright* (Ohio) 392; *R. v. Berriman*, 6 Car. & P. 601; *Anonymous*, 6 Car. & P. 408; *Rex v. Norton*, Russ. & R. C. C. 509. See *Page v. State*, 61 Ala. 16; *Aaron v. State*, 1 Ala. Sel. Cas. 12; *People v. Lockwood*, 6 Cal. 205; *Moynahan v. People*, 3 Colo. 367; *Mitchum v. State*, 11 Ga. 615; *Penrod v. People*, 89 Ill. 150; *State v. Witt*, 34 Kan. 488; *State v. Angel*, 7 Ired. (N. C.) L. 27; *Boyd v. State*, 14 Lea (Tenn.) 161; *Rutherford v. State*, 11 Lea (Tenn.) 31; *Hunter v. State*, 8 Tex. App. 75; *Rothchild v. State*, 7 Tex. App. 519; *State v. Lincoln*, 17 Wis. 579.

Setting Out "Usual Name" in Indictment.—In a trial for the murder of William Redus, there was evidence that his true name was William "Reder," but that he was known and often called "Redus." The court charged that, if the jury so found the fact, it was immaterial whether "Redus" was the true name or not. *Held*, correct. *Hunter v. State*, 8 Tex. App. 75.

2. See *Moynahan v. People*, 3 Colo. 367; *Mitchum v. State*, 11 Ga. 615; *Penrod v. People*, 89 Ill. 150; *Rutherford v. State*, 11 Lea (Tenn.) 31; *State v. Lincoln*, 17 Wis. 579.

Separating Surname.—An indictment for the murder of "Patrick Fitz Patrick," *held*, not to be supported by proof of the killing of "Patrick Fitzpatrick," and this, although two allegations following such designation described the deceased as "the said Patrick Fitzpatrick." *Moynahan v. People*, 3 Colo. 367.

Failure to Prove Christian Name.—On the trial of a party indicted for the

murder of one "Robert Kain," the evidence failed to show that the person killed was of that name, the witnesses calling him "Kain" only, without giving any Christian name. *Held*, that this variance was fatal. *Penrod v. People*, 89 Ill. 150.

Same—Proving Initials of Name.—An indictment charged, that William R. Morris was murdered by the prisoner, and the proof was that W. R. Morris was slain by him; and it was *held* that the proof of identity was well left to the jury, and that a verdict of guilty found by them, ought not to be disturbed. *Mitchum v. State*, 11 Ga. 615.

Same—Variance in Christian Name.—Where all the witnesses agreed that they never knew the deceased to be called by the name alleged in the indictment, but two of them, without professing to know the real name, testified in substance that they supposed it to be as alleged, from their recollection of certain writings which they had seen some time before, it was *held*, that it was error for the court to so instruct the jury as to leave them to think that they could convict upon such evidence, by stating that "if they found from the evidence that the deceased was known by several Christian names, and was described by one of these in the indictment, and there was proof of the name as laid, it was sufficient." *State v. Lincoln*, 17 Wis. 579.

3. *State v. Lincoln*, 17 Wis. 579.

Full Name Need Not be Proved.—The failure of the witness to give, upon a trial for murder, the full name of the person murdered, as set out in the indictment, is not material after the verdict, if the name or description, as given by the witness corresponds, as far as it goes, with the name mentioned in the indictment, and it sufficiently appearing that there was no contest over the name or identity of the person. *Rutherford v. State*, 11 Lea (Tenn.) 31.

4. See *Page v. State*, 61 Ala. 16; *Aaron v. State*, 1 Ala. Sel. Cas. 12;

the middle name is immaterial.¹ Where the deceased had no name, or where it was unknown to the grand jury, the indictment should describe the deceased, and allege the name or a part thereof, as the case may be, to be unknown to the grand jury;² and such an averment is a material one, to be proven to the satisfaction of the jury.³

If the name of the deceased is contained in the averment of the assault or infliction of the mortal injury, its omission in the averment of death is immaterial,⁴ but it must be stated in the conclusion;⁵ the rule, stated generally, being that the indictment must so indicate the deceased that the defendant could successfully plead former jeopardy to another indictment for the homicide of the same person.⁶

m. AVERMENT OF DEFENDANT'S SANITY.—The fact that defendant is or may be insane or *non compos mentis*, is solely a matter of defence; consequently an indictment for homicide need not

State *v. Witt*, 34 Kan. 488; State *v. Lincoln*, 17 Wis. 579.

Idem Sonans.—Where, in an indictment for murder, the name of the deceased was alleged to be "Boudet," or "Boredet," when it was in fact "Burte," *held*, that the variance was so slight as to be immaterial. Aaron *v. State*, 1 Ala. Sel. Cas. 12.

On an indictment for killing "Tobin Preyer," proof of the killing of a person whose name was sounded "Tobin Prior," *held* to be no variance. Page *v. State*, 61 Ala. 16.

An information for murder charged the killing of "Bernhart." The person killed was "Banhart." *Held*, immaterial. State *v. Witt*, 34 Kan. 488.

In an indictment for murder, the surname of the person killed was spelled in three different ways, to wit: "Giddings," "Gidings" and "Gidines," the Christian name being the same in every case. *Held*, that the variance was not sufficient ground for an arrest of judgment, the second and third forms being each *idem sonans* with the first, within the decisions upon that subject. State *v. Lincoln*, 17 Wis. 579.

1. People *v. Lockwood*, 6 Cal. 205.

2. Tempe *v. State*, 40 Ala. 350; Bryant *v. State*, 36 Ala. 270; Edmonds *v. State*, 34 Ark. 720; Reed *v. State*, 16 Ark. 499.

Infant Child.—The words "infant child, name to the grand jury unknown," are a sufficient description in an indictment of a human being upon whom the office of murder may be committed. Tempe *v. State*, 40 Ala. 350.

An Indictment for the Murder of "a Certain Wyandott Indian, whose name is unknown in the grand jury," is valid and sufficiently descriptive of the deceased, without any allegation that the words "Wyandott Indian" means a human being. Reed *v. State*, 16 Ark. 499.

Christian Name Unknown.—An indictment charging that the defendant "killed — Butler, whose Christian name is to the grand jury unknown," is sufficient. Bryant *v. State*, 36 Ala. 270.

3. Reed *v. State*, 64 Ark. 499.

4. Alford *v. Com.*, 84 Ky. 623.

Naming Deceased—Blank in Subsequent Allegation.—An indictment reciting that the accused, with malice aforethought did kill Frank Wheeler, by wounding him with a knife, "from which the said . . . did then and there die," *held* good, the blank name being immaterial, since it was apparent that Frank Wheeler was referred to. Alford *v. Com.*, 64 Ky. 623.

See State *v. Brabson*, 38 La. An. 144.

5. Dias *v. State*, 7 Black. (Ind.) 20; s. c., 39 Am. Dec. 448; State *v. Pemberton*, 30 Mo. 376.

Designating Person Killed.—An indictment which charges an assault and stabbing of one H D, whereof he died, and concluding "and so the jurors do say that the said C H P in manner and form, and by the means aforesaid, feloniously, etc., did kill and murder," is bad, as not designating the person murdered. State *v. Pemberton*, 30 Mo. 376.

6. State *v. Brabson*, 38 La. An. 144.

allege that the defendant is of sound mind,¹ nor that he is "a person of sound memory or discretion."²

n. CONCLUSION.—All grades of homicide being offences at common law as well as under the statutes, the words "contrary to the form of the statute in such case made and provided," or their equivalent, are not necessary,³ unless prescribed by statute;⁴ where, however, the indictment is so concluded, the fact that the offence is defined by one statute and the punishment is prescribed by another, will not necessitate the use of the plural instead of the singular form.⁵ In some states it is prescribed that all indictments shall conclude "against the peace and dignity of the state," or with other expressions of like nature; and such a provision is mandatory, and, therefore, an indictment is not good which fails to conform strictly thereto.⁶

4. More than One Homicide by the Same Act.—The indictment may charge the accused in one count with the murder of two or more persons by the same act;⁷ but it has been held that where the indictment is so framed, and it appears that each of the deceased persons were killed by a separate blow, although inflicted at the same time and place, the defendant may require the prosecution to elect upon which homicide they will proceed; but that judgment cannot, however, be arrested thereon.⁸

5. Joinder of Counts.—*a. DIFFERENT MODES OF COMMITTING ONE OFFENCE.*—Where there is uncertainty as to the mode in which the homicide is committed, or as to the means used, it is good pleading to frame the indictment with as many counts as may be necessary to meet the evidence;⁹ and the prosecution

1. *Fahnestock v. State*, 23 Ind. 231.

2. *Dumas v. State*, 63 Ga. 600; *Bean v. State*, 17 Tex. App. 60.

3. *State v. Harris*, 12 Nev. 414.

4. See *State v. Dunkley*, 3 Ired. (N. C.) L. 116.

Where Death Occurred Without State—
Doctrine in North Carolina.—In an indictment for murder, where the assault is alleged to have been committed in the same county in the state, and the death to have occurred in another state, it is not necessary that the indictment should conclude "against the form of the statute." *State v. Dunkley*, 3 Ired. (N. C.) L. 116.

5. Contra Formam Statuti.—An indictment for murder was found and concluded *contra formam statuti*. By the statute of 1846, the punishment is either death or imprisonment in the state prison at hard labor during life, at the discretion of the jury. *Held*, that the conclusion of the indictment in the singular, to wit, *contra formam statuti*, was correct. *Bennett v. State*, 3 Ind. 167.

6. *Calvert v. State*, 8 Tex. App. 538; *Cox v. State*, 8 Tex. App. 254.

The Texas Constitution requires that "all prosecutions shall be carried on and in the name of the 'State of Texas' and conclude 'against the peace and dignity of the state.'" Accordingly, the fact that an indictment for murder concluded "against the peace and dignity of the statute." *Held*, to vitiate the conviction, although the objection was raised in the first instance in the appellate court, and by a motion for a rehearing, after judgment of affirmance. *Cox v. State*, 8 Tex. App. 254.

7. *Chivarrio v. State*, 15 Tex. App. 330; *Rucker v. State*, 7 Tex. App. 549.

8. *Forrest v. State*, 13 Lea (Tenn.) 103.

9. *Joy v. State*, 14 Ind. 139; *People v. McDowell*, (Mich.) 9 Cr. L. Mag. 72; *Hunter v. State*, 40 N. J. L. (11 Vr.) 495; *Lanergan v. People*, 39 N. Y. 39; *Cox v. People*, 19 Hun (N. Y.) 430; *Dill v. State*, 1 Tex. App. 278; *Smith v. Com.*, 21 Gratt. (Va.) 809; *Lazier v. Com.*, 10 Gratt. (Va.) 70.

should not be required to elect on which count they will proceed to trial,¹ as all of such counts, taken together, describe only a single offence.²

b. DIFFERENT OFFENCES.—Murder and manslaughter, predicated of the same homicide, may be charged in the same indictment;³ and the prosecution should not be required to elect upon which count it will proceed,⁴ nor should one of the counts be quashed on motion.⁵

c. PRINCIPALS AND ACCESSORIES.—Where an indictment for murder charges the defendant as principal in one count and as accessory before the fact in another, a motion to require the prosecution to elect upon which count they will proceed should not be granted;⁶ and this rule applies where there is a plurality of defendants, and one count charges all with being principals, and another charges part as accessories before the fact.⁷

6. Conviction of a Degree, or for an Offence Lower than that Charged.—As in the case of other analogous crimes, an indictment for murder in the first degree will sustain a conviction of murder in any lower degree;⁸ and an indictment for murder will sustain a

1. *Joy v. State*, 14 Ind. 39; *People v. McDowell*, (Mich.) 9 Cr. L. Mag. 72; *Lanergan v. People*, 39 N. Y. 39; *Dill v. State*, 1 Tex. App. 278.

Burning and Beating.—Counts alleging a murder by burning, by beating, and by both burning and beating, may be joined, and the state cannot be compelled to elect between them at the trial. *Joy v. State*, 14 Ind. 139.

2. *State v. Hunter*, 40 N. J. L. (11 Vr.) 495.

3. *Henry v. State*, 33 Ala. 389; *People v. Sessions*, 89 Mich. 594; *People v. McCarthy*, 110 N. Y. 309; *Kane v. Com.*, 109 Pa. St. 541.

Alleging Former Conviction.—The joinder of a count of manslaughter to a count of murder, with an averment that the prisoner had previously been convicted of manslaughter only, is proper, when it is sought to impose on the prisoner, in case he is found guilty of manslaughter only, the double punishment provided by statute in case of a second conviction of manslaughter. *Kane v. Com.*, 109 Pa. St. 541.

4. *People v. McCarthy*, 110 N. Y. 309.

Charging Offence in Different Degrees.—Two counts of an indictment charged defendant with manslaughter in the first degree, and a third count with manslaughter in the second degree, but only one act of killing was charged. *Held*, under N. Y. Code, Crim. Proc., § 279, allowing one act to be charged in different counts, that the prosecution

will not be compelled to elect on which count it will proceed. *People v. McCarthy*, 110 N. Y. 309.

5. Quashing Indictment Where Different Degrees Alleged.—Defendant was bound over on a charge of murder, and the information afterwards filed charged, in the first count, murder; in the second count, the statutory crime of manslaughter by causing death by abortion. *Held*, that a motion to quash the second count was properly refused. *People v. Sessions*, 58 Mich. 594.

6. *State v. Hamlin*, 47 Conn. 95; s. c., 36 Am. Rep. 54. *Compare Simms v. State*, 10 Tex. App. 131.

7. *State v. Hamlin*, 47 Conn. 95; s. c., 36 Am. Rep. 54. *Compare People v. Ah Hop*, 1 Idaho 698.

Several Defendants—Principals and Accessories.—When the defendants, five in number, are indicted in one count as principals in the murder, and in another count four of them are indicted as accessories before the fact, the latter may be rejected as surplusage. *People v. Ah Hop*, 1 Idaho 698.

An indictment for murder charged in one count three defendants as principals, and in another two as principals, and the third as an accessory before the fact. *Held*, to be no misjoinder of counts. *State v. Hamlin*, 47 Conn. 95; s. c., 36 Am. Rep. 54.

8. *McPherson v. State*, 29 Ark. 225; *People v. Dolan*, 9 Cal. 576; *Buckner v. Com.*, 14 Bush (Ky.) 601; *Conner v.*

conviction of voluntary manslaughter,¹ but not of involuntary manslaughter, unless that degree of the offence is also distinctly charged.² But under such an indictment for murder the defendant may be convicted of assault with intent to kill and murder;³ but not unless the indictment embraces the charge of assault.⁴

Com., 13 Bush (Ky.) 714; Davis v. State, 39 Md. 355; State v. Sloan, 47 Mo. 604; McGee v. State, 8 Mo. 495; Keefe v. People, 40 N. Y. 348; State v. Grant, 7 Oreg. 414; Livingston's Case, 14 Gratt. (Va.) 592; Giskie v. State, 71 Wis. 612.

1. McPherson v. State, 29 Ark. 225; People v. Dolan, 9 Cal. 576; Packer v. People, 8 Colo. 361; Reynolds v. State, 1 Kelly (Ga.) 222; Roy v. Kansas, 2 Kan. 405; Buckner v. Com., 14 Bush (Ky.) 601; Conner v. Com., 13 Bush (Ky.) 714; King v. State, 6 Miss. (5 How.) 730; State v. Sloan, 47 Mo. 604; Plummer v. State, 6 Mo. 231; Watson v. State, 5 Mo. 497; Burnett v. State, 14 Lea (Tenn.) 439; People v. McDonnell, 92 N. Y. 657; State v. Grant, 7 Oreg. 414; Peters v. State, 12 Tex. App. 650; Livingston's Case, 14 Gratt. (Va.) 592; White v. Territory, (Wash. Ter.) 19 Pac. Rep. 37.

Change of Statute.—After the finding of an indictment for murder, a change in the law made offences similar to that charged, manslaughter only. The act contained no saving clause. *Held*, that a trial for manslaughter could be had under the indictment. *Packer v. People*, 8 Colo. 361.

Death from Disease Superinduced.—Under an indictment charging murder by blows, a conviction of manslaughter may be had on evidence showing that the death was caused by pneumonia superinduced by the wound and the blows. *Burnett v. State*, 14 Lea (Tenn.) 439.

2. *Bruner v. State*, 58 Ind. 159; *Walters v. Com.*, 44 Pa. St. 135. See *Brown v. State*, 110 Ind. 486. Compare *Buckner v. Com.*, 14 Bush (Ky.) 601; *Conner v. Com.*, 13 Bush (Ky.) 714.

When Involuntary Manslaughter is Charged.—An indictment for manslaughter contained two counts; the first charged voluntary manslaughter in express terms, and the second, that defendant, on the day named, did "unlawfully, feloniously, and willfully, touch, beat, bruise, and strike down, upon a brick pavement, in a violent manner, and with great force H, from which striking down, and the falling upon the pavement, he, the said H,

then and thereby received a mortal wound on his head," from the effect of which death instantly ensued. *Held*, that nothing was charged in the second count from which any intention to take the life of deceased could be inferred, but the plain inference therefrom was that death was not intended, although the striking was unlawful and intentional; and that a verdict of guilty of the crime of involuntary manslaughter should therefore not be reversed on the ground that both counts in the indictment charged voluntary manslaughter. *Brown v. State*, 110 Ind. 486.

Rule in Kentucky.—One indicted for murder may be convicted of murder, voluntary manslaughter or involuntary manslaughter, but not of the offence defined by Ky. Gen. Stat., ch. 29, art. 4, § 2, of killing by willfully striking, etc. He may be guilty of involuntary manslaughter without being guilty of such statutory offence, but not conversely. *Buckner v. Com.*, 14 Bush (Ky.) 601.

Killing by Willfully Striking, etc., is not included in the crime of murder, and is not a degree of the offence of homicide within the meaning of the Kentucky Criminal Code, sections 262, 263; hence under an indictment for murder, the accused cannot be convicted of the crime of killing by willfully striking, etc., but he may be convicted of either of the degrees of manslaughter. *Conner v. Com.*, 13 Bush (Ky.) 714.

3. *People v. McDonnell*, 92 N. Y. 658; *Peterson v. State*, 12 Tex. App. 650. See *Bush v. Com.*, 78 Ky. 268.

Maliciously Wounding.—If, on a trial for murder or manslaughter, there be any evidence that the wound was not dangerous in itself, and death resulted from improper treatment or from disease contracted subsequently, not resulting from the wound, the jury must be so instructed, and may find the accused guilty of maliciously wounding under Ky. Gen. St. ch. 29, art. 6 § 2, or of wounding in a sudden affray under article 17. *Bush v. Com.*, 78 Ky. 268.

4. *Scott v. State*, 60 Miss. 268.

7. Indictment of Accessories and Co-Conspirators.—One whom the proof shows to have been a principal in the second degree, having been present and aiding, abetting or assisting in the homicide, may be convicted under an indictment charging him as the actual perpetrator, or as principal in the second degree;¹ and if the indictment charges that defendant was present, aiding and abetting another in the commission of the homicide, the proof need not conform strictly to the averment as to the actual perpetrator.² But proof that the defendant was accessory only, whether before or after the fact, will not warrant a conviction under an indictment

1. *Brister v. State*, 26 Ala. 107; *People v. Ah Fat*, 48 Cal. 61; *State v. O'Neal*, 1 Houst. Cr. Cas. (Del.) 58; *Thompson v. Com.*, 1 Met. (Ky.) 13; *Spies v. People (Anarchists' Case)*, 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829; *Com. v. Chapman*, 65 Mass. (11 Cush.) 422; *State v. Payton*, 90 Mo. 220; *Railford v. State*, 59 Ala. 106; *State v. Cockman*, 2 Winst. (N. C.) L. No. 2, 95; *State v. Fley*, 2 Brev. (S. C.) L. 338; s. c., 4 Am. Dec. 583; *State v. Anthony*, 1 McC. (S. C.) L. 285; *State v. Jenkins*, 14 Rich. (S. C.) L. 215; s. c., 94 Am. Dec. 132; *Sharpe v. State*, 17 Tex. App. 486; *Davis v. State*, 3 Tex. App. 91; *Hawley v. Com.*, 75 Va. 847; *State v. Cameron*, 2 Chand. (Wis.) 172; *U. S. v. Douglass*, 2 Blatchf. C. C. 207.

Accessories.—Under the Illinois Statute, the man who, "not being present aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of a crime," may be considered as the principal in the commission of the crime, may be indicted as principal, and may be punished as such. The indictment need not say anything about his having aided and abetted either a known principal or an unknown principal. It may simply charge him with committing the crime as principal. Then, if, upon the trial, the proof shows that the person charged aided, abetted, assisted, advised or encouraged the perpetration of the crime, the charge that he committed it as principal is established against him. It would make no difference whether the proof showed that he so aided and abetted a known or an unknown principal. *Spies v. People (Anarchists' Case)*, 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

"Two Defendants"—One Mortal Wound.—An indictment charging two defendants with murder, stated that, with guns, etc., they shot deceased, "giving him one mortal wound." *Held*,

that it was not inconsistent, for both defendants were equally responsible. *State v. Payton*, 90 Mo. 220.

2. Perpetrator Unknown.—In an indictment against several for murder, some of the counts charged the defendants with having advised, encouraged, aided and abetted a particular person named in the perpetration of the crime, and evidence was introduced to show that the particular person named did perpetrate the crime. Other counts charged the defendants with having advised, encouraged, aided and abetted an unknown person in the commission of the crime, and proof was given which tended to show that the perpetrator of the crime was an unknown person. In this condition of the pleadings and the proofs, it was not required of the trial court that it should so direct the jury as to restrict them to the consideration of the case on the theory that the crime was committed by the particular person named, and to omit any reference to the other theory that it was perpetrated by an unknown person. *Spies v. People (Anarchists' Case)*, 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

Same.—Riot.—Where an indictment for murder against two rioters charges that the mortal injury was inflicted by the prisoners, proof that it was inflicted by others of the rioters, whether they are known or unknown, it seems, will sustain the indictment,—all present and participating in the commission of the offence being equally guilty. *State v. Jenkins*, 14 Rich. (S. C.) L. 215; s. c., 94 Am. Dec. 132.

Variance.—If the indictment charges that A gave the mortal blow, and that B and C were present aiding and abetting, while the evidence shows that B struck the blow, and that A and C were present aiding and abetting, this is not a material variance, for the blow is adjudged in law to be the stroke of every one of them. *Brister v. State*,

charging him as principal;¹ there must be a distinct and specific averment that defendant advised, encouraged or assisted a person named, to commit the crime of murder.² And an indictment which charges defendant both with "assisting and abetting" in the killing, and with being an "accessory before the fact to the killing and murdering," is fatally inconsistent.³

8. Joint Indictment.—As in the case of other crimes, all or any of the participants in the homicide may be jointly indicted in one count for its commission;⁴ and the individual acts of each defendant need not be separately stated.⁵ Under such a charge one alone may be tried,⁶ or all may be tried and one convicted of the crime or degree charged, and another of a lower degree or offence,⁷ or one may be convicted and the other acquitted.⁸

9. Signature and Indorsement.—At common law it is not necessary for the prosecuting officer to sign or indorse the indictment;⁹ but in some of the states it is made essential by statute.¹⁰

It is essential to the validity of every indictment that it contain an indorsement that it is "a true bill," signed by the foreman of the grand jury;¹¹ but the omission of such an indorsement should be taken advantage of by motion to set aside the indictment, or by demurrer.¹²

It is sometimes provided by statute that the names of all material witnesses for the state, who testified before the grand jury, shall be indorsed on the indictment; but an objection to the omission of this indorsement must be made on motion to quash, or it will be deemed to be waived.¹³

XII. BAIL.—At common law all public offences are bailable, not excepting even crimes punishable with death; though the right to refuse bail to a person charged with such a crime is within the discretion of the court.¹⁴ But in the United States it is now the

26 Ala. 107; *State v. Cockman*, 1 Winst. (N. C.) L. No. 2, 95.

1. *Walratch v. State*, 8 Neb. 80.

2. *Inciting, etc.*—An indictment charged S H with inciting, etc., S H to a murder instead of W R S. *Held*, a fatal mistake. *State v. Houston*, 19 Mo. 211.

3. *State v. Sales*, 30 La. An. pt. II, 916.

4. *State v. Zeibart*, 40 Iowa 169; *Mask v. State*, 32 Miss. 405; *State v. Payton*, 90 Mo. 220; *State v. Arden*, 1 Bay. (S. C.) L. 487; *State v. Bradley*, 9 Rich. (S. C.) L. 168; *Hampton v. State*, 45 Tex. 154.

5. *State v. Payton*, 90 Mo. 220.

6. *State v. Bradley*, 9 Rich. (S. C.) L. 168.

7. *Mask v. State*, 32 Miss. 405; *State v. Arden*, 1 Bay. (S. C.) L. 487.

8. *Hampton v. State*, 45 Tex. 154.

9. *State v. Reed*, 67 Me. 127; *Keittler v. State*, 18 Miss. (10 Smed. & M.) 192, 235.

10. See *Heacock v. State*, 42 Ind. 393.

11. *State v. Shippey*, 10 Minn. 223; *State v. Horton*, 63 N. C. 595; *State v. Harwood*, 1 Winst. (N. C.) L. No. 1, 228.

12. *State v. Shippey*, 10 Minn. 223. See *State v. Harwood*, 1 Winst. (N. C.) L. No. 1, 228.

13. *State v. Griffin*, 87 Mo. 608.

14. See *Ex parte Bryant*, 34 Ala. 270; *State v. McNab*, 2 N. H. 160; *State v. Rockafellow*, 6 N. J. L. (1 Halst.) 332; *People v. Van Horn*, 8 Barb. (N. Y.) 158; *People v. Dixon*, 4 Park. Cr. Cas. (N. Y.) 651; *People v. Hyler*, 2 Park. Cr. Cas. (N. Y.) 570; *State v. Hill*, 3 Brev. (S. C.) L. 89; s. c., 1 Tread. (S. C.) Const. 242; *U. S. v. Hamilton*, 3 U. S. (3 Dall.) 17; bk. 1 L. ed. 490; *U. S. v. Stewart*, 2 U. S. (2 Dall.) 43; bk. 1 L. ed. 502; *U. S. v. Burr*, 1 Burr's Trial, 306; *Rex v. Pepper*, Comb. 208; *Rex v. Delamere*, Comb. 111; *Rex v. Barthelemeley*, Dears. C. C.

general rule that the defendant shall be admitted to bail, as a matter of right in all cases, including all degrees of homicide, except when the charge is for a capital offence, the proof of which is evident, or the presumption great;¹ and this right is often guaranteed by constitutional provision.

60; *Rex v. Barronet*, Dears. C. C. 51; s. c., 1 El. & B. 1; *Harvey's Case*, 10 Mod. 334; *Rex v. Higgins*, 4 O. S. U. C. 93; *Rex v. Yates*, 1 Show. 190; *Danby's Case*, Skin. 56; *Rex v. Wyndham*, 1 Strangl. 2; s. c., 16 Eng. & L. Eq. 361; *Ferrington's Case*, T. Jones 222; *Stafford's Case*, T. Raym. 381; *Watson's Case*, 1 Salk. 106; *Anonymous*, Lofft. 281.

1. See *Ex parte* Acree, 63 Ala. 234; *Ex parte* White, 9 Ark. 222; *Ex parte* Wolfe, 57 Cal. 94; *People v. Tinder*, 19 Cal. 539; *State v. Wicks*, R. M. Charlt. (Ga.) 139; *Lynch v. People*, 38 Ill. 494; *Ex parte* Kendall, 100 Ind. 599; *Ex parte* Hock, 68 Ind. 206; *Ex parte* Sutherland, 56 Ind. 595; *Ex parte* Moore, 30 Ind. 197; *Ex parte* Heffen, 27 Ind. 87; *Baldwin v. Westenhaver*, (Iowa) 39 N. W. Rep. 882; *Hight v. U. S.*, Morr. (Iowa) 407; s. c., 43 Am. Dec. 111; *Tum v. State*, 3 Ind. 293; *In re* Mallison, 36 Kan. 735; *Ullery v. Com.*, 8 B. Mon. (Ky.) 13; *Reddy v. Com.*, 9 Dana (Ky.) 38; *State v. Brewster*, 35 La. An. 605; *State v. Brusle*, 34 La. An. 61; *Territory v. Benoit*, 1 Mart. (La.) 42; *State v. Hartwell*, 35 Me. 139; *Yuer v. People*, 34 Mich. 290; *Ex parte* Floyd, 60 Miss. 913; *Ex parte* Bridwell, 57 Miss. 39; *Ex parte* Fortenberry, 53 Miss. 428; *Beall v. State*, 39 Miss. 715; *Moore v. State*, 36 Miss. 137; *Shore v. State*, 6 Mo. 640; *State v. Rockafellow*, 6 N. J. L. (1 Halst.) 332; *Florida v. Mullin*, 3 N. Y. Leg. Obs. 210; *People v. Perry*, 8 Abb. (N. Y.) Pr. N. S. 27; *People v. Shattuck*, 6 Abb. (N. Y.) N. C. 33; *People v. Lohman*, 2 Barb. (N. Y.) 450; *Ex parte* Taylor, 5 Cow. (N. Y.) 39; *People v. Cole*, 6 Park. Cr. Cas. (N. Y.) 695; *People v. McLeod*, 25 Wend. (N. Y.) 483; s. c., 37 Am. Dec. 328; *People v. Godwin*, 5 City Hall Rec. (N. Y.) 11; *State v. Dew*, 1 Tayl. (N. C.) 142; *State v. Simmons*, 19 Ohio 139; *Com. v. Keeper of Prison*, 2 Ashm. (Pa.) 227; *Com. v. Lemley*, 2 Pittsb. (Pa.) 362; *State v. Hill*, 3 Brev. (S. C.) L. 89; *Moore v. State*, 31 Tex. 572; *Ex parte* Cooper, 31 Tex. 185; *In re* Smith, (Tex. App.); 9 S. W. Rep. 359; *Thompson v. State*, 25 Tex. (Supp.) 395; *Ex parte*

O'Connor, 22 Tex. App. 660; *Ex parte* Allen, 22 Tex. App. 201; *Ex parte* Bryant, 21 Tex. App. 639; *Ex parte* Coldren, 15 Tex. App. 465; *Ex parte* Bacon, 12 Tex. App. 318; *Ex parte* Randon, 12 Tex. App. 145; *In re* Foster, 5 Tex. App. 625; *Webb v. State*, 4 Tex. App. 167; *Green v. Com.*, 11 Leigh (Va.) 677; *In re* Perry, 19 Wis. 19; *U. S. v. Stewart*, 2 U. S. (2 Dall.) 343; bk. 1 L. ed. 502.

"Cooling Time."—Upon an application by a person charged with murder, to be admitted to bail, it appeared that the prisoner and the deceased, being friends between whom there had been no previous difficulty, met in a saloon, where they became intoxicated and fell into a dispute. The prisoner became excited and angry and attempted to go out, when the deceased, much the stronger man, perpetrated repeated personal violence and indignity upon the prisoner, sufficient to provoke him to extreme anger. The prisoner, greatly excited, escaped at length from the deceased, hastened to his own house, a short distance, and without being absent more than five minutes, returned with a revolver, with which he immediately shot and killed the deceased. *Held*, that it was not clear that there was sufficient time between the provocation and the act for passion to cool and reason to resume control, or that the killing was malicious, and that bail should be taken. *Ex parte* Moore, 30 Ind. 197.

When Persons Indicted for Homicide Bailable.—In the following cases, defendants indicted for murder have been admitted to bail, under the provision of the constitution of Texas that all prisoners shall be bailable "unless for capital offences when the proof is evident" (Bill of Rights, § 11).

Where deceased was killed in a fight between himself and two others on one side and defendant and his father on the other, and the fight was brought on by deceased and his party. *Ex parte* Bryant, 21 Tex. App. 639.

Where deceased had provoked the quarrel with defendant, and dared him to cross a mark which he made on the ground, and, on his advancing, struck

It is also considered good reason for admission to bail that the defendant has a present, painful, severe and dangerous disease, which is likely to endanger his life if he is kept in confinement;¹ and in some states it has become a rule that a prisoner under indictment for a capital offence will be admitted to bail, unless he is brought to trial within a certain specified time.² But it has been said that this is no ground for admission to bail, unless the continuance will operate oppressively upon the prisoner.³

The question as to the sufficiency of the proof of defendant's guilt to warrant a refusal of bail is one to be decided by the court to which the application is made, according to the circumstances of each particular case. It has been sometimes held that an indictment for a capital offence is, of itself, sufficient proof of defendant's guilt to preclude any inquiry into the merits of an application for bail,⁴ except under special and extraordinary circumstances⁵; but the weight of authority is clearly to the effect that an indictment does not raise such a presumption of guilt as will absolutely preclude the court from going behind the indictment and investigating the merits of the charge with a view to ascertaining whether the accused is entitled to bail.⁶ And he may have a writ of habeas corpus as a matter of right.⁷

at him with a dangerous weapon, whereupon defendant cut deceased with his knife, inflicting wounds from which he died. *Ex parte* Allen, 22 Tex. App. 201.

Where, upon an indictment for murder of an infant, by willfully permitting it to starve, there was evidence tending to show that the child might have died from being fed on impure milk. *Ex parte* O'Connor, 22 Tex. App. 660.

Where the evidence showed a murder, but not that the deceased was the man for whose murder defendant was indicted, nor that the defendant was connected with the homicide. *Ex parte* Randon, 12 Tex. App. 146.

Same—Shooting From Ambush.—Deceased was shot from ambush, and killed, at midnight, while being conveyed to jail. According to his dying declarations, he recognized relators by the flash of their guns, and previous ill feeling between them and deceased, and threats by one of them were shown. A hat, which witness testified he gave to one of the relators a few days before, was found near the scene of the killing. The officer in charge of deceased saw no one near the place from which the shots were fired, and the next morning he found the tracks of but one person in the neighborhood. *Held*, that the court erred in refusing bail to relators. *In re* Smith, (Tex.) 9 S. W. Rep. 359.

1. *People v. Cole*, 6 Park. Cr. Cas. (N.

Y.) 695; *Archer's Case*, 6 Gratt. (Va.) 605; *Com. v. Semms*, 11 Leigh (Va.) 665; *U. S. v. Jones*, 3 Wash. C. C. 224. See *Lester v. State*, 33 Ga. 192; *Thomas v. State*, 40 Tex. 6.

2. See *Ex parte* Carroll, 36 Ala. 600; *Ex parte* Croom, 19 Ala. 561; *Ex parte* Skiff, 18 Ala. 464; *Ex parte* Simonton, 9 Port. (Ala.) 390.

3. *State v. Abbott*, R. M. Charl. (Ga.) 244. See *Rex v. Andrews*, 2 Dowl. & L.; s. c., 1 New Cas. 199.

4. *People v. Tinder*, 19 Cal. 539; *Hight v. U. S.*, Morr. (Iowa) 407; s. c., 43 Am. Dec. 111; *State v. Brewster*, 35 La. An. 605; *State v. Brusle*, 34 La. An. 61; *People v. Shattuck*, 6 Abb. (N. Y.) N. C. 33; *People v. McLeod*, 1 Hill (N. Y.) 377; s. c., 25 Wend. (N. Y.) 483; s. c., 37 Am. Dec. 328.

5. *People v. Tinder*, 19 Cal. 579; *People v. McLeod*, Morr. (Iowa) 407; s. c., 37 Am. Dec. 328; *State v. Brewster*, 35 La. An. 605.

6. *Ex parte* White, 9 Ark. 222; *State v. Wicks*, R. M. Charl. (Ga.) 139; *Lynd v. People*, 38 Ill. 494; *Lumm v. State*, 3 Ind. 293; *Com. v. Lemley*, 2 Pittsb. (Pa.) 262. See *Ex parte* Wolf, 57 Cal. 94; *Ex parte* Hock, 68 Ind. 206; *People v. Van Horne*, 8 Barb. (N. Y.) 158; *Yarborough v. State*, 2 Tex. 523.

7. See *Ex parte* Wolf, 57 Cal. 94; *State v. Wicks*, R. M. Charl. (Ga.) 139; *Ex parte* Hock, 68 Ind. 206; *Lumm*

The failure of a trial jury to agree is a proper fact to be shown on an application for bail pending a motion for a new trial;¹ but it does not follow that the courts will, as a matter of course, admit to bail because the jury have failed to agree.²

Defendant has the burden to show that the proof of his guilt is not evident, nor the presumption great—as an indictment for a capital homicide implies *prima facie* that no right to bail exists.³ And in order to show this, he must produce the evidence on which the prosecution will rely for conviction.⁴ But he need not affirmatively prove his innocence by other evidence; and he is entitled to bail, unless the evidence, taken as a whole, satisfies the court that his guilt is apparent.⁵ He may base his application upon affidavits arising from the testimony on which the charge is founded,⁶ or affidavits tending to show that the prosecution has been instituted from malice or mistake;⁷ but it has been held that affidavits taken *ex parte* cannot be made sufficient ground for proof upon which to admit to bail.⁸

Admission to bail is not an adjudication that the defendant is not guilty of a capital offence;⁹ but the refusal of a court to hear evidence on an application for bail after indictment for a capital offence is such a final judgment as is reviewable on appeal;¹⁰ and the appellate court will review and weigh the evidence,¹¹ and decide accordingly, without regard to the decisions of the court below.¹²

In a capital case the prisoner is not bailable, after conviction, on motion for a new trial;¹³ and after a conviction for a lower degree of homicide, the right to bail is governed by the same rules as obtain in the case of other felonies.¹⁴

v. State, 7 Ind. 293; *Com. v. Lemley*, 2 Pittsb. (Pa.) 262. Compare *Ex parte White*, 9 Ark. 229, where it is held that to entitle a person under indictment for a capital offence to a writ of habeas corpus on an application for bail, he must state facts in his petition under oath which will rebut the presumption raised against him by the indictment.

1. *Beal v. State*, 39 Miss. 715; *People v. Cole*, 6 Park. Cr. Cas. (N. Y.) 695; *State v. Summons*, 19 Ohio 139; *Webb v. State*, 6 Tex. App. 167.

It is stated in *State v. Summons*, 19 Ohio 132, that the rule in such cases is that if, after trial and disagreement, on application for bail, the evidence is so weak that it would not sustain a verdict of guilty against a motion for a new trial, the court should admit the prisoner to bail. In *Beall v. State*, 39 Miss. 715, however, it was held that a court may admit a defendant to bail in such a case, even though on the evidence the jury ought to have rendered a verdict of guilty.

2. *State v. Summons*, 19 Ohio 139; *Webb v. State*, 6 Tex. App. 167.

3. *Ex parte Kendall*, 100 Ind. 599.

4. *Ex parte Hefferin*, 27 Ind. 187.

5. *Ex parte Randon*, 12 Tex. App. 145.

6. *People v. Godwin*, 5 City H. Rec. (N. Y.) 11.

7. *State v. Hill*, 3 Brev. (S. C.) L. 89.

8. *State v. Drew*, 1 Tayl. (N. C.) 142.

9. *Moore v. State*, 36 Miss. 137.

10. *Ex parte Kendall*, 100 Ind. 599; *Ex parte Hefferin*, 27 Ind. 98; *Lumm v. State*, 3 Ind. 293.

11. *Ex parte Hefferin*, 27 Ind. 98.

12. *Ex parte Sutherland*, 56 Ind. 595.

13. *State v. Connor*, 2 Bay. (S. C.) 34.

14. *Bail on Appeal—Iowa Doctrine*.—Under Iowa Code, section 4529, providing that where an appeal is taken from a judgment of imprisonment in the penitentiary, and the defendant is unable to give bail, the district court

The general rules of procedure in the granting and refusing of bail in cases of homicide are the same as in other offences.¹

XIII. CHANGE OF VENUE.—As a general rule, an application for a change of the venue on the trial of an indictment for homicide is, like such applications in other cases, addressed to the sound discretion of the court,² which will not be interfered with except when clearly abused;³ but sometimes by statutory provision the court is deprived of its discretion, and the place of trial must be changed as a matter of right, upon petitioner's compliance with the prescribed conditions.⁴

The application for change of venue must usually be accompanied by affidavits of reputable persons to the effect that they believe that defendant will not be able to obtain a fair and impartial trial in the county, because of the prejudice therein existing against him.⁵ The prosecution may file counter affidavits,

may, in its discretion, order the sheriff to retain the defendant in custody to await the judgment, the district court has discretion to order a defendant convicted of murder in the second degree retained in custody; since that degree, being included within the term "murder," as defined by Iowa Code, sections 3848, 3849, is within the prohibition of chapter 103, acts 17th general assembly that no defendant convicted of murder shall be admitted to bail, section 4107, and all other inconsistent sections, permitting bail in certain cases. *Baldwin v. Westenhaver*, (Iowa) 39 N. W. Rep. 882.

1. See 2 Am. & Eng. Encycl. of L. 1, tit. BAIL.

2. *Blackman v. State*, (Ga.) 7 S. E. Rep. 626; *State v. Perigo*, 70 Iowa 657.

Change of Venue—Georgia Doctrine.—The Code of Georgia, § 4687, providing that change of venue shall be granted only when the judge shall be satisfied, by an examination of the person liable to serve, that an impartial jury cannot be obtained, does not, in so far as it regulates the manner in which the judge shall satisfy himself, violate the provisions of the Georgia constitution, restricting change of venue to cases in which the judge is satisfied that an impartial jury can be obtained in the county, but providing that the power is to be exercised in such manner as has been or shall be provided by law. *Blackman v. State*, (Ga.) 7 S. E. Rep. 626.

3. **Local Prejudice.**—A verdict of guilty of murder in the first degree will be set aside where it is apparent that from the prejudice existing a fair trial was not had, and where it is

apparent that the court, of its own motion, should have changed the venue *Steagald v. State*, 22 Tex. App. 464.

4. **In Capital Cases.**—The exception of the case of offences punishable with death from the requirements of the Illinois act of 1861, that the petitioner for a change of venue shall state the grounds of his belief, etc.,—construed to leave the court no discretion to refuse the application in a capital case. *Perteet v. People*, 65 Ill. 230; *Rafferty v. People*, 66 Ill. 118.

5. See *Seam v. State*, (Ala.) 4 So. Rep. 521; *State v. Nash*, 7 Iowa 341; *Meuly v. State*, (Tex. App.) 9 S. W. Rep. 563.

Weight of Affidavits.—Upon an application for a change of venue in a murder case, on account of the excitement and prejudice in the county, the full and decisive affidavits of three disinterested witnesses make out a strong *prima facie* case, only to be overcome by very strong negative testimony. *State v. Nash*, 7 Iowa 347.

What Statements are Sufficient.—On an indictment for murder, when it appears from the affidavits in support of defendant's motion for a change of venue that deceased was popular, well respected and widely known; that accused is a poor negro, without friends or influence; that the killing was committed under circumstances calculated to arouse public indignation, and that great excitement followed, that the danger of lynching was apparently so great that it was deemed necessary to order out the militia to protect the accused before and during his preliminary examination, and to remove him to another county immediately thereafter;

both for the purpose of impeaching the credibility of affidavits filed for the petitioner,¹ and also for adducing contrary proof to the effect that no prejudice really exists.²

It is a general rule that the original indictment must be filed in the court to which the trial of a prosecution for homicide is transferred;³ but in some states the trial may be had on a transcript furnished by the clerk of the court of original jurisdiction, and duly certified by him to contain a copy of the indictment, with all the indorsements thereon, and the entries and orders made in relation to the cause, including the order for the removal of the trial,⁴ and attested with the seal of such court.⁵

XIV. COUNSEL.—The regularly authorized prosecuting officer is the only attorney having the right to prosecute an indictment for homicide without special consent of the court; but it is not improper for the court to permit him to be assisted by counsel⁶ employed by relatives or friends of the deceased, or by other persons interested in punishing the offence with which the defendant is charged.⁷ The fact that there is a prosecuting officer for each district or other division of the state cannot prevent the general prosecuting officer of the state from assisting the local prosecutor at a trial for homicide, at his option.⁸

and it is stated that some of the jurors regularly summoned had threatened to "put an end to shooting, and make short work of the murderer,"—the trial court should grant a motion when the trial occurs only two and one-half months after these occurrences, although the state files counter-affidavits of many citizens that, in their opinion, defendant can have as fair and impartial trial in the county in which the indictment is laid as in any other county in the state, but not denying the allegations of the other affidavits. *Seam v. State*, (Ala.) 4 So. Rep. 521.

1. See *Meuly v. State*, (Tex. App.), s. c., 9 S. W. Rep. 563.

2. *Seam v. State*, (Ala.) 4 So. Rep. 521; *Meuly v. State*, (Tex. App.); s. c., 9 S. W. Rep. 563.

3. See *Sawyer v. State*, 16 Ind. 93; *Beauchamp v. State*, 6 Blackf. (Ind.) 600; *Schumaker v. State*, 16 Ohio 43.

Filing Indictment on Change of Venue.—The record showed that the defendant was indicted in the Vigo circuit court, for the murder of G M; that he pleaded there not guilty; that he procured a change of venue for his trial on that indictment to the Parke circuit court; that the clerk of the former court handed over the papers, and among them the indictment (which was spread on the record), to the clerk of the latter court, in which they were

filed; that the defendant was placed on his trial in the Parke circuit court, for the murder of G M, on the plea of not guilty, theretofore entered in that behalf; that he made no objection to the indictment on which he was tried; and that the indictment which was recorded in the last-named court, and on which the defendant was tried, was the one which was transferred among the papers in the cause. *Held*, that these facts showed that the indictment found against the defendant in the Vigo circuit was the one on which he was tried. *Beauchamp v. State*, 6 Blackf. (Ind.) 300.

4. *Brister v. State*, 26 Ala. 107.

5. **Record of Indictment in Transcript on Change of Venue.**—A prisoner charged with a capital offence, where the venue was changed, went to trial without objecting that the record transmitted was not attested by the seal of the court. *Held*, that this was a waiver, and that the objection could not afterwards be made. *Mayor v. State*, 2 Sneed (Tenn.) 11.

6. *Rounds v. State*, 57 Wis. 45.

7. *People v. Tidwell*, (Utah Tr.) 12 Pac. Rep. 61.

8. **The Attorney-General may properly assist the circuit attorney at a trial for murder, whether ordered by the governor to do so or not, and the prisoner cannot take just exception.** *State v. Hays*, 23 Mo. 287.

In a prosecution for homicide, as well as for other offences, the defendant is entitled to the services of counsel; and if he has not the means with which to employ counsel, an attorney must be assigned by the court to defend him.¹

A person accused of homicide is entitled to a full, fair and able presentation of his case in all courts where it is considered; and it has been held that the gross ignorance, incompetence and imbecility of the attorney for a person charged with murder, whereby his defence is not fully and fairly presented, may be good ground upon which to grant a new trial after a conviction for that offence.²

XV. ARRAIGNMENT AND PLEA.—1. Necessity and Sufficiency.—It may be laid down as a general rule that, in all prosecutions for homicide, as well as for other crimes, the defendant must be arraigned in the court of trial,³ in order that he may have an opportunity to plead to the indictment;⁴ and where the prosecution is for a capital offence, the arraignment cannot be waived,⁵ although it has been held that the defendant may waive the reading of the indictment.⁶ The person must answer for himself, and in his own proper person,⁷ unless he is shown to be incapacitated, when counsel may plead "not guilty" for him.⁸

A motion to withdraw a plea of not guilty in order to allow the defendant to demur,⁹ or to plead insanity,¹⁰ or to withdraw a plea of guilty before judgment,¹¹ is addressed to the discretion of the court.

2. Plea—*a*. GUILTY.—It is competent for a person indicted for murder to plead guilty as indicted; and such plea will usually

1. See *People v. Moice*, 15 Cal. 329; 1 Bish. Cr. Proc. (3rd ed.) *et seq.* 303.

2. See *State v. Jones*, 12 Mo. App. 93.

3. See Opinion of Justices, 91 Mass. (9 Allen) 585.

4. See *Segald v. State*, (Tex. App.) 9 Cr. L. Mag. 515; *Nolen v. State*, 8 Tex. App. 585.

5. *Elick v. Territory*, 1 Wash. Ter. 136.

6. *Minich v. People*, 8 Colo. 440.

7. **Arraignment and Plea in Trial Court.**—On an indictment for murder, the record contained the following entry: "Comes now C who prosecutes in behalf of the territory, and the defendant in his own proper person and by his attorneys. The prisoner, upon being asked as to his right name, replied that it was 'Elick.' Arraignment of prisoner waived by counsel and upon being asked as to the charge in the indictment pleaded 'not guilty' by counsel." *Held*, that the arraignment and plea were not sufficient and that all subsequent proceedings were without warrant of law. *Elick v. Territory*, 1 Wash. Ter. 156.

8. *Elick v. Territory*, 1 Wash. Ter. 130.

9. *Com. v. Chapman*, 65 Mass. (11 Cush.) 422.

10. **Withdrawal of Plea of "Not Guilty"—Pleading Lunacy.**—On being arraigned for murder, defendant pleaded not guilty. Eight days afterwards the jury was sworn without objection. Defendant then asked to withdraw the plea and file a plea of lunacy at the time of the trial. The court refused, but told the jury that they might find defendant insane during the trial, and that, in such case, judgment would be delayed and execution stayed. *Held*, that defendant had no ground for complaint. *Taylor v. Com.*, 109 Pa. St. 262.

11. **Under Proper Advice Defendant Pleaded Guilty of Murder.**—The court heard evidence, determined the crime to be murder in the first degree, and fixed the punishment at death. Immediately, and before the entry of judgment, defendant sought to withdraw his plea. *Held*, that this could not be done. *People v. Lennox*, 67 Cal. 113.

be accepted by the court, if it appear that he was sane and uninfluenced.¹ Where such a plea is entered, it is the duty of the court to proceed to ascertain the degree of defendant's guilt; the decision, in some jurisdictions, to be by the court,² and by jury in others.³

b. NOT GUILTY.—Where a person pleads not guilty it is the duty of the court to proceed to trial at the proper time. Where the defendant stands mute when arraigned, a plea of not guilty will be entered.⁴ Although it is sometimes provided by statute that insanity must be specially pleaded, yet it is generally held that under a plea of not guilty, defendant may show that he was insane at the time of the alleged commission of the offence charged.⁵

c. FORMER JEOPARDY.—As in other offences, where a person has once gone through the legal form of a trial for any grade of homicide, he cannot be tried a second time for the offence charged.⁶ And where a person is convicted of a lower degree of the offence than is charged, it operates as an acquittal of all higher degrees. Thus, a conviction of murder in the second degree operates as an acquittal of the higher grade, even though the indictment charges murder in the first degree; and if the conviction is set aside and a new trial is granted, the defendant cannot be convicted of a higher crime than murder in the second degree.⁷ But such

1. *Sanders v. State*, 18 Tex. App. 585.

Pleading Guilty.—A was indicted, tried, and convicted of the crime of murder, but the judgment was reversed on error. Subsequently, and after the cause was remanded, a new indictment was preferred against him for manslaughter. After his conviction of the crime of murder, and prior to the finding of the indictment for manslaughter, the law fixing the punishment for this latter offence was changed. The indictment alleged the act of killing to have been committed on a day which was subsequent to the passage of the law, though, in fact, committed during the existence of another and different law in relation to the same offence. A voluntarily pleaded "guilty," and was sentenced to seven years' confinement to the penitentiary, under the provisions of the new law. *Held*, on motion for a *habeas corpus*, that the plea was the result of a fair contract, and that the motion must be denied. *Sellers v. People*, 6 Ill. 183.

2. See *People v. Noll*, 20 Cal. 164; *McCauley v. U. S.*, 1 Morr. (Iowa) 486.

3. **Pleading Guilty to Murder—Fixing Degree.**—Although one pleads guilty of murder in the first degree, the jury

must find the degree, the Texas Code explicitly so declaring. *Sanders v. State*, 18 Tex. App. 372.

4. See *Mose v. State*, 36 Ala. 211.

5. *People v. Howell*, 28 Cal. 456.

6. See *Gunter v. State*, (Ala.); s. c., 10 Crim. L. Mag. 428; *Jordon v. State*, 81 Ala. 20; *Sylvester v. State*, 72 Ala. 201; *Johnson v. State*, 29 Ark. 31; *People v. Lockwood*, 6 Cal. 205; *Small v. State*, 63 Ga. 386; *Brennon v. People*, 15 Ill. 511; *Clem v. State*, 42 Ind. 420; *Wright v. State*, 5 Ind. 527; *Conner v. Com.*, 13 Bush (Ky.) 714; *State v. Dennison*, 31 La. An. 847; *State v. Byrd*, 31 La. An. 419; *Hart v. State*, 25 Miss. 528; *State v. Anderson*, 89 Mo. 312; *State v. Simms*, 71 Mo. 538; *State v. Smith*, 53 Mo. 139; *State v. King*, 1 Mo. App. 62; *State v. Ray*, 1 Rice (S. C.) L. 1; *Smith v. State*, 22 Tex. App. 316; *Cheek v. State*, 4 Tex. App. 444; *State v. Belding*, 33 Wis. 120.

7. *Jordon v. State*, 81 Ala. 20; *Sylvester v. State*, 72 Ala. 201; *Johnson v. State*, 29 Ark. 31; *Smith v. State*, 22 Tex. App. 316; *Cheek v. State*, 4 Tex. App. 444. *Compare*, *State v. Anderson*, 89 Mo. 312; *State v. Sims*, 71 Mo. 538; *State v. Smith*, 53 Mo. 139; *State v. King*, 11 Mo. App. 92, which hold that, under the Missouri constitution of 1875, art. 2, § 23, a conviction in such a

former acquittal must be specially pleaded on the subsequent trial.¹ And a conviction of manslaughter operates as an acquittal of all higher grades of homicide.² But a conviction for assault and battery, not being included in any degree of felonious homicide, is not proper under an indictment for murder, and will not bear a subsequent prosecution for that offence.³

Where two or more persons are killed by the same act a conviction on an indictment for the killing of one is a good plea in bar to an indictment for killing the other.⁴

The discharge of a jury without legal necessity, and without consent, before the rendition of the verdict, will also operate as a bar to a subsequent prosecution.⁵ Lack of jurisdiction, where made ground for an arrest of judgment on the defendant's motion, will not bar a subsequent trial.⁶

XVI. SERVICE OF INDICTMENT ON DEFENDANT.—It is often provided by statute that a person indicted for a capital offence shall be entitled to have served upon him a copy of the indictment, either before arraignment,⁷ or before the trial;⁸ but if the defend-

case may be had for murder in the first degree.

1. *Jordan v. State*, 81 Ala. 20. Compare *Johnson v. State*, 29 Ark. 31.

What is a Sufficient Plea.—To an indictment for murder in the first degree for the killing of A, the defendant entered a special plea in bar, that she had been indicted for murder in the first degree for killing one B; that she had been tried by a jury upon said indictment on a plea of not guilty, and that upon such trial she was found guilty of murder in the second degree, and sent to the state prison for life; by which finding and judgment she was acquitted of the charge of murder in the first degree as charged in said indictment; and the crime charged in said indictment, for which she was tried and acquitted, "was and is identical in all its parts, incidents, and circumstances, with the crime charged in the indictment for the killing of 'A,' that the evidence whereby alone the state will attempt to prove the indictment in this cause is the same and nowise different from that employed and produced upon the trial of the indictment on which she was acquitted of murder in the first degree; and this she is ready to verify," etc. *Held*, a good plea. *Clem v. State*, 42 Ind. 420.

2. *State v. Dennison*, 31 La. An. 847; *State v. Byrd*, 31 La. An. 419.

"Willfully Striking."—A conviction for killing by willfully striking, rendered on an indictment for murder, was held equivalent to an acquittal of the

crime of murder and all subsidiary crimes included. *Conner v. Com.*, 13 Bush (Ky.) 714.

3. **Conviction of Assault Under Indictment for Murder.**—A prisoner was tried, on an indictment for murder, and the jury found him guilty of an assault and battery. *Held*, that, as assault and battery is not included in any of the degrees of felonious homicide, but is merged in the felony, in a case of felonious homicide, that the verdict was a nullity, that the defect could be reached by a motion in arrest of judgment, and that the indictment still stood against the prisoner, and that he must again be put on trial. *Wright v. State*, 5 Ind. 527.

4. *Clem v. State*, 42 Ind. 420.

5. *Gunter v. State*, (Ala.); s. c., 10 Cr. L. Mag. 428.

6. *Small v. State*, 63 Ga. 386.

7. *Minich v. People*, 8 Colo. 440.

8. See *Scott v. State*, 37 Ala. 117; *McCoy v. State*, 46 Ark. 141; *Fouts v. State*, 8 Ohio St. 98; *State v. Winnigham*, 10 Rich. (S. C.) L. 257; *Johnson v. State*, 4 Tex. App. 268.

Service of Indictment.—In South Carolina.—A prisoner, indicted for a capital offence, is entitled, by law, to a copy of the indictment three days before trial, if he demands it and pays the fees for copying. The demand should be made in open court, when he is arraigned. *State v. Winnigham*, 10 Rich. (S. C.) L. 257.

Same.—Rule in Ohio.—Where a prisoner under indictment for murder

ant does not so receive a copy of the indictment, he must object to the omission before trial, and if he goes to trial without objecting, it is a waiver of his privilege, and he cannot therefore move in arrest of judgment because of such omission.¹

XVII. TIME OF TRIAL.—While prosecutions for homicides of all grades are governed by the same general rules of practice as are all other prosecutions for felony, yet, in such cases involving consequences so serious to the accused, the court should proceed carefully, and with the utmost regard for his rights. He has the constitutional guarantee of a speedy trial, but that is no cause for a trial fixed with undue haste, and against his objection, and which works to his prejudice. Especially is this so where the punishment for the offence charged may involve the life of the accused. He is always entitled to a reasonable length of time in which to prepare his defence, after his formal accusation by the grand jury.² He is entitled to have compulsory process for the attendance of witnesses to testify in his favor, and, consequently, time reasonably sufficient for obtaining them;³ but this means witnesses to give testimony in his defence to the merits, and not necessarily witnesses to join with him in an affidavit for the purpose of obtaining a change of venue.⁴ But where a continuance or adjournment is asked for on the ground of the absence of necessary witnesses, the court may usually properly refuse the request, if the prosecution admits the truth of the facts to which the absent witnesses are expected to testify, as set forth in the motion.⁵ A postponement is sometimes properly granted for the purpose of obtaining a witness to contradict a witness whose

wishes to avail himself of the omission to furnish him with a copy of the indictment "at least twelve hours before trial," he must declare it, by motion, before trial, or interpose it as an objection to being put on trial, and show the omission on record, by bill of exceptions. *Fouts v. State*, 8 Ohio St. 98.

Nol. Pros. on one Count.—It is sufficient if a copy of an indictment for murder, as found by the grand jury, is served on the prisoner, although a *nol. pros.* has been entered as to one of the counts. *Scott v. State*, 37 Ala. 117.

Apparent Clerical Error.—An objection that in the served copy of an indictment for murder, the word "name" in the formal introductory clause, was written "same." *Held*, to be frivolous, and the copy to be "correct" within the requirement of Paschal's Tex. Dig. art. 2930. *Johnson v. State*, 4 Tex. App. 268.

1. *McCoy v. State*, 46 Ark. 141.

2. *State v. Boyd*, 37 La. An. 781;
State v. Fuller 2 Park. Cr. Cas. (N. Y.) 16.

Reasonable Time to Prepare Defence—Three Hours.—A defendant in a capital case, who is guilty of no laches is entitled to a reasonable time to prepare his defence. Three hours is not such time. *State v. Boyd*, 37 La. An. 781.

3. *Wall v. State*, 18 Tex. App. 682.

4. See *Stapleton v. Com.*, (Ky.) 3 S. W. Rep. 793; *State v. Lewis*, 9 Mo. App. 321; *Skates v. State*, 64 Miss. 644; *People v. Wilson*, 3 Park. Cr. Cas. (N. Y.) 199; *Boyett v. State*, (Tex. App.) 9 S. W. Rep. 275; *Bailey v. State*, (Tex. App.) 9 S. W. Rep. 270; *Wall v. State*, 18 Tex. App. 682; *Miller v. State*, 18 Tex. App. 232; *Hodd v. State*, 8 Tex. App. 382.

5. *People v. Wilson*, 3 Park. Cr. Cas. (N. Y.) 199.

Absence of Material Witnesses.—On an application for delay in a trial for murder, grounded on an affidavit of the absence of material witnesses, it appeared, on the part of the government, and was not disputed by the accused, that no living person save the prisoner was present at the alleged murder, nor

testimony is unexpected, and causes surprise.¹ In considering the motion, if the postponement or continuance is asked for the purpose of obtaining absent witnesses, the court should consider the materiality of their expected testimony as it is stated in the motion, and its probable truth;² and if such testimony would be plainly immaterial or inadmissible, or would lack weight sufficient to benefit defendant, the motion may be refused;³ and there can be no benefit in granting a continuance where it is improbable that the absent witnesses will ever be present.⁴ But it may be good ground for a postponement or continuance, as the case may be, that the necessary witnesses for the defence have not

was there claim of an *alibi*. The court required the facts expected to be proved by the absent witnesses to be set forth. It appeared that the witnesses were expected to testify to the defendant's good character before the alleged murder. The government admitted this and the motion was denied. *People v. Wilson*, 3 Park. Cr. Cas. (N. Y.) 199.

1. **Time to Secure Witness to Contradict Unexpected Evidence.**—The fact that, on a trial for murder, the state produced material testimony of a new witness who had not been called at two previous judicial investigations of the case, and refused to grant the defendant a postponement until a contradicting witness, twelve miles away, could arrive. *Held*, to be ground for a new trial under Texas Code, article 568, as to some unexpected circumstances, etc. *Hodde v. State*, 8 Tex. App. 382.

2. *Miller v. State*, 18 Tex. App. 232.

3. *Boyett v. State*, (Tex. App.) 9 S. W. Rep. 275; *Bailey v. State*, (Tex. App.) 9 S. W. Rep. 270; *Stapleton v. Com.*, (Ky.) 3 S. W. Rep. 793.

Witness to Prove Another Guilty of the Offence.—A conviction for murder will not be reversed for refusing a continuance to procure witnesses to prove that another person, shown not to have been present at the killing, and confessed being guilty thereof, there being direct, as well as strong circumstantial evidence that defendant, and not the other person, committed the crime; as such confession, in view of these facts, would have been inadmissible. *Bailey v. State*, (Tex. App.) 9 S. W. Rep. 270.

Evidence Without Weight.—That defendant could prove, by witnesses, absent without fault, the time of night at which the homicide for which he was indicted occurred; that he was seen going in the direction of home shortly previous thereto, and not seen by them

again that night; that two men, of whom the defendant was not one, inquired for deceased the day before he was killed, threatened him, and went in the direction of the town where the crime was committed, is ground neither for a continuance nor a new trial, when the inculpatory evidence is so strong that the evidence would have probably made no change in the verdict. *Boyett v. State*, (Tex.) 9 S. W. Rep. 275.

Absent Witness to Prove Threats—When Continuance to Procure Refused.

—A motion for a continuance of the trial of an indictment for murder was supported by an affidavit that defendant could prove by an absent witness that deceased had threatened to take defendant's life, and the threats had been communicated to him. *Held*, that the proof showing that defendant had no fear of deceased, and that defendant's effort was to provoke him in order that he might shoot him, the overruling of the motion would not be disturbed. *Stapleton v. Com.*, (Ky.) 3 S. W. Rep. 793.

4. **Continuance Refused When not Probable that Witness Will be Present.**

—A continuance of a trial for homicide was asked for on the ground of the absence from the state of the physician who attended deceased, and by whom it was expected to prove that deceased died, not from the effects of the wound inflicted by defendant, but from pneumonia. Immediately after the killing, more than six years before the trial, defendant fled and remained away until a short time before the trial; and the physician in the meantime removed from the state, and had never returned, nor indicated any intention of returning. *Held*, that the continuance was properly refused, there being no reasonable expectation that the witness would ever attend in court. *Skates v. State*, 64 Miss. 644.

been summoned, and the omission is not the fault of defendant.¹ But postponement because defendant has not been able to obtain counsel, or has obtained counsel so recently that there has not been sufficient time in which to prepare the defence, is largely within the discretion of the court.²

Where the defendant has had sufficient time to prepare his defence, it is not generally error to put him upon his trial at a special or adjourned term, properly ordered and recognized; and he cannot be heard to object that such term was not ordered on his petition.³

XVIII. TRIAL OF JOINT DEFENDANTS.—Where two or more persons are jointly indicted for a homicide, they have the right to demand a separate trial;⁴ but they may waive such a trial, and where they have done so, it is within the discretion of the court to grant a subsequent application.⁵ The order in which defendants indicted jointly shall be severally tried is wholly within the discretion of the court; and, therefore, the principal in the second degree may properly be tried before the principal in the first degree, if the court so order.⁶ It is not necessary, however, that all the proceedings as to one of the defendants shall be concluded before the other is put upon his trial.⁷

1. Omission by Counsel.—Judgment will be reversed and a new trial granted in a capital case, where it appears that the defendant confided in his attorney to summon the necessary witnesses for his defence, but that they were not summoned, and that the court nevertheless ordered the trial to proceed, and that a conviction of murder in the first degree resulted. *State v. Lewis*, 9 Mo. App. 321.

2. Abandonment of Case by Counsel.—Continuance.—Discretion of Court.—Where the accused on arraignment informed the judge that he had retained counsel, but afterwards asked continuance because his counsel had abandoned his case, and counsel was then assigned, who defended him through the trial and on appeal; *held*, that the appellate court should not interfere with the discretion of the judge in refusing a continuance. *State v. Johnson*, 36 La. An. 852.

Time to Prepare Defence.—One Day not Sufficient.—Where, at the trial of a prosecution for homicide charged to have been committed only nine days previously, defendant asked a continuance on the ground that it was only on the preceding day he had been able to secure counsel, who had had no reasonable time to prepare the defence, it was *held*, that a refusal to grant the

continuance was error, for which a conviction would be set aside. *State v. Brooks*, (La.) 1 So. Rep. 421.

3. Collier v. State, 20 Ark. 36. See *Martin v. State*, 77 Ala. 1.

Trial at Special Term.—Where the record shows that a capital trial was had at an extra term, called and held conformably to law, and on the day specified in the orders calling it, it is of no consequence that the order fixing the day for trial was made on the day before the final adjournment of the regular term, while the order for the adjourned term was not made until the next day; nor is it material that an order was not made at the extra term setting a day for the trial. *Martin v. State*, 77 Ala. 1.

4. See People v. Alviso, 55 Cal. 230; *Studstill v. State*, 7 Ga. 2.

5. People v. Alviso, 55 Cal. 230.

6. Boyd v. State, 17 Ga. 194.

7. Where two were jointly indicted as principals in the second degree for murder, and the case being called as to one, his counsel stated that there was a plea of *autrefois acquit* to be disposed of, which was done, and verdict rendered for the state, it was *held*, that the other principal might be put on trial, without first concluding the proceedings against his co-defendant. *Studstill v. State*, 7 Ga. 2.

XIX. PRESENCE OF DEFENDANT.—Upon the trial of an indictment for a homicide as in prosecutions for other felonies, it is imperative that the defendant be present in court when any material step is taken in the progress of the trial, or of anything pertaining thereto.¹ But he may waive the right to be present at some minor steps in the proceedings by voluntarily remaining absent, or otherwise;² and his appeal is properly heard in his absence.³ The record must affirmatively show that defendant was present in court during the trial, and when the verdict was rendered and the sentence pronounced;⁴ but where the record states that the

1. See *Sylvester v. State*, 71 Ala. 17; *People v. Sing Lum*, 61 Cal. 538; *Territory v. Gay*, 2 Dak. 125; *Gladden v. State*, 12 Fla. 562; *Epps v. State*, 102 Ind. 539; *State v. Decklotts*, 19 Iowa 447; *Simpson v. State*, 56 Miss. 297; *Scaggs v. State*, 16 Miss. (8 Smed. & M.) 822; *State v. Schoenwald*, 31 Mo. 147; *State v. Cross*, 27 Mo. 332; *Territory v. Yarberry*, 2 N. Mex. 391; *State v. Cartwright*, 1 Oreg. 193; *Jewell v. Com.*, 22 Pa. St. 94; *State v. David*, 14 S. C. 428; *Shapoonmash v. U. S.*, 1 Wash. Ter. 219; *Leschi v. Territory*, 1 Wash. Ter. 23; *State v. Greer*, 22 W. Va. 800. Compare *People v. Bealoba*, 17 Cal. 380.

2. See *Territory v. Gay*, 2 Dak. 125; *Epps v. State*, 102 Ind. 539.

Examining Witness in Defendant's Absence.—A verdict on a murder trial will be set aside where it appears that a witness was asked two questions in the absence of the prisoner, though the judge directed the jury not to consider them, and on the prisoner's return they were repeated and the same answers received. *State v. Greer*, 22 W. Va. 800.

A Motion to Quash an indictment for murder may be made in the prisoner's absence. *Epps v. State*, 102 Ind. 539.

Between Verdict and Sentence.—Though highly proper, it is not necessary that the prisoner, charged with a capital offence, should be present in court at any time between the verdict and sentence. *Jewell v. Com.*, 22 Pa. St. 94.

Motion for New Trial.—A prisoner objected to sentence in a murder cause on the ground that he was not in court when a motion for a new trial was made and determined. The court offered to hear a re-argument of the motion, which was declined by the prisoner. *Held*, that there was no error to his injury in overruling the objection. *State v. Decklotts*, 19 Iowa 44.

3. *State v. Davis*, 14 S. C. 428.

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4. *Sylvester v. State*, 71 Ala. 17; *Simpson v. State*, 56 Miss. 297; *Scaggs v. State*, 16 Miss. (8 Smed. & M.) 722; *State v. Schoenwald*, 31 Mo. 147; *State v. Cross*, 27 Mo. 332; *State v. Cartwright*, 1 Oreg. 193; *Shapoonmash v. U. S.*, 1 Wash. Tr. 219; *Leschi v. Territory*, 1 Wash. Tr. 23. Compare *People v. Sing Lum*, 61 Cal. 598; *Territory v. Yarberry*, 2 N. Mex. 391, where it is *held* that defendant's presence will be presumed unless the record shows the contrary.

What is Sufficient Record to Show Defendant's Presence.—An entry of the proceedings on the second day of the trial in the following form: "Now again come as well the parties aforesaid as also the jurors," etc., sufficiently shows the presence of the defendant. *State v. Schoenwald*, 31 Mo. 147.

On a trial for murder, the record set forth the verdict "We, the jury, do find the defendant L guilty as charged in the indictment, and that he suffer death; and thereupon defendant gives notice for a motion for a new trial." The sentence then followed on the record, "and the defendant, saying nothing why judgment should not be pronounced against him, it is considered, etc. *Held*, that it sufficiently appeared that the defendant was not only present when the verdict was rendered against him, but that he was present when the sentence was pronounced. *Leschi v. Territory*, 1 Wash. Ter. 23.

Same—On an Appeal in a Capital Case, the record must show affirmatively that defendant was personally present in court when the day for his trial was fixed and the order made for summoning a special venire. *Sylvester v. State*, 71 Ala. 17.

Where a motion for a new trial is made by one who has been convicted of murder, the record must affirmatively show the presence of the prisoner when his motion is overruled. *Simpson v. State*, 56 Miss. 297.

prisoner was present when the trial began, though silent regarding his presence at some subsequent step, the presumption will be in favor of the regularity of the proceedings and the presence of defendant.¹

The absence of defendant's counsel is generally no ground for reversal, where the proceedings were regular and no prejudice to the defendant is shown.²

XX. JURY.—1. **Drawing, Summoning and Impanelling.**—The proceedings for obtaining jurors in prosecutions for homicide are usually the same as in trials for other felonies; but it is sometimes provided that certain special proceedings shall be had or special precautions taken in prosecutions where the punishment may be capital.³ In such cases all proceedings connected with the jury should be carried on with especial care and with the utmost caution, as an incident of the slightest weight may operate to the defendant's prejudice; and where the charge is for a capital offence, the defendant should not be allowed to waive the prescribed mode of drawing or summoning the jury, nor should any of the proceedings be varied in the slightest manner from the mode prescribed by law.⁴ In the absence of a showing to the contrary, it will always be presumed that the summoning of the jurors was regular;⁵ and where there are mistakes in the process, in the names of jurors, the error must be taken advantage of before conviction.⁶ It seems, however, that a slight deviation in the summoning of the jury, in point of time, is no serious error, where no prejudice to defendant is shown;⁷ nor is it ground for reversal that some of the panel are excused before trial without defendant's consent.⁸ It is often provided that a special venire may be ordered in a capital case;⁹ and this order should be shown

1. *State v. Cartwright*, 10 Oreg. 139. Compare *Shapoonmash v. U. S.*, 1 Wash. Tr. 219.

On a trial for murder, where the record showed that the prisoner was in court at the commencement of the trial, and that the court adjourned from one day to the next, but nothing was said about the prisoner until after the jury rendered their verdict, when it appeared that the court "remanded the prisoner to the custody of the marshal," it was *held*, that it could not be presumed that the prisoner was present in court when the verdict was rendered. *Shapoonmash v. U.S.*, 1 Wash. Tr. 219.

2. **Absence of Counsel** when verdict of guilty of murder was rendered, the jury being properly polled, is no ground for a new trial. *Penn v. State*, 62 Miss. 450.

3. See *Morrison v. State*, (Ala.); 4 So. Rep. 402.

4. **Record Must Show Regularity.**—The fact that all the names in the jury box prior to the convening of the court

are exhausted, or that the other contingencies enumerated in the jury act prerequisite to the right of the judge and sheriff to prepare the list, actually exist, must appear affirmatively upon the record, where the regularity and validity of a conviction for murder is in question. *People v. Dunn*, 1 Idaho 75.

But the fact that, in a murder trial, a panel of forty qualified jurors was procured on the 6th, when the cause was not to be tried until the 10th, constitutes no error. *State v. Collins*, 86 Mo. 245.

5. *Rash v. State*, 61 Ala. 89.

6. *Jewell v. Com.*, 22 Pa. St. 94.

7. See *People v. Vance*, 21 Cal. 400.

8. *People v. Lee*, 17 Cal. 76.

9. See *Jackson v. State*, 77 Ala. 18; *State v. Murph*, 1 Winst. (N. C.) No. 1, 129; *Loeffner v. State*, 10 Ohio St. 598; *Steagald v. State*, 22 Tex. App. 464; s. c., 9 Cr. L. Mag. 515.

"Regular Jury" Does not Include Talesmen.—In summoning a special venire for a capital case, which, under

on the record.¹ Where the number of jurors regularly summoned has been exhausted without obtaining a jury, it is proper, in some states, to order the officer of the court to summon talesmen for its completion,² and such an order, even in a prosecution for a capital offence, may be made orally, and need not be entered of record.³ But talesmen should not be called until all the jurors, either regularly or specially summoned, have been disposed of.⁴

2. Qualifications of Jurors.—The qualifications prescribed for jurors in homicide cases are the same as are required in all other criminal prosecutions. They must be good and lawful men,⁵ qualified electors of the county,⁶ and must not have served on

Alabama Code, sections 4872, 4874, must include the "regular jury," or "those summoned on the regular juries for the week," only jurors regularly summoned and in attendance are meant, not talesmen, or those failing to attend, or those excused. *Jackson v. State*, 77 Ala. 18.

Entitling Venire.—A *venire* for a special jury in a capital case need not either be entitled as of the case pending, nor state the name of the person alleged to have been murdered. *Loeffner v. State*, 10 Ohio St. 598.

Challenge to the Array.—It is no ground of challenge to the array in a capital case, that it does not appear from an order for a special *venire facias*, that it was made in the case of the prisoner. It is sufficient if it appears that it was made at the term at which the trial was had. *State v. Murph*, 1 Winst. (N. C.) No. 1, 129.

1. *Stegald v. State*, 22 Tex. App. 464; s. c., 9 Cr. L. Mag. 515.

2. See *Morrison v. State*, (Ala.) 4 So. Rep. 402; *State v. Allen*, 47 Conn. 121.

Where, in a capital case, the number of regular jurors had been exhausted without making up the panel, and the prisoner's counsel moved that the court order additional regularly appointed jurors to be summoned instead of appointing talesmen, *held*, that the court committed no error in denying the motion. *State v. Allen*, 47 Conn. 121.

3. *Morrison v. State*, (Ala.) 4 So. Rep. 402.

4. **Drawing Jury**—Alabama Code, 1886, section 4324, provides that on a trial for a capital offence, the names of the special jurors for the case and the regular jurors in attendance must be written on slips of paper, and all placed in the same box, and an officer designated by the court

must draw them out, one by one, and if from these names a jury be not obtained, the court must direct the sheriff to summon other jurors. The officers who had charge of the drawing of a jury in a capital case failed to put all the names of those summoned as jurors in the box. All the names put in were drawn out, and a jury obtained. The court ordered the other names to be put into the box, and the drawing proceeded. Defendant insisted that talesman should be summoned, which the court refused, until all jurors summoned had been drawn, when talesmen were summoned to complete the jury. *Held*, that the refusal to grant defendant's request was proper. *Morrison v. State*, (Ala.) 4 So. Rep. 402.

5. **Objection Too Late on Appeal.**—But it is too late to raise the objection that the record does not show that the petit jurors were good and lawful men for the first time in the supreme court. *Potsdamer v. State*, 17 Fla. 895.

Juror Convicted of Infamous Crime—Pardon.—On a trial for murder, a motion in arrest of judgment, on the ground that one of the jurors had been convicted of a felony, is properly overruled where it appears that the juror has been pardoned, and the effect of the pardon, under the constitution in force when it was granted, was not merely to release the offender from punishment, but in legal contemplation to obliterate the offence itself. *Edward's Case*, 78 Va. 39, 43; s. c., 8 Va. L. J. 22; *Puryear v. Com.*, (Va.) 9 Cr. L. Mag. 788.

6. **Juror Non-resident—When Objection to be Taken.**—The objection that a juror is disqualified to serve because a non-resident in the county must, to be available, be taken before he is sworn, even in a capital offence. *Costly v. State*, 19 Ga. 614.

the grand jury which found the indictment.¹ But the fact that a person summoned as a juror has been peremptorily challenged by defendant at a former trial of the indictment does not disqualify him.²

3. Defendant's List.—Where the indictment is for a capital offence the law sometimes gives the defendant the right to have served upon him, before trial, a list of the jurors summoned.³ The object of conferring this right upon the accused is to enable him better to exercise his right of challenge; and, hence, this part of the proceedings should be carried on with that object in view, and the service of any list which will accomplish this purpose is sufficient.⁴ The defendant is not entitled to be served before trial with a list of the talesmen.⁵

4. Challenge.—*a.* FOR CAUSE.—(1) *Implied Bias.*—A juror may be challenged for implied bias in prosecutions for homicide, as well as in other cases, if within the prohibited degree of consanguinity or affinity to the defendant or to the deceased; and if it be found that a person so related has served upon the jury, a

1. On a trial for murder, the court may excuse a juror where he does not remember whether he was on the grand jury that found the indictment, and the court cannot find the record which would give information as to whether he was on such jury. And it will be presumed that the search after the record was sufficient, there being no evidence to the contrary. *State v. Kelly*, 1 Nev. 224.

2. *Blackman v. State*, (Ga.) 7 S. E. Rep. 626.

3. *Kenan v. State*, 73 Ala. 15; *Aikin v. State*, 35 Ala. 399; *State v. Ward*, 14 La. An. 684; *State v. Bangor*, 30 Me. 341; *State v. Brooks*, 30 N. J. L. (1 Vr.) 356. See Ala. Code 1776, § 4782; La. Rev. Stat. 1876, § 992; 1879, c. 55, § 1; Me. Rev. Stat. 1871, c. 134, § 14; Miss. Rev. Code 1880, § 3057; Mo. Rev. Stat. 1879, §§ 1900, 1904; N. H. Gen. Stat. 1867, c. 243, § 1; Ohio Rev. Stat. 1880, §§ 7271, 7273.

Right to List Depends on Statute.—It is quite clear that the defendant's right to a list of the jurors depends entirely on statutory provision. See *Driskill v. State*, 45 Ala. 21; *Rex v. Dowling*, 3 Cox, C. C. 509; 1 *Thompson on Trials*, §§ 17, 18.

4. List Served—Sufficiency of.—It not appearing that the defendant had been misled by the *venire*, which only gave the initials of the Christian names, nor that the jurors were not customarily known by their initials, the *venire* was held good. *Aikin v. State*, 35 Ala. 399.

The sheriff, when he served the

venire upon the prisoner, told him that it was "a list of the jury summoned to try his case for the murder of A, at the present term of the court," and read the list to him. *Held*, that it was not fatal that the list was headed "jurors summoned for M, instead of jurors summoned to try M." *Aikin v. State*, 35 Ala. 399.

A list of the jurors, headed "list of jurors for the third and fourth weeks of the October term of the district court of the parish of Caddo," duly served on the prisoner, *held*, to be a sufficient compliance with law. *State v. Ward*, 14 La. An. 684.

Same—Abbreviation of Place of Residence.—A list of jurors served on a defendant indicted for murder, at the same time with a copy of the indictment, having on it the words "petit jury, April term, 1863," followed by forty-eight names, with abbreviations of the names of the places of residence, which, however, could be understood as well if there were no abbreviations, is sufficient. And it makes no difference that there is a cross between the two parts of the name of a juror. *State v. Brooks*, 30 N. J. L. (1 Vr.) 356.

Same—Amendment.—While proceedings are in *fiat*, the court may permit the sheriff to amend the list of jurors served on defendant so as to correspond to the title of the cause, and to correct the return of service so as to correctly show service on defendant. *Kenan v. State*, 73 Ala. 15.

5. *State v. Bangor*, 30 Me. 341.

verdict of guilty will be reversed.¹ It has been held that ignorance as to the relationship is cause to treat service as a juror in the same manner as if the jurymen had not been so related.²

(2) *Actual Bias*.—A juror may be challenged for actual bias when it is fairly shown that he has a decided opinion as to the defendant's guilt or innocence, which would probably affect his verdict; but the mere fact that the juror has formed or expressed an opinion not positive and based upon rumor, does not disqualify him, where it is his opinion that he can try the case impartially and fairly, according to the law and the evidence as received by the jury, without regard to, and notwithstanding what he has read or heard.³

Where, in a prosecution for a capital offence, a juror, on his *voir dire* examination, states that he has conscientious scruples against capital punishment, which would probably influence him in returning a verdict, he may be challenged for cause by the prose-

1. See *State v. Hanley*, 34 Minn. 430; *State v. Congdon*, 14 R. I. 458; *Parrish v. State*, 12 Lea (Tenn.) 655.

A Verdict of Manlaughter will be reversed if a juror related to the defendant within the prohibited degree has been passed as competent. *Parrish v. State*, 12 Lea (Tenn.) 655.

Consanguinity in the Sixth Degree between a juror and one tried for murder will not necessarily be deemed ground for a new trial. *State v. Congdon*, 14 R. I. 458.

2. Ignorance of Relationship.—A new trial for murder will not be granted because one of the jurors was second cousin to the deceased, of which relationship he was wholly ignorant. *Traviss v. Com.*, 106 Pa. St. 597.

3. *Spies v. People* (Anarchists' Case), 122, Ill., 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829; *State v. Sopher*, 70 Iowa 494; s. c., 9 Cr. L. Mag. 218; *Roy v. State*, 2 Kan. 405; *Holt v. People*, 13 Mich. 224; *Parker v. State*, 55 Miss. 414; *Hall v. Com.*, (Pa.) 10 Cr. L. Mag. 409; *Steagald v. State*, 22 Tex. App. 464; s. c., 9 Cr. L. Mag. 515. See *People v. Woods*, 29 Cal. 635; *Blackman v. State*, (Ga.) 7 S. E. Rep. 726; *Simms v. State*, 8 Tex. App. 230.

Prejudice That Would Require Evidence to Remove.—A proposed juror admitted that he had formed an opinion respecting the defendant's guilt or innocence, and that it would require evidence to remove it. He stated further that the opinion was formed upon hearsay, which he valued little, and that he could render an impartial verdict upon the law and the evidence.

Held, that the juror was qualified, and not subject to challenge for cause. *Steagald v. State*, 22 Tex. App. 464; s. c., 9 Cr. L. Mag. 515.

Opinion Formed.—A juror admitted that he had formed an impression from what he had read, but it was not what he would call a fixed opinion. *Held*, that the question as to what he meant by the impression, "whether it was the same thing as an opinion," was properly overruled, and that the juror was competent. *Hall v. Com.*, (Pa.) 10 Cr. L. Mag. 409.

"Partial Opinion."—Where, in a trial for murder, a juror, examined as to his competency, said, "I have formed a partial opinion as to the guilt or innocence of the defendant from rumors heard in the street, but not a positive opinion," it was *held* that such opinion did not disqualify him. *Holt v. People*, 13 Mich. 224.

Former Statements.—It is not ground for a new trial that a juror who had stated on his *voir dire* that he had no prejudice against defendant, and could render an impartial verdict, was subsequently discovered to have stated before the trial that he believed defendant guilty, because two juries had found him guilty, as the two statements are not inconsistent. *Blackman v. State*, (Ga.) 7 S. E. Rep. 626.

One convicted of murder moved for a new trial on the ground that one of the jurors, before being impanelled, said that if put on the jury he would hang the defendant. By a counter-showing it appeared that the juror's remark was a mere device to avoid service on the

cution,¹ even though he may state that he can try the case fairly, and carry out the law; his opposition being to the law prescribing the punishment, and not to its fulfillment by the courts.² But where the indictment is for homicide of a grade not capital, the opinions of a juror as to the death penalty are immaterial.³

It may sometimes be cause for challenge that a juror is prejudiced against the defence of insanity; but not where he states on his *voir dire* examination that he can try the cause fairly and impartially according to the law and the evidence, under such a defence.⁴

Prejudice against "anarchism" cannot disqualify a juror upon the trial of an indictment of an anarchist for murder, resulting from an anarchistic conspiracy; for anarchy is crime, and prejudice against crime is not only proper in a juror, but laudable.⁵

It is good cause for challenge that a juror states that he would

jury, and that he had no bias. *Held*, not error to overrule the motion. *Simms v. State*, 8 Tex. App. 230.

1. *Murphy v. State*, 37 Ala. 142; *State v. Jewell*, 33 Me. 583. See *Smith v. State*, 55 Miss. 410.

Conscientious Scruples.—On a trial for murder, a refusal to comply with the request of the accused further to examine two members of the special venire touching their conscientious scruples, after each had answered that he "would not like for a man to be hung." *Held*, to be error. *Smith v. State*, 55 Miss. 410.

2. *Stephenson v. State*, 110 Ind. 358; s. c., 59 Am. Rep. 216.

On the trial of an indictment for murder, a juror answered on his *voir dire* that he regarded the law inflicting a death penalty as wrong, but thought the jury should carry out the law; that he had conscientious scruples aside from the law, but felt free to carry out the law; that he had for years thought the law was not just right, and that, leaving out the law, he had scruples. *Held*, that although the case was not within the letter of the statute prescribing as cause for challenge such conscientious opinions as would preclude affixing the death penalty in a capital case (*Ind. Rev. Stat.* 1881, § 1791); the discharge of the juror against defendant's objection was not ground for reversal of a conviction. *Stephenson v. State*, 110 Ind. 358; s. c., 59 Am. Rep. 216.

3. *Finn v. State*, 5 Ind. 400.

4. *Hall v. Com.*, (Pa.) 10 Cr. L. Mag. 409.

Declarations of Conscientious Scruples on Voir Dire Examination.—A juror having on his *voir dire* declared that he had conscientious scruples against a defence on the ground of insanity. *Held*, that it was not error to exclude defendant's questions: "Whether under any circumstances, in his capacity as a juror, he thinks it would be possible to set up such a defence, and if he would consider it a valid defence? Whether he could conceive of any case in which there could be such a defence, which he would entertain as a juror?" *Hall v. Com.*, (Pa.) 10 Cr. L. Mag. 409.

5. See *Spies v. People* (*Anarchists' Case*), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

Prejudice Against "Anarchism."—In *Spies v. People*, *supra*, the court say: "The juror . . . further stated that he had a prejudice against socialists, communists and anarchists. This did not disqualify him from sitting as a juror. If the theories of the anarchist should be carried into practical effect, they would involve the destruction of all law and government. Law and government cannot be abolished without revolution, bloodshed and murder. The socialist or communist, if he attempted to put into practical operation his doctrine of a community of property, would destroy individual rights in property. Practically considered, the idea of taking a man's property from him without his consent, for the purpose of putting it into a common fund for the benefit of the community at large, involves the commission of theft and robbery. Therefore, the

not convict a person accused of murder upon circumstantial evidence alone.¹

b. PEREMPTORY.—At common law the number of jurors whom the defendant was permitted to challenge peremptorily in cases of felony was thirty-five; but the number allowed is now usually prescribed by statute, and it is generally the same in all homicide cases as in other prosecutions for felony;² but a larger number of challenges is sometimes allowed in trials for capital offences.³

5. Oath of Jurors.—The oath of petit jurors in a prosecution for homicide is the common law oath in criminal cases, unless otherwise prescribed by law. But a slight variation in the words, without the omission of any important part, is not reversible error.⁴

6. Discharge of Jurors.—It is sometimes proper for the court to discharge jurors during trial; but the cause for which a juror may be discharged should not be the result of the action of the court

prejudice, which the ordinary citizen, who looks at things from a practical standpoint, would have against anarchism and communism, would be nothing more than a prejudice against crime.

"In *Winnesheik Insurance Co. v. Schueller*, 60 Ill. 465, we said: 'A man may have a prejudice against crime, against a mean action, against dishonesty, and still be a competent juror. This is proper, and such prejudice will never force a jury to prejudice an innocent and honest man.' In *Robinson et al. v. Randall*, 82 Ill. 521, we again said: 'The mere fact, therefore, that a juror may have a prejudice against crime does not disqualify him as a juror. A juror may be prejudiced against larceny, or burglary, or murder, and yet such fact would not in the least disqualify him from sitting upon a jury to try some person, who might be charged with one of these crimes.'"

1. *State v. Leabo*, 89 Mo. 247.

2. See *Mimms v. State*, 16 Ohio St. 221.

3. See *Noles v. State*, 24 Ala. 672.

Where the accused may be convicted under the indictment of murder in the first degree, he is entitled to the number of peremptory challenges allowed in prosecutions for that offence; and it is, therefore, no objection to the form of indictment prescribed by the Code, page 698, that it does not distinguish between the different degrees of murder. *Noles v. State*, 24 Ala. 672.

4. See *Crist v. State*, 21 Ala. 137; *Baxter v. State*, 15 Lea (Tenn.) 657; *Fitzhugh v. State*, 13 Lea (Tenn.) 258; *Hartigan v. Territory*, 1 Wash. Tr. 447.

Record Should Show Jury Sworn.—Where it is very manifest from the

record that the jury was sworn to try the issues made by the charges in an indictment for murder, and by defendant's plea of not guilty, it is immaterial that the language used is not that ordinarily used. *Baxter v. State*, 15 Lea (Tenn.) 657.

Same—Form of Oath.—Where the record in a capital case recites that the jurors were sworn "to well and truly try the issues joined," and containing the form of "well and truly try and due deliverance make," it is sufficient at least when first objected to in the appellate court. *Fitzhugh v. State*, 13 Lea (Tenn.) 258.

A verdict in a capital case will not be set aside because the jury were sworn to accept the law as given by the court, this being their duty in any event. *Hartigan v. Territory*, 1 Wash. Tr. 447.

Same—Failure of Record to Show.—On a trial for murder, the record, at its commencement, did not state that the jury were sworn, but at the commencement of the record of the second day's proceedings, it stated that "thereupon also came the defendant, and his counsel, as also the counsel for the state, together with the jury that had been impanelled as aforesaid, and sworn as aforesaid, and the trial of said cause was resumed," etc.; and the record afterwards stated, that the jury "return into court, and on their oaths say," etc. *Held*, that it sufficiently appeared from the record that the jury were sworn, and that the appellate court would presume they were sworn before the testimony was heard. *Crist v. State*, 21 Ala. 137.

in derogation of the prisoner's right, but something over which the court had no control, as, for instance, sickness or other imperative necessity.¹

7. Separation.—*a. DURING TRIAL.*—The question whether the separation of the jury on the trial of an indictment for homicide is error, demanding a new trial, is one which largely depends upon the circumstance of each particular instance, and no general rule can be laid down which can be followed in all cases; but the weight of authority now is to the effect that it is not error for the court to allow the jury to separate prior to the final submission of the cause, under proper instructions as to their acts regarding the case on trial during their separation, unless it is shown that thereby something occurred by which defendant was liable to be prejudiced;² and the better opinion is that this

1. *Bates v. State*, 19 Tex. 122.

2. See *People v. Bonney*, 19 Cal. 426; *May v. People*, 8 Colo. 210; *Elkin v. People*, 5 Colo. 508; *State v. Babcock*, 1 Conn. 401; *State v. Madoill*, 12 Fla. 151; *Kirk v. State*, 73 Ga. 620; *Neal v. State*, 64 Ga. 281; *Reins v. People*, 30 Ill. 256; *Henning v. State*, 106 Ind. 386; *s. c.*, 55 Am. Rep. 756; *Jarrell v. State*, 58 Ind. 293; *Evans v. State*, 7 Ind. 271; *State v. Felter*, 25 Iowa 67; *State v. Hornsby*, 32 La. An. 1268; *State v. Johnson*, 30 La. An. 921; *State v. Frank*, 23 La. An. 213; *State v. Evans*, 21 La. An. 321; *State v. Tucker*, 10 La. An. 501; *State v. Desmond*, 5 La. An. 399; *State v. Crosby*, 4 La. An. 434; *State v. Hornsby*, 8 Rob. (La.) 354; *s. c.*, 41 Am. Dec. 305; *State v. Ryan*, 13 Minn. 370; *Bilansky v. State*, 3 Minn. 427; *Coleman v. State*, 59 Miss. 484; *Territory v. Clayton*, (Mont. Tr.) 19 Pac. Rep. 293; *Stephens v. People*, 19 N. Y. 553; *People v. Montgomery*, 13 Abb. (N. Y.) Pr. N. S. 207; *Stephens v. People*, 4 Park. Cr. Cas. (N. Y.) 396; *State v. Baker*, 63 N. C. 276; *Moss v. Com.*, 107 Pa. St. 267; *State v. Anderson*, 2 Bail. (S. C.) L. 565; *State v. McKee*, 1 Bail. (S. C.) L. 651; *s. c.*, 21 Am. Dec. 499; *Wilson v. State*, 6 Baxt. (Tenn.) 206; *Odle v. State*, 6 Baxt. (Tenn.) 159; *Boyett v. State*, (Tex. App.) 9 S. W. Rep. 275; *Bailey v. State*, (Tex. App.) 9 So. Rep. 270; *Wilson v. State*, 18 Tex. App. 576; *Ogle v. State*, 16 Tex. App. 361; *West v. State*, 7 Tex. App. 150; *Cox v. State*, 7 Tex. App. 1; *Hartigan v. Territory*, 1 Wash. Tr. 447. *Compare Berry v. State*, 10 Ga. 511; *Anonymous*, 63 Me. 590; *State v. Collins*, 81 Mo. 652; *Peiffer v. Com.*, 15 Pa. St. 468; *s. c.*, 53 Am. Dec. 605; *Cochran*

v. State, 7 Humph. (Tenn.) 544; *Wiley v. State*, 1 Swan (Tenn.) 256; *Grisson v. State*, 4 Tex. App. 374.

Separation While Eating Dinner.—Where, during a trial for murder, the jury were put in charge of an officer to be kept together, with permission to eat their dinner, and one of the jurors was allowed "to pass by or near a number of persons and to eat his dinner a short distance from the other jurors, but he conversed with no one," it was *held* that this was nothing of which the prisoner had any right to complain. *State v. Baker*, 63 N. C. 276.

Drinking at Hotel.—A new trial will not necessarily be granted because two jurors during the trial, went into a neighboring hotel and took a drink, no harm being shown to have resulted. *May v. People*, 8 Colo. 210.

Physical Necessity.—It is not sufficient cause for granting a new trial that one of the jurors, who was suffering from diarrhœa, was called suddenly to the privy, while the bailiff was absent, so that he could not notify him, the juror having returned as soon as possible to the jury-room, and there being no claim that he spoke or saw any one. *Territory v. Clayton*, (Mont.) 19 Pac. Rep. 293.

Absence of Juror During Adjournment.—Where, under an indictment for murder, a verdict of manslaughter was rendered, *held*, that the absence of one of the jurors for two days during an adjournment, with the permission of the court, and in the custody of a sworn officer, was no ground for a new trial. *Moss v. Com.*, 107 Pa. St. 267.

Sickness of Relative.—That a juror was permitted, during a murder trial, to go home to see his sick wife, accom-

applies to capital cases,¹ although it was formerly frequently maintained that it does not.² And even where such separation is error, the defendant waives his right to object, unless he does so before verdict.³ But it has been held in some cases that the prosecution has the burden to show that nothing occurred whereby the defendant was likely to suffer prejudice;⁴ and still other courts have maintained, either under a statutory provision or otherwise, that the jury in capital cases can separate only before being duly empanelled, sworn, and charged with the case,⁵ unless in charge of an officer.⁶ Again, it is sometimes maintained, that while the jury may be permitted to separate with the defendant's consent, it is error to allow a separation over his objection.⁷ The jurors have no right, however, in capital cases at least, to separate without authority of the court.⁸

b. AFTER RETIRING.—The rule is different as to a separation of the jurors after they have retired to consider the case; and they must not separate until they have rendered their verdict.⁹ This rule may, however, have its exceptions. Thus, a separation of a jury, caused by their discharge after returning a verdict which was informal, they being immediately recalled, and the verdict

panied by a deputy sheriff, with the consent of counsel; that he remained in the room with his wife and little girl only, for about thirty minutes; that he conversed with no one but his wife; and that the only reference to the trial was, in answer to her question, he stated that it would continue several days,—is no ground for setting aside the verdict. *Boyett v. State*, (Tex.) 9 S. W. Rep. 275.

In a capital case the judge may give a juror leave of absence to attend a dying brother. *Coleman v. State*, 59 Miss. 484.

Acting in Drama.—Defendant on trial for murder consented that a juror should act in a dramatic performance on condition that he should be attended by the sheriff. *Held*, that a breach of the condition vitiated a verdict, although the juror deposed that he conversed with no one concerning the trial during the time of his absence. *Wilson v. State*, 18 Tex. App. 576.

Place of Eating.—The fact that while a trial for murder was in progress, part of the jurors were allowed to sit at their meals with three of the witnesses for the state, in a distinct room from that where sat the officer in charge and the other jurors, was *held* to vitiate the verdict in *Odle v. State*, 6 Baxt. (Tenn.) 159.

Otherwise as to the mere fact that the jury took their meals at the house

of a person who aided the prosecution in selecting the jury, no tampering being shown. *Wilson v. State*, 6 Baxt. (Tenn.) 206.

Under Missouri Rev. St. 1879, § 1909, permitting the separation of the jury "except in capital cases," *held*, that a separation in a capital case was ground for reversal of judgment, though there was no suspicion of undue influence. *State v. Collins*, 81 Mo. 652.

1. *Williams v. State*, 48 Ala. 85; *Morgan v. State*, 48 Ala. 65; *Jumpertz v. People*, 21 Ill. 375; *Quinn v. State*, 14 Ind. 589; *State v. Frank*, 23 La. An. 213; *State v. Evans*, 21 La. An. 321; *Woods v. State*, 43 Miss. 364; *McLean v. State*, 8 Mo. 153; *Com. v. Boyle*, 9 Phila. (Pa.) 592; *People v. Shafer*, 1 Utah Tr. 260; *State v. Godfrey*, *Brayt*. (Vt.) 170.

2. *Hartigan v. Territory*, 1 Wash. Tr. 447. See *Bilansky v. State*, 3 Minn. 427.

3. *Henning v. State*, 106 Ind. 386; s. c., 55 Am. Rep. 756.

4. *Monroe v. State*, 5 Ga. 85; *Moss v. Com.*, 107 Pa. St. 267; *Keenan v. State*, 8 Wis. 132.

5. *State v. Burns*, 33 Mo. 483; *Peiffer v. Com.*, 15 Pa. St. 468.

6. *Grisson v. State*, 4 Tex. App. 374.

7. *Anderson v. State*, 28 Ind. 22; *Quinn v. State*, 14 Ind. 589.

8. *Russell v. People*, 44 Ill. 508.

9. See *Maher v. State*, 3 Minn. 444.

corrected, only thirty seconds elapsing until their recall, in which time only a few had broken ranks and removed from where they stood when they were discharged, will not vitiate the verdict.¹

8. Misconduct by or Relating to the Jury. — *a. DURING TRIAL.* — The jury in a murder case, especially if the charge be for a capital offence, should always be in charge of a sworn officer when not in the presence of the court.² But the fact that such officer may be interested as a witness is not, of itself, sufficient to preclude him from having charge of the jury.³ The officer must hold no communication whatever with any of the jurors concerning the case on trial unless authorized to do so by the law; he must lodge them at night where there is no danger that they will be tampered with or spoken to concerning the case;⁴ he must take general care that nothing occurs whereby they may be prejudiced in any way concerning the case on trial;⁵ and he has no right to allow them to exercise any unusual rights or privileges without

1. *Boyett v. State*, (Tex.) 9 S. W. Rep. 275.

2. *Gibbons v. People*, 23 Ill. 518; *Trim v. Com.*, 18 Gratt. (Va.) 983. See *Kirk v. State*, 73 Ga. 620; *Dumas v. State*, 63 Ga. 600.

Unsworn Deputy. — That a part of a jury, during a trial for murder, were locked in a room with an unsworn deputy sheriff, during the temporary absence of the high sheriff with the others, was *held* not to be such misconduct of the jury as would entitle the prisoner to a new trial. *Trim v. Com.*, 18 Gratt. (Va.) 983.

3. At the trial of a prosecution for homicide, the sheriff in charge of the jury during their deliberations had entered the complaint on which defendant was arrested and had also testified as a witness for the people. *Held*, that this was not ground for a new trial. *People v. Coughlin*, (Mich.) 32 N. W. Rep. 905; s. c., 9 West. Rep. 129.

4. **Lodging Jury with Brother of Prosecuting Witness.** — A new trial will not be granted to a prisoner convicted of murder, because the jury were lodged at night in the house of a brother of one who had furnished money and otherwise aided in the prosecution, said brother being the jailer, and having had no communication with the jury who were in charge of a bailiff. *Dumas v. State*, 63 Ga. 600.

Bailiff Lodging with Jury. — It is not ground for reversal that the bailiff in charge of the jury slept in the room with them one night during the trial, nothing further appearing to defendant's prejudice. *Kirk v. State*, 73 Ga. 620.

5. **Receiving Letters.** — During the trial of a capital case, the jury were allowed to receive sealed letters. *Held*, that this afforded ground sufficient for setting aside a verdict of guilty of murder in the first degree, although there was no reason for supposing that the letters contained anything likely to influence the verdict. *State v. Robinson*, 20 W. Va. 713; s. c., 43 Am. Rep. 799.

Reading Newspaper. — During the progress of a murder trial, and while the court had taken a recess, the jury were in the court-house in charge of the sheriff, and one of the jurymen, standing near a window, saw a newspaper in the hands of a person near the window on the outside of the court-house, and asked him for it. The party addressed handed up the paper to the juror saying no more than "you are welcome." The juror glanced over the paper and then handed it back. *Held*, that this was not such misconduct in the juror as would entitle the defendant to a new trial. *State v. Anderson*, 4 Nev. 265.

Juror Examining Skull of Deceased. — It is no reason for setting aside a conviction of murder that, during a recess, one of the jurors examined a piece of the skull of the person alleged to have been murdered, which was lying on the district attorney's table, the circumstances of the case being such as to show that the juror could not have been misled thereby, and the fact of the juror having examined the skull being known to the prisoner's counsel before they entered upon the defence. *Wilson v. People*, 4 Park. Cr. Cas. (N. Y.) 619.

permission of the court.¹ But the court has a large discretion as to their acts during the trial, which, when exercised beforehand, will not be interfered with, unless abused.²

But counsel should not say or do anything, not in the line of their duties, which might have the effect of influencing the jury.³ One on trial for a homicide, like any other defendant, will be deemed to have waived any irregularity in the conduct of the jury which he perceives but neglects to have remedied in proper time.⁴

b. AFTER RETIRING.—The only duty of the jury, after they retire, stated in general terms, is to confer together touching the guilt or innocence of the defendant in relation to the homicide for which he is on trial, until they arrive at a unanimous conclusion, or until it is manifest that they cannot agree. They should all consult together, each in the hearing of all the others; and secrecy between some of them, from the others, is improper.⁵ They should confer with no one except the officer in charge; nor should any person except him be allowed in their presence;⁶ and they should not consult even him upon any question whatever related to the case under their consideration.⁷ They should not

1. See *People v. Gray*, 61 Cal. 164; s. c., 44 Am. Rep. 549; *Jones v. People*, 6 Colo. 452; s. c., 45 Am. Rep. 526.

Jurors Drinking Liquors.—During a murder trial, lasting eleven days, large quantities of beer, wine and whisky were ordered by the jury, at their own expense, and consumed by them, mostly before the submission, but some afterwards, without permission of the court and without the knowledge of the defendant. It did not clearly appear that any juror was intoxicated. *Held*, that a conviction must be set aside. *People v. Gray*, 61 Cal. 164; s. c., 44 Am. Rep. 549.

Same—Use in Moderate Quantities.—But it has been *held* that a conviction in a capital case will not be set aside because the jury used, during the confinement, a moderate quantity of intoxicating liquors. *Jones v. People*, 6 Colo. 452; s. c., 45 Am. Rep. 526.

2. Attending Theater in a Body.—A conviction for murder will not be set aside because, with the permission of the court, they attended the theater in a body, in charge of an officer. *Jones v. People*, 6 Colo. 452; s. c., 45 Am. Rep. 526.

Attending Church.—The refusal of the court below to grant a new trial for the murder because of a sermon listened to by the jury and charged to have prejudiced them, is a matter of discretion and will not be reviewed by the supreme

court. *Alexander v. Com.*, 105 Pa. St. 1.

3. Counsel Offering Nourishment to Jury.—Offers by the district attorney and also by counsel of the accused, made in presence of the jurors, to contribute to their sustenance during the trial, *held*, highly improper, but not ground for a reversal of a judgment of conviction of murder. *Thomas v. State*, 61 Miss. 60.

4. Waiver of Irregularity by Failure to Object.—So *held*, where the prisoner's counsel stated privately to the court that it was not best to say anything about a juror's reading a newspaper report of the homicide, as it might, by giving the article undue prominence, do more harm than good. *Bulliner v. People*, 95 Ill. 394.

5. Monroe v. State, 5 Ga. 85.

6. Drunken Man in Jury-Room.—But a verdict of guilty of murder will not be set aside because a drunken man was found in the jury-room asleep, he having been at once ejected, and it being certain that his presence caused no harm. *State v. Gould*, 90 N. C. 658.

7. State v. Brown, 22 Kan. 222; *Wilson v. People*, 4 Park. Cr. Cas. (N. Y.) 619; *People v. Hartung*, 4 Park. Cr. Cas. (N. Y.) 259.

But such an irregularity will not vitiate a conviction if it appear beyond all reasonable doubt that no injury has resulted to the prisoner therefrom. *Wilson v. People*, 4 Park. Cr. Cas. (N.

be allowed to communicate with the judge, except in open court, in the prisoner's presence;¹ nor is it proper for them to receive or read law books, or accounts or records of other trials or cases,² or examine things not in evidence,³ or places accessible to them,

Y.) 619; *People v. Hartung*, 4 Park. Cr. Cas. (N. Y.) 259.

A Bailiff's Assisting the Jury to decipher and read the instructions, although at request of jurors, *held*, to be ground for setting aside a verdict of guilty of murder. *State v. Brown*, 22 Kan. 222.

1. *Cartwright v. State*, 12 Lea (Tenn.) 620.

Judge Speaking to Jury.—But a verdict will not be set aside merely because the judge, as he passed the jury-room, said that he was going home, and that if they agreed they could send for him, it being apparent that the communication could not have done harm. *Cartwright v. State*, 12 Lea (Tenn.) 620.

2. *Jones v. State*, 89 Ind. 82; *State v. Robinson*, 20 W. Va. 713; s. c., 43 Am. Rep. 799. See *Graves v. State*, 63 Ga. 740; *State v. Harris*, 34 La. An. 118; *Gandolfo v. State*, 11 Ohio St. 114.

Reading Opinion of Supreme Court.—Upon the trial of a capital case, in which a verdict of guilty was rendered, it appeared that the jury had with them in the jury-room the volume of the opinions of the supreme court containing the report of a previous trial of the case. *Held*, that a new trial should be granted, it not appearing from affidavits of the jurors, or otherwise, that they had not read the report of the case printed therein. *Jones v. State*, 89 Ind. 82.

Records of Insanity Cases.—The defence was moral insanity, and insanity caused by intoxication. The jury, while together, were allowed to receive newspapers containing accounts of the Guiteau trial, and of the testimony of one of the expert physicians for the government, expressing his disbelief in moral insanity and dipsomania. *Held*, that this afforded ground for setting aside the verdict. *State v. Robinson*, 20 W. Va. 713; s. c., 43 Am. Rep. 799.

Sending Statutes to Jury.—Where the judge, presiding at the trial of a prisoner for murder, sent to the jury, on their request, in the absence of the prisoner, a copy of the statutes of the state, calling their attention to the three sections relating to homicide, it was *held*, that it was an exercise of discretion on the

part of the judge which did not prejudice the prisoner, and furnished no ground for the reversal of judgment. *Gandolfo v. State*, 11 Ohio St. 114.

Law Books in Jury-Room.—A new trial will not be granted to one convicted of manslaughter, because there were law books in the jury-room, and because the jury accidentally had with them the written testimony taken at the inquest, it not appearing that the evidence or the books were read, or that any harm resulted to the prisoner from the fact. *State v. Harris*, 34 La. An. 118.

Book of Forms.—A new trial will not be granted in a murder case because the jury, after they had agreed on their verdict, procured a copy of the Code for the purpose of putting their verdict in proper form. *Graves v. State*, 63 Ga. 740.

3. *Yates v. People*, 38 Ill. 527; *Wilson v. People*, 4 Park. Cr. Cas. (N. Y.) 619; *People v. Hartung*, 4 Park. Cr. Cas. (N. Y.) 256. See *Titus v. State*, 49 N. J. L. (20 Vr.) 36; s. c., 9 Cr. L. Mag. 353.

Sending Pistol to Jury-Room.—On a trial upon a charge of murder, it was *held* to be sufficient cause for new trial, that, after the jury had retired, a pistol, that had been shown to them on the trial, but not identified as the one by means of which the deceased came to his death, was sent to them without the prisoner's consent; and that they by experimenting therewith, were influenced in determining the guilt of the prisoner. *Yates v. People*, 38 Ill. 527.

Examining Woody Fiber with Magnifying Glass.—After the jury in a trial for murder had retired to consider their verdict, certain of them sent for a magnifying glass, and with it compared certain wood fibers, that were adhering to the clothes of the murdered girl, with those of a wooden platform that had been exhibited at the trial, and upon which, the state contended, deceased had been thrown down. *Held*, that it appearing that the entire identity of appearance of fibers was an undisputed fact, the verdict would not be disturbed for this irregularity. *Titus v. State*, 49 N. J. L. (20 Vr.) 36; s. c., 9 Cr. L. Mag. 353.

connected with the homicide.¹

XXI EVIDENCE.—1. Witnesses.—The general rules relating to witnesses in criminal cases—their competency, credibility, the order of their testimony and the number allowed to testify to the same fact—are applicable in trials for homicide. Persons charged with crimes have, in most jurisdictions, a right, guaranteed by constitutional provision, to be confronted by witnesses against them, as well as to have compulsory process for witnesses to testify in their favor, and, therefore, proof of their guilt is of no avail, unless adduced in their immediate presence, and in a judicial inquiry into the charge against them; but this right may be waived by one charged with homicide, and he may agree that depositions shall be received instead.²

One indicted for a homicide is usually entitled to a list (either indorsed upon the indictment or otherwise), of the witnesses to appear against him. This is either provided by statute, or it is the general practice,³ but this is not always so.⁴ The prosecution need not, however, adhere strictly to such list in examining its witnesses, and the prosecuting officer may exercise his own discretion; and he may examine all material witnesses whether their names are upon the list or not, or he may omit to call and examine witnesses whose names are upon the list.⁵

The rule of practice that witnesses may be separated and excluded from the court room, is applicable to trials for homicide, generally at the discretion of the court, as in other felonies,⁶ but at the option of the parties, or either of them.⁷ This proceeding is for the purpose of promoting the credibility of the witnesses, and, therefore, its omission can affect their credibility only.⁸ And while excluded from the court room, they are not necessarily to be treated as if they were jurors, kept from all communication concerning the case on trial.⁹

It is sometimes proper for the court to prevent the repetition, by many different witnesses, of the same fact; but this is largely a matter of discretion.¹⁰

1. A verdict of murder in the second degree will not be set aside because the jury examined the room in which the homicide was committed, it having been committed in the court-house, and because they read from the penal code, it not appearing that they were influenced thereby. *McDonald v. State*, 15 Tex. App. 493.

2. *People v. Murray*, 52 Mich. 288.

3. See 1 Bish. Cr. L. 3d ed., § 950.

4. See *State v. Nugent*, 71 Mo. 136.

5. *State v. Cain*, 20 W. Va. 679. See *Morrow v. State*, 57 Miss. 836.

6. *Thomas v. State*, 27 Ga. 287. See *Hellems v. State*, 22 Ark. 207.

And it is no abuse of discretion to allow a part of the witnesses to remain in court to assist in the prosecution

or defence. *Thomas v. State*, 27 Ga. 287.

7. See *Hellems v. State*, 22 Ark. 207.

8. *Hellems v. State*, 22 Ark. 207.

9. The court will not order an officer, having charge of witnesses who have been excluded from the court-room, until they should severally be called to testify, to prohibit them from reading the newspaper accounts of the evidence in the case. *Com. v. Hersey*, 84 Mass. (2 Allen) 173.

10. **Number of Witnesses to Same Point.**—On the trial of an indictment for murder, it appeared that deceased was privately and hastily buried on the day next after the killing. The body was afterwards disinterred to ascertain if any wounds appeared upon it. Two

Any person whose disqualification is not shown is a competent witness either for or against the person charged with the homicide. Persons who are jointly indicted with the defendant are not, generally, competent to testify in his favor;¹ but in some states the rule is otherwise, unless a conspiracy is charged.² A husband and wife are not, at common law, competent to testify for or against each other; but this rule has frequently been changed by statute.³ It is sometimes the practice to discontinue the prosecution of one defendant, if he will testify against others indicted for the same crime, and this is within the discretion of the prosecuting officer, with the consent of the court; but this must not be done under circumstances which are liable to induce falsehood and injury to defendant.⁴

In prosecutions for homicide, as well as in other cases, a witness is not obliged to reply to any question, the answer to which, in his judgment, may criminate himself.⁵

2. Determining the Competency of Evidence.—It is sometimes necessary for the court to hear proof from which to determine the competency of evidence offered touching the merits of the charge under consideration, which evidence usually consists of dying declarations of deceased;⁶ and while the court is hearing this

of the witnesses who were present on that occasion were permitted to testify as to what they had seen; and two others, one of them a physician, the only medical witness that testified, gave evidence as to the condition of the body, and the nature and character of the wounds upon it. *Held*, that an objection that the court erred in thus permitting four witnesses to prove the same harrowing state of facts, was not tenable. *McConnell v. State*, 22 Tex. App. 354; s. c., 58 Am. Rep. 647.

1. Persons who are Jointly Indicted with Defendant, one of whom has been acquitted, and a *nolle prosequi* entered as to the others, are competent, though another joint indictment is pending against them and the defendant for the murder of another man, at the same time, and in the same transaction, as that for which defendant is on trial. *State v. Walker*, (Mo.) 9 S. W. Rep. 646. 646.

2. Wright v. Com., (Ky.) 9 Cr. L. Mag. 331; *People v. Sweeney*, 41 Hun. (N. Y.) 332.

Kentucky Crim. Code, section 234, providing that if two or more persons be jointly indicted for the same offence, each shall be a competent witness for the others, unless the indictment charges a conspiracy, does not apply where, although the indictment charges a conspiracy, there is no evidence to sustain

the charge. In such a case accused is entitled to the testimony of the person jointly indicted with him. But evidence of threats made by such persons are incompetent against the other. *Wright v. Com.*, (Ky.) 9 Cr. L. Mag. 331.

Failure to Call a Witness.—A and B were jointly indicted for murder. On B's trial A was as accessible to the prosecution as to B. *Held*, that no presumptions against B were admissible by reason of the fact that B did not make A a witness. *People v. Sweeney*, 41 Hun. (N. Y.) 332.

3. See 1 Greenl. Ev. (14th ed.) § 334, etc.

4. Several defendants were indicted for murder, and the prosecuting attorney told them that he would enter a *nol. pros.* as to the defendant whose statement would be of most value to the prosecution. *Held*, that a conviction obtained on evidence thus induced could not be sustained. *Harris v. State*, 15 Tex. App. 629.

5. *Mims v. State*, 16 Ohio St. 221.

6. *Johnson v. State*, 47 Ala. 9; *Collier v. State*, 20 Ark. 36; *People v. Glenn*, 10 Cal. 32; *State v. Elliott*, 45 Iowa 486; *State v. Ross*, 18 La. An. 340; *Lambeth v. State*, 23 Miss. 322; *McDaniel v. State*, 16 Miss. (8 Smed. & M.) 401; s. c., 47 Am. Dec. 93; *Donnelly v. State*, 26 N. J. L. (2 Dutch.) 463, 601; *State v. Williams*, 67 N. C. 60;

preliminary proof, it is proper to require the jury to retire,¹ but it is not error to allow them to remain, if they are told to disregard entirely all of such proof.²

3. Order of Proof.—In prosecutions for homicide, the rules prescribing the order of proof, although they should be followed as closely as may be, are not arbitrary; but the order may be varied, if circumstances require it, at the discretion of the court.³ The *corpus delicti*, however, ought to be shown first, as far as the testimony can possibly be separated.⁴ And where several defendants are charged as conspirators, the conspiracy should, if possible, be first established *prima facie*, before the acts and declarations of one are received in evidence against the others;⁵ this rule cannot well be enforced where the proof of the conspiracy depends upon a vast amount of circumstantial evidence, or a vast number of isolated and independent facts. And it has been held that in any case where such acts and declarations are introduced in evidence, and the whole of the evidence introduced on the trial, taken together, shows that such a conspiracy actually exists, it will be considered immaterial whether the conspiracy was established before or after the introduction of such acts and declarations. The prosecution may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or it may prove the acts of the different persons, and thus prove the conspiracy.⁶

4. Competency.—*a. OF EVIDENCE TO PROVE THE CORPUS DELICTI.*—The *corpus delicti* consists of two fundamental and necessary facts; first, the death; and second, the existence of criminal agency as its cause.⁷ The proof of the *corpus delicti* is essential to a conviction for homicide; and any fact which goes

Smith v. State, 9 Humph. (Tenn.) 9; State v. Howard, 32 Vt. 380; Swisher v. Com., 26 Gratt. (Va.) 963, 965; s. c., 21 Am. Rep. 330; Hill v. Com., 2 Gratt. (Va.) 594; Reg. v. Hunt, 2 Cox C. C. 239; Rex v. Johns, 1 East P. C. 357; Rex v. Welbourn, 1 East P. C. 358; Rex v. Johns, 1 Leach C. C. (4th ed.) 504, note; Rex v. Hucks, 1 Stark. 521. See Jackson v. State, 56 Ga. 235; Campbell v. State, 11 Ga. 353; Starkey v. People, 17 Ill. 17.

1. Price v. State, 72 Ga. 441; People v. Smith, 104 N. Y. 491; s. c., 58 Am. Rep. 537; State v. Cain, 2 W. Va. 679.

2. Price v. State, 72 Ga. 441; People v. Smith, 104 N. Y. 491; s. c., 58 Am. Rep. 537; State v. Cain, 20 W. Va. 679.

3. People v. Wilson, 55 Mich. 506. See Spies v. People (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

4. People v. Millard, 53 Mich. 63;

People v. Hall, 48 Mich. 482; s. c., 43 Am. Rep. 477.

5. **The Proof of Conspiracy**, which will authorize the introduction of evidence as to the acts and declarations of co-conspirators may be such proof only as is sufficient, in the opinion of the trial judge, to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact. Sometimes for the sake of convenience, the acts and declarations of one are admitted in evidence before such sufficient proof is given of the conspiracy, the prosecution undertaking to furnish such proof at a subsequent stage of the cause. Spies v. People (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

6. Spies v. People (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

7. Pitts v. State, 43 Miss. 472.

to show the existence of either of these elements is admissible in evidence for that purpose. Thus it is competent to show the condition of the health of deceased,¹ or that an injury relied upon by the defendants as the cause of death was, in the opinion of an expert, received after death,² or that the deceased had possessed and worn wearing apparel found where the body is supposed to have been burned;³ or to prove the official character of deceased as an officer of the law, in order to show that he was in the peace of the state.⁴ On the other hand, evidence that deceased was of a suicidal disposition is competent, where it is possible that the death was so caused;⁵ or that deceased had described an injury accidentally inflicted, upon which defendants rely as the cause of death;⁶ or if the death be disputed, that the person killed was seen alive after the time when the charge is alleged to have been committed;⁷ but the prosecution cannot rebut such evidence by testimony that, about the time of the alleged murder, a person so strongly resembling the person claimed to have been murdered, as to have been mistaken for him by persons well acquainted with the latter, was seen in the neighborhood of the alleged crime.⁸

b. ACTS, THREATS AND DECLARATIONS BY DECEASED.—(1) Threats.—Where the proof leaves a doubt concerning defendant's motive in committing the homicide, whether he was actuated by malice or believed that he was in danger from deceased, he may prove threats of violence made towards him by deceased, provided they were communicated to him before the killing, as tending to show cause for belief that he was in great danger of receiving harm from deceased when he committed the homicide;⁹ but

1. *Phillips v. State*, 68 Ala. 469; *Williams v. State*, 64 Md. 384; *State v. Baldwin*, 36 Kan. 1; s. c., 9 Cr. L. Mag. 49.

2. **Proof of the Corpus Delicti.**—On a trial for murder alleged to have been caused by numerous and severe beatings, and in which the defence was, that the deceased came to his death in consequence of a severe burn in the abdomen, after the prosecution had introduced a witness to prove the beatings, a physician was called as a witness, who testified that in his opinion the burn was received after death. *Held*, that the evidence was admissible as tending to corroborate the testimony of the previous witness. *State v. Harris*, 63 N. C. 1.

3. *State v. Williams*, 7 Jones (N. C.) L. 446; s. c., 78 Am. Dec. 248.

4. *State v. Denkins*, 24 La. An. 29.

5. *Boyd v. State*, 14 Lea (Tenn.) 161.

6. *State v. Harris*, 63 N. C. 1.

7. *Com. v. Webster*, 59 Mass. (5 Cush.) 295; s. c., 52 Am. Dec. 711.

8. *Com. v. Webster*, 59 Mass. (5 Cush.) 295; s. c., 52 Am. Dec. 711.

9. *Eiland v. State*, 52 Ala. 322; *Powell v. State*, 52 Ala. 1; *Noles v. State*, 26 Ala. 31; *Pritchett v. State*, 22 Ala. 39; *Palmore v. State*, 29 Ark. 248; *Atkins v. State*, 16 Ark. 568; *People v. Lee Chuck*, (Cal.) 15 Pac. Rep. 322; *People v. Anderson*, 39 Cal. 703; *People v. Lombard*, 17 Cal. 316; *People v. Williams*, 17 Cal. 142; *Keener v. State*, 18 Ga. 194; s. c., 63 Am. Dec. 269; *Monroe v. State*, 5 Ga. 85; *Howell v. State*, 5 Ga. 48; *Williams v. People*, 54 Ill. 422; *Campbell v. People*, 16 Ill. 17; s. c., 61 Am. Dec. 49; *State v. Elliott*, 45 Iowa 486; *Cornelius v. Com.*, 15 B. Mon. (Ky.) 539; *Rapp v. Com.*, 14 B. Mon. (Ky.) 614; *Holloway v. Com.*, 11 Bush (Ky.) 344; *Carico v. Com.*, 7 Bush (Ky.) 124; *State v. Robertson*, 30 La. An. 340; s. c., 58 Am. Rep. 201; *State v. McCoy*, 29 La. An. 593; *State v. Spalding*, 34 Minn. 361; *Hawthorne v. State*, 61 Miss. 749; *Johnson v. State*, 54 Miss. 430; *Long v. State*, 52 Miss. 23; *State v. Downs*, 91 Mo. 19;

where it is clearly and unequivocally shown that defendant was the aggressor, and there is no pretence that deceased was about to carry the threats into execution, or that defendant had reasonable grounds to believe and did believe that such was the case,

State v. Harris, 59 Mo. 550; State v. Bryant, 55 Mo. 75; State v. Keene, 50 Mo. 357; State v. Sloan, 47 Mo. 604; State v. Matthews, 78 N. C. 523; State v. Turpin, 77 N. C. 473; State v. Dodson, 4 Oreg. 64; Horbach v. State, 43 Tex. 242; Brumley v. State, 21 Tex. App. 222; s. c., 57 Am. Rep. 612; State v. Abbott, 8 W. Va. 741; U. S. v. Rice, 1 Hughes C. C. 560. See Wood v. State, 92 Ind. 269; State v. Blunt, 91 Mo. 503; State v. Lee, 66 Mo. 165; State v. Alexander, 66 Mo. 148; McMillen v. State, 13 Mo. 30; Dickson v. State, 39 Ohio St. 73; Howard v. State, 23 Tex. App. 265; King v. State, 9 Tex. App. 515; Lewis v. Com., 78 Va. 732.

Threats of Secret Societies.—Evidence tending to show that two organizations of which deceased was a member, had threatened defendant's life, and that defendant had been informed of such threats, is competent evidence. People v. Lee Chuck, (Cal.) 15 Pac. Rep. 322.

Defendant a Magistrate.—Evidence that, as a justice of the peace, the prisoner had prosecuted the deceased for embezzlement of the county school fund, and that in consequence thereof, the deceased vowed that the defendant should not be at the trial of said indictment, for that he would kill him, is admissible, in connection with other circumstances, to show that defendant was in fear of his life from the deceased, and that the killing was in self-defence. Monroe v. State, 5 Ga. 85.

Quarrel Sought by Deceased.—Where A called B into his store, and placing himself between B and the door, called him a liar, and with a knife in his hand threatened to cut off his ears, on a trial of B for shooting A maliciously, etc., evidence that a son of A who was in the store when B entered it, immediately ran up stairs and returned with a pistol in his hand, which he snapped at B, and that the son had had his pistol loaded a few days before, and then made a contingent threat to shoot B, of which B was notified before he entered the store, was held to be admissible. Rapp v. Com., 14 B. Mon. (Ky.) 614.

Mistaken Identity.—Upon the trial of defendant for killing a constable who was attempting to arrest him, it appeared

that defendant shot at deceased as soon as he was spoken to by the latter, without waiting for or seeking any explanations; and defendant offered to prove by his wife that a third party had grossly insulted her in his absence, and had made threats to kill defendant, which had been communicated to him, and that in the afternoon of the day of the killing the third party had attempted to carry the threats into execution; that he was a hard character, and that defendant had good reason to believe at the time of the shooting that the man who turned out to be the deceased, was such third party. Held, that the offer of this testimony as one entire proposition was properly rejected, but that so much as proposed to prove the threats communicated to defendant, and the attempt to kill him on the same day, was material in connection with the quarrel, as tending to explain the fact of defendant's being armed and in expectation of an attack, and as bearing on the question of premeditation. State v. Spaulding, 34 Minn. 361.

Threats not Communicated.—On a trial for homicide committed by a deadly weapon in the hands of either the accused or his brother, both of whom were engaged in an affray with deceased, who first attacked the brother, it was held, that the threats of the deceased which may have referred to the brother, made to a third person immediately preceding the attack, though not communicated to defendant or his brother, were competent as part of the *res gestæ*. Dickson v. State, 39 Ohio St. 73.

Same—Form of Question.—On the trial of defendant for the murder of his wife, a witness was asked by defendant's counsel if he ever heard anyone speak to deceased about her having "acted foolishly in marrying a cripple" like defendant. Held, that if the question was intended to prove threats by deceased against defendant, it was not in the proper form, and should be excluded; and, if it was not intended to show threats, it was irrelevant and inadmissible. State v. Blunt, 91 Mo. 503.

Same—Communicator Deceased.—Upon the trial of an indictment for murder, the accused may prove that a

evidence of such threats by deceased, although they were communicated to defendant, is inadmissible.¹ Where the threats had not been communicated to defendant, they are admissible only when the evidence leaves a doubt as to whether the defendant or the deceased was the aggressor at the time of the homicide.²

man, then dead, had but a short time before the homicide told him that the deceased had armed himself to kill the accused. *Carico v. Com.*, 7 Bush (Ky.) 124.

No Overt Act.—Penal Code Texas, article 608, which declares that a defendant, seeking to justify on the ground of threats, must prove an overt act on the part of deceased, does not render evidence of the threats inadmissible where there is no testimony of an overt act. *Howard v. State*, 23 Tex. App. 265.

1. *Payne v. State*, 60 Ala. 80; *People v. Taing*, 53 Cal. 602; *Bond v. State*, 21 Fla. 738; *Lawrence v. Com.*, (Ky.) 9 So. Rep. 165; *People v. Garbutt*, 17 Mich. 9; *State v. Downs*, 91 Mo. 19; *State v. Clum*, 90 Mo. 482; *Gonzales v. State*, 31 Tex. 495; *Carter v. State*, 18 Tex. App. 372; *Territory v. Halliday*, (Utah Tr.) 17 Pac. Rep. 118. See *State v. Brooks*, (La.) 2 So. Rep. 498; *State v. Spell*, 38 La. An. 20; *State v. Birdwell*, 36 La. An. 859; *Moriarty v. State*, 62 Miss. 654; *State v. Guy*, 69 Mo. 430; *Thomas v. State*, 11 Tex. App. 315.

Covert Assassination.—On a trial of an indictment for murder, the evidence showed that the homicide was the result of covert assassination. *Held*, that evidence of threats made by deceased against defendant, known to the latter, was properly excluded. *State v. Clum*, 90 Mo. 482.

Pursuit by Defendant.—On trial of P for the murder of S, there was evidence that P, having had a quarrel with S, rode off several miles, procured a gun, followed S, attacked him when they met, and shot and killed him, S having no weapon in his possession. *Held*, that threats made by S two weeks previously, and communicated to P, were not competent evidence for P. *Payne v. State*, 60 Ala. 80.

Premeditation.—Evidence that defendant's wife, whom he had killed, had been unfaithful to him, and had made threats against him, was immaterial where his crime was shown to have been premeditated, and committed when he was in no danger from her. *Law-*

rence v. Com., (Ky.) 9 S. W. Rep. 165.

General Foolhardy Threats.—In a trial for murder, evidence is inadmissible, on the part of the defence, to show that a threat made by the deceased to put to his end "the first nigger that fools with me," was communicated to the defendant about half an hour after it was made. *State v. Guy*, 69 Mo. 430.

Overt Act of Deceased Against a Third Person.—A was seated in B's shop with a pistol in his pocket and a double-barrelled shot gun in his lap, while B and C were engaged in angry conversation. C without speaking to A, suddenly threw his hand to his hip pocket when A fired and killed him. *Held*, that evidence of antecedent threats by C against A, was not admissible, for if there was any overt act it was against B. *Moriarty v. State*, 62 Miss. 654.

2. *Roberts v. State*, 68 Ala. 156; *Harris v. State*, 34 Ark. 469; *Palmore v. State*, 29 Ark. 248; *People v. Travis*, 56 Cal. 251; *People v. Alivire*, 55 Cal. 263; *People v. Scoggins*, 37 Cal. 676; *Davidson v. People*, 4 Colo. 145; *Lingo v. State*, 29 Ga. 470; *Mayfield v. State*, 110 Ind. 591; *State v. Brown*, 22 Kan. 222; *Hart v. Com.*, (Ky.) 2 S. W. Rep. 673; *State v. Jackson*, 37 La. An. 806; *State v. Janvier*, 37 La. An. 645; *State v. Labuzan*, 37 La. An. 489; *Turpin v. State*, 55 Md. 462; *Newcomb v. State*, 37 Miss. 383; *State v. Hays*, 23 Mo. 287; *Binfield v. State*, 15 Neb. 484; *State v. Stewart*, 9 Nev. 120; *State v. Ferguson*, 9 Nev. 58; *State v. Hall*, 9 Nev. 50; *Thomason v. Territory*, (N. Mex.) 13 Pac. Rep. 223; *Stokes v. People*, 53 N. Y. 164; s. c., 13 Am. Dec. 492; *State v. Turpin*, 77 N. C. 73; s. c., 24 Am. Dec. 455; *Little v. State*, 6 Baxt. (Tenn.) 491; *West v. State*, 18 Tex. App. 640; *Allen v. State*, 17 Tex. App. 637; *Wiggins v. People*, 93 U. S. (3 Otto) 465; bk. 23 L. ed. 941. See *Green v. State*, 69 Ala. 6; *Hughey v. State*, 47 Ala. 97; *Dupree v. State*, 33 Ala. 380; s. c., 73 Am. Dec. 422; *Powell v. State*, 19 Ala. 577; *Coker v. State*, 20 Ark. 53; *Atkins v. State*, 16

(2) *Acts*.—All acts and conduct of the deceased previous to the fatal encounter may be shown in evidence, which form a part of the *res gestæ*, or which in any manner tend to shed light upon

Ark. 568; *People v. Campbell*, 59 Cal. 243; s. c., 43 Am. Rep. 257; *Keener v. State*, 18 Ga. 194; s. c., 63 Am. Dec. 269; *Holler v. State*, 37 Ind. 57; s. c., 10 Am. Rep. 74; *Dukes v. State*, 11 Ind. 557; s. c., 71 Am. Dec. 370; *Williams v. State*, (La.) 3 So. Rep. 629; *State v. Fisher*, 33 La. An. 1344; *State v. Ryan*, 30 La. An. pt. II, 1176; *State v. Duniphey*, 4 Minn. 438; *Edwards v. State*, 47 Miss. 581; *Harris v. State*, 47 Miss. 318; *State v. Rider*, 90 Mo. 54; *State v. McNally*, 87 Mo. 644; *State v. Downs*, 91 Mo. 19; *Pitman v. State*, 22 Oreg. 354; *Fitzhugh v. State*, 13 Lea (Tenn.) 258; *Pridgen v. State*, 31 Tex. 420; *Howard v. State*, 23 Tex. App. 265; *Wilson v. State*, 18 Tex. App. 576; *Logan v. State*, 17 Tex. App. 50; *West v. State*, 2 Tex. 460; *White v. Territory*, (Wash. Tr.) 19 Pac. Rep. 37.

Uncommunicated Threats—Affray.—Upon a trial for murder, evidence of threats previously made by the deceased, to kill the defendant, was excluded, it not appearing that they had been communicated to the defendant. Shortly before the homicide, an affray between the deceased and defendant had occurred. *Held*, that the evidence rejected was admissible, upon the question of whether the deceased began the affray, thereby attempting to fulfill his threats. *People v. Alivtre*, 55 Cal. 263.

Threats by Third Person.—On the trial of an indictment for murder, where defendant pleaded self-defence, and the existence of a feud between the families of the deceased and accused was shown, statements of the father of deceased, made in the hearing of the latter, that if defendant and his brothers didn't watch they would get hurt, for his son would shoot them, were admissible, and an instruction that they could only be considered to impeach the testimony of deceased's father, who had denied making the statements, was erroneous. *Mayfield v. State*, 110 Ind. 591.

"Going to Have Blood."—Threats of deceased, made fifteen minutes before his death, that he "was going to have blood before morning," are properly admitted upon the trial of one charged with his murder, as tending to show

that the deceased was the aggressor. *State v. McNally*, 87 Mo. 644.

Uncommunicated Following Communicated Threats.—On trial of D for murder of B, it was proved that a feud had existed between them for many years, and that repeated threats of B to take D's life had been communicated to D. *Held*, that evidence was admissible, by way of showing B's attitude to D at the time of the killing, that immediately before the killing B had made threats to kill D, which were not communicated to D. *Davidson v. People*, 4 Colo. 145.

On a trial for murder, there was evidence of threats made by the deceased against defendant and communicated to defendant; there was also evidence that the deceased followed defendant to the house, and that a rock was used by deceased upon defendant's head during the fight, but it did not clearly appear by whom the rock was introduced into the fight, the evidence upon which point was circumstantial. The defendant offered evidence of threats made by deceased, but not communicated to defendant, which was excluded. *Held*, that the evidence of uncommunicated threats was admissible; to corroborate the evidence of communicated threats; to show the state of feeling of the deceased toward the defendant, and the *quo animo* with which he had pursued defendant to the house; and as one of the circumstances tending to show who introduced the rock into the fight, the evidence upon that point being wholly circumstantial. *State v. Turpin*, 77 N. C. 473; s. c., 24 Am. Rep. 455.

Where Communicated Threats, Followed by a Subsequent Attack, leading to a killing, have been proved, evidence of other threats, made between the communicated ones and the assault, may be received as corroborating the evidence and establishing the reality of the danger, under apprehension of which defendant may have acted. *State v. Williams*, (La.) 3 So. Rep. 629.

At the trial of an indictment for murder, the evidence showed that defendant, armed with rifle and revolver, sought out deceased while engaged at his work, and shot him while he was fleeing, and that deceased was wholly

the question of motive or malice, or of legal provocation, or upon the question whether defendant committed the homicide.¹ But acts or conduct of the deceased which are not a part of the *res gestæ*, and which could not in any manner have influenced the defendant in the commission of the homicide, cannot be shown.²

(3) *Declarations.*—(a) *Before the Act Causing Death.*—Declarations of the deceased made before the commission of the act which caused his death are admissible in evidence when constituting a part of the *res gestæ*, or when showing a motive, or

unarmed, and there were no weapons within his reach. *Held*, that evidence of threats made by deceased against defendant was properly excluded, as affording no justification; nor was there error in refusing to instruct the jury on the law of self-defence. *Thomason v. Territory*, (N. Mex.) 13 Pac. Rep. 223.

1. See *Walker v. State*, 63 Ala. 105; *State v. Sullivan*, 51 Iowa 142; *State v. Ramsay*, 82 Mo. 133; *Jeby v. State*, (Tex. App.) 7 S. W. Rep. 705; *Howard v. State*, 23 Tex. App. 265; *Cluverius v. Com.*, 81 Va. 787; *Puryear v. Com.*, (Va.) 9 Cr. L. Mag. 788.

"*Looked Scared.*"—Evidence in a murder trial that just before the second and fatal encounter deceased "looked scared, and looked as if he wanted to get away," is admissible. *State v. Ramsay*, 82 Mo. 133.

Fictitious Letter.—Defendant was on trial for murder of a woman eight months advanced in pregnancy. The theory of the prosecution was that he had seduced her and murdered her to avoid exposure. The prosecution offered in evidence a letter written and signed by the deceased in a name not her own, for the purpose of giving to the lady for whom deceased worked an excuse for leaving and going to the city where she met defendant and her death. *Held*, that the letter was of the *res gestæ* and admissible. *Cluverius v. Com.*, 81 Va. 787.

Acts Inconsistent With Declarations.—On the trial of an indictment for murder, it appeared that the accused had slain the deceased in a fight, at night, without any eye-witness of the encounter; the evidence on the part of the state tended to show that two days before the fight the deceased had threatened to arrest the defendant for living in adultery with his daughter, and had insisted on his marrying her. *Held*, that the defendant might show that the deceased was opposed to the defendant's marrying his daughter, and

was himself living in adultery with her, although she was his daughter. *Walker v. State*, 63 Ala. 105.

Provocation.—If the evidence opens the question of intent to kill, it is competent to prove, for the purpose of reducing the homicide to manslaughter, that the prisoner in attacking the deceased, acted from recent provocation, likely to induce him to chastise him. *People v. Lewis*, 3 Abb. App. Dec. (N. Y.) 535.

2. See *Rogers v. State*, 62 Ala. 170; *People v. Turcott*, 65 Cal. 126; *State v. Cross*, 68 Iowa 180.

Concealment of Gun.—Where, in a murder trial, defendant's counsel, in his opening, based his plea of self-defence on the apparent intention of the deceased to draw a pistol, evidence of the concealment of a gun on the premises of the deceased, with no offer to show its relevancy, *held*, properly excluded. *People v. Turcott*, 65 Cal. 126.

Testified Before Grand Jury.—On a trial for murder, where self-defence was relied on by the accused, evidence that the accused had testified against the deceased before the grand jury in a certain case, *held*, inadmissible to show the character and extent of the hostility of the deceased towards the accused, and the character of the attack made by the former upon the latter. *State v. Cross*, 68 Iowa 180.

A constable and several persons whom he had summoned to aid in executing a warrant for the arrest of A, went to A's house before day and aroused him, and, in answer to a question from A as to who was present, the constable stated the names of several persons who were not in fact present—among them B. After this A shot and killed one C, one of the posse. *Held*, on a trial of A for murder, error to permit the state, against defendant's objection, to show by B that the constable had in fact summoned him. *Rogers v. State*, 62 Ala. 170.

when going to show who was the aggressor.¹ But it is not, as a general rule, competent to prove against the defendant previous declarations of the deceased made out of his presence and hearing, and not communicated to him.²

1. *Burns v. State*, 49 Ala. 370; *Edmonds v. State*, 34 Ark. 720; *Boyle v. State*, 97 Ind. 322; *State v. Moelchen*, 53 Iowa 310; *State v. Vincent*, 24 Iowa 570; s. c., 95 Am. Dec. 753; *State v. Harris*, 63 N. C. 1; *Cox v. State*, 8 Tex. App. 254; s. c., 34 Am. Rep. 746.

Declarations as to Place of Setting Out and Destination of Journey.—On the trial of an indictment for murder charged to have been committed while the deceased and the accused were travelling together, it was *held* not to be error to instruct the jury that what the deceased said "about where they had come from, and where they were going, being engaged in the journey, might be received as part of the *res gesta*." *State v. Vincent*, 24 Iowa 570.

Statement as to Previous Injury.—The defendant offered to prove that the deceased said that he had a burn upon the abdomen. *Held*, that the evidence was admissible. *State v. Harris*, 63 N. C. 1.

Describing Assailants.—On the trial of three persons for the murder of B, it appeared that he was taken out of his father's house in the night by a party of men, who allowed him to return under surveillance and put on his boots, when he told his mother in a whisper, with exhibitions of terror, that two of them were two of the defendants, and a third one who was jointly indicted with them. *Held*, that his statement was part of the *res gesta*, and her testimony thereon was admissible. *Cox v. State*, 8 Tex. App. 254; s. c., 34 Am. Rep. 746.

Showing Physical Peculiarities, in a murder trial, where it is material to prove that the deceased had a peculiar tooth in his mouth, his declarations about it, made when there could have been no *lis mota*, are admissible in evidence, as *res gesta*. *Edmonds v. State*, 34 Ark. 720.

Telling of Former Assaults.—On a trial for murder, wherein defendant pleaded in self-defence, that when he shot deceased the latter was striking at him with a knife, evidence that the night before deceased told defendant of two felonious assaults which he had committed, and that he preferred a knife to a pistol as more effective, *held*, admis-

sible, as showing that defendant had ground for believing that the attack on him was felonious. *Boyle v. State*, 97 Ind. 322.

Statement to Peace Officer.—Evidence that the deceased stated to a justice of the peace that the defendant threatened to kill him, and that he desired the defendant's arrest, is admissible in connection with evidence of a conversation between the justice and the defendant, wherein the latter was informed of the deceased's complaint. *State v. Moelchen*, 53 Iowa 310.

Declarations on Seeking Interview.—Where on trial of B, for the murder of M, it was shown that M sought an interview with B, and they walked away together, out of the presence and hearing of witnesses, the declarations of M, made when starting to the place where he met B, showing a hostile motive, were admissible in behalf of B, though not communicated to B prior to the killing, to enable the jury to determine who was the aggressor. *Burns v. State*, 49 Ala. 370.

2. *Cheek v. State*, 35 Ind. 492. See *People v. Carkhuff*, 24 Cal. 640; *Weyrich v. People*, 89 Ill. 90; *Combs v. State*, 75 Ind. 215; *State v. Vincent*, 24 Iowa 570; s. c. 95 Am. Dec. 753.

Declarations of Deceased—When not Admissible.—In a trial for murder, it is error to admit evidence of the declarations of the deceased, made several hours before the murder, that he expected the defendant at his house that night. *People v. Carkhuff*, 24 Cal. 640.

Evidence that the deceased, on being remonstrated with by the witness for visiting defendant's wife, replied that he should go there as much as he pleased, and that he was not afraid of defendant or of his shooting, was *held* to be inadmissible, such statements not having been communicated to the accused. *Combs v. State*, 75 Ind. 215.

At the trial of a wife for the murder of her husband by poisoning,—*Held*: 1. That evidence of declarations of the deceased, made at different times through a period of some ten years or more anterior to his death, out of the hearing of the wife, and not assented to

(b) *Afterwards.*—(b') *When not in Extremis.*—Declarations made by the person slain, after receiving the fatal injury, but when not in extremis, must, to be competent, be a part of the *res gesta*,¹ unless made in the presence of the defendant,² or

by her, or even made known to her, were inadmissible, as being simply expressive of the state of health and condition of mind, or state of feeling, of the deceased. 2. That declarations of the deceased in regard to his having had a prior attack of disease of some character, the nature of which he did not entirely comprehend, and which were not made as explanatory of the state of his health at that time, but merely as a narrative of past occurrence, were also inadmissible. 3. That declarations of the deceased in regard to his suspicions of his wife's chastity, not made in her presence or communicated to her, were also inadmissible, but that it was competent for the prosecution to show that she was unchaste, in order to establish a motive which might operate on her mind, and induce her to take the life of the deceased. *Weyrich v. People*, 89 Ill. 90.

1. See *State v. Frazier*, 1 Houst. Cr. Cas. (Del.) 176; *Darby v. State*, (Ga.) 3 S. E. Rep. 663; *Stevenson v. State*, 69 Ga. 68; *Winslow v. People*, 92 Ill. 299; *Jones v. State*, 71 Ind. 66; *Com. v. Hackett*, 84 Mass. (2 Allen) 136; *Mayes v. State*, 64 Miss. 329; s. c., 60 Am. Rep. 58; *Warren v. State*, 9 Tex. App. 619; s. c., 35 Am. Rep. 745; *Tooney v. State*, 8 Tex. App. 452; *State v. Carlton*, 48 Vt. 636; *Livingston's Case*, 14 Gratt. (Va.) 592.

Declarations at Time and Place of Killing.—On trial of A for murder of B, testimony of C, that hearing a gun's report and B screaming he ran to her, 300 yards distant, and that she said A had shot her, was admissible as part of the *res gesta*. *Stevenson v. State*, 69 Ga. 68.

Declaration After Receiving Poison.—On a trial of T, for murder of B, by poisoning, a witness for the state testified that he found B, the day before he died, prostrated and helpless behind a gambling saloon with which T was connected. *Held*, that for the purpose of showing B's bodily condition at the time, his declaration to the witness was admissible that he was not drunk, but had been drugged and dragged there. *Tooney v. State*, 8 Tex. App. 452.

Declarations Showing Absence of Cause.—A witness testified that the

deceased said defendant had cut him and he had done nothing. *Held*, that whether deceased had done anything or not was a question of fact and not a conclusion of law, and the testimony was properly admitted. *Darby v. State*, (Ga.) 3 S. E. Rep. 663.

Complaints of Pain.—On a trial for murder, the government having proved that the prisoner beat the deceased, complaints of pain made by the deceased within two hours of the beating are admissible in evidence.—*Livingston's Case*, 14 Gratt. (Va.) 592.

Declarations as to the Slayer.—On a trial for murder, a witness for the prosecution testified that he saw the deceased when he fell shot, from a distance of a hundred and fifty yards, and that he immediately went to him and asked him how he shot himself, to which he replied "I did not do it; I was shot from up yonder," motioning toward a neighboring mountain—and the evidence was *held* to be competent, as a part of the *res gesta*. But proof of the contemporaneous declaration by the deceased that he knew G W shot him, for he had threatened him, *held* incompetent. *Warren v. State*, 9 Tex. App. 619; s. c., 35 Am. Rep. 745.

Deceased, a few minutes after the shooting, said, "Prince Jones shot me." *Held*, clearly mere narrative, and not admissible. *Jones v. State*, 71 Ind. 66.

Statements, Five Minutes Afterwards.—On a trial for murder it became a question whether defendant or another person cut the deceased during a fight. It appeared that the deceased after being cut ran away, and five minutes afterwards made certain statements to a witness. *Held*, that these statements were not of the *res gesta*, and were inadmissible. *Mayes v. State*, 64 Miss. 329.

Same—Half Hour.—On the trial of an indictment for murder, the statements of the deceased, made about half an hour after the shooting, and after he had been removed to his own house and laid in bed,—*held*, inadmissible as part of the *res gesta*. *State v. Frazier*, 1 Houst. Cr. C. (Del.) 176.

2. *People v. McCarthy*, 110 N. Y. 309; See *State v. Nash*, 7 Iowa 347; *State v. Gillick*, 7 Iowa 287; *State v. Devlin*, 7 Mo. App. 32.

unless contradictory of dying declarations proved by the state, and introduced by defendant for that purpose.¹

(6^b) *Dying Declarations*.—Dying declarations of the person killed, as to matters relating to the homicide, which are of the *res gesta*, are admissible in evidence; but to render them admissible as dying declarations they must be shown to have been made when the declarant was in full expectation of approaching death, and had lost all hope of recovery.² The full belief of impending

A witness testified that after deceased was shot, and while she was conversing with defendant in his presence, deceased went into the house. She was also permitted to state what deceased said in the house. After it appeared that defendant was not present at the conversation in the house, the court struck out that conversation. *Held*, that the error, if any, in admitting such conversation, was cured. *People v. McCarthy*, 110 N. Y. 309;

1. *People v. Lawrence*, 21 Cal. 368; *Felder v. State*, 23 Tex. App. 477; s. c., 59 Am. Rep. 777.

Statements of Deceased to Rebut Dying Declarations.—Where, upon a third trial for murder, the dying declarations of the deceased are admitted in evidence against the accused, he may introduce evidence of statements, made by the deceased at other times, directly contradicting his dying declarations; and it is not necessary in such cases, as indeed it is generally impossible, that the attention of the deceased should have been previously called to the particular occasion and circumstances under which the supposed contradictory statements were made, in order to allow him to offer any possible explanation. *People v. Lawrence*, 21 Cal. 368.

2. *Jordan v. State*, 81 Ala. 20; *Ward v. State*, 78 Ala. 441; *Reynolds v. State*, 68 Ala. 502; *Ex parte Nettles*, 58 Ala. 268; *May v. State*, 55 Ala. 39; *Kelly v. State*, 52 Ala. 361; *Walker v. State*, 52 Ala. 192; *Johnson v. State*, 50 Ala. 456; *Johnson v. State*, 47 Ala. 9; *Johnson v. State*, 17 Ala. 618; *McLean v. State*, 16 Ala. 672; *Ben v. State*, 1 Ala. Sel. Cas. 9; *Dunn v. State*, 2 Ark. 229; s. c., 35 Am. Dec. 54; *People v. Ramirez*, 73 Cal. 403; *People v. Lee-SareBo*, 72 Cal. 623; *People v. Brady*, 72 Cal. 490; *People v. Abbott*, (Cal.) 4 Pac. Rep. 769; *People v. Gray*, 61 Cal. 164; s. c., 44 Am. Dec. 549; *People v. Taylor*, 59 Cal. 640; *People v. Hodgdon*, 55 Cal. 76; s. c., 36 Am. Rep. 30; *People v. Chin Mook Sow*, 51 Cal. 597; *People*

v. Ah Dat, 49 Cal. 652; *People v. Vernon*, 35 Cal. 49; *People v. Sanchez*, 24 Cal. 17; *People v. Ybarra*, 17 Cal. 166; *People v. Lee*, 17 Cal. 79; *People v. Glenn*, 10 Cal. 32; *Dixon v. State*, 13 Fla. 626; *Walton v. State*, (Ga.) 5 S. E. Rep. 203; *Bryant v. State*, (Ga.) 4 S. E. Rep. 853; *Darbey v. State*, (Ga.) 3 S. E. Rep. 663; *Whitaker v. State*, (Ga.) 3 S. E. Rep. 403; *Dumas v. State*, 62 Ga. 58; *Hill v. State*, 41 Ga. 484; *Thompson v. State*, 24 Ga. 297; *Campbell v. State*, 11 Ga. 353; *West Brook v. People*, (Ill.) 18 N. E. Rep. 304; *Digby v. People*, 113 Ill. 123; s. c., 55 Am. Rep. 402; *Moeck v. People*, 100 Ill. 242; s. c., 39 Am. Rep. 38; *Tracy v. People*, 97 Ill. 101; *Scott v. People*, 63 Ill. 508; *Barnett v. People*, 54 Ill. 325; *Murphy v. People*, 37 Ill. 447; *Starkey v. People*, 17 Ill. 21; *Powers v. State*, 87 Ind. 144; *Montgomery v. State*, 80 Ind. 338; s. c., 41 Am. Rep. 815; *Jones v. State*, 71 Ind. 66; *Watson v. State*, 63 Ind. 548; *Binns v. State*, 46 Ind. 311; *Morgan v. State*, 31 Ind. 193; *Ward v. State*, 8 Blackf. (Ind.) 101; *State v. Schmidt*, 73 Iowa 469; *State v. Johnson*, 72 Iowa 393; *State v. Leeper*, 70 Iowa 748; *State v. Elliott*, 45 Iowa 486; *State v. Nash*, 7 Iowa 347; *State v. Wilson*, 24 Kan. 189; s. c., 36 Am. Rep. 257; *State v. Bohan*, 15 Kan. 407; *State v. Medlicott*, 9 Kan. 257; *People v. Com.*, (Ky.) 9 S. W. Rep. 509; *Vaughn v. Com.*, (Ky.) 6 S. W. Rep. 153; *Marcum v. Com.*, (Ky.) 1 S. W. Rep. 727; *Luker v. Com.*, (Ky.) 5 S. W. Rep. 354; *Mockabee v. Com.*, 78 Ky. 380; *Collins v. Com.*, 12 Bush (Ky.) 271; *Leiber v. Com.*, 9 Bush (Ky.) 11; *Young v. Com.*, 6 Bush (Ky.) 317; *Adwell v. Com.*, 17 B. Mon. (Ky.) 310; *Walston v. Com.*, 16 B. Mon. (Ky.) 15; *State v. Spencer*, 30 La. An. 362; *State v. Brunetto*, 13 La. An. 45; *State v. Hannah*, 10 La. An. 131; *State v. Price*, 6 La. An. 691; *State v. Newhouse*, (La.) 2 So. Rep. 799; *Hay v. State*, 40 Md. 633; *Com. v. Haney*, 127 Mass. 455; *Com. v. Roberts*, 108 Mass. 296; *Com. v. Carey*, 66 Mass. (12 Cush.)

death is the true and the only test of the admissibility in evidence of such declarations; but it is thought that this does not necessitate proof of apprehensions of immediate death, if it be clearly shown that the deceased had no expectation of surviving the

246; *People v. Simpson*, 48 Mich. 474; *People v. Olmstead*, 30 Mich. 431; *People v. Knapp*, 26 Mich. 112; *State v. Cantieny*, 34 Minn. 1; *Hill v. State*, 64 Miss. 431; *Brown v. State*, 32 Miss. 433; *Lewis v. State*, 17 Miss. (9 Smed. & M.) 115; *Woodside v. State*, 3 Miss. (2 How.) 655; *State v. Partlow*, 90 Mo. 608; s. c., 59 Am. Rep. 31; *State v. Mathes*, 90 Mo. 571; *State v. Rider*, 90 Mo. 54; *State v. Vasant*, 80 Mo. 67; *State v. Johnson*, 76 Mo. 121; *State v. Kilgore*, 70 Mo. 546; *State v. Draper*, 65 Mo. 335; s. c., 27 Am. Rep. 287; *State v. McCanon*, 51 Mo. 160; *State v. Simon*, 50 Mo. 370; *Fitzgerald v. State*, 11 Neb. 577; *Rakes v. People*, 2 Neb. 157; *Peak v. State*, (N. J.) 10 C. L. Mag. 528; *Donnelly v. State*, 26 N. J. L. (2 Dutch.) 463, 601; *Brotherton v. People*, 75 N. Y. 159; *People v. Davis*, 56 N. Y. 95; *People v. Perry*, 8 Abb. (N. Y.) Pr. N. S. 27; *Hackett v. People*, 54 Barb. (N. Y.) 370; *Hunt v. People*, 3 Park. Cr. Cas. (N. Y.) 569; *People v. Knickerbocker*, 1 Park. Cr. Cas. (N. Y.) 302; *People v. Grunzig*, 1 Park. Cr. Cas. (N. Y.) 299; *People v. Anderson*, 2 Wheel. Cr. Cas. (N. Y.) 398; *State v. Mills*, 91 N. C. 581; *State v. Blackburn*, 80 N. C. 474; *State v. Poll*, 1 Hawks (N. C.) L. 442; s. c., 9 Am. Dec. 655; *State v. Tilghman*, 11 Ired. (N. C.) L. 513; *State v. Shelton*, 2 Jones (N. C.) L. 360; s. c., 64 Am. Dec. 587; *State v. Peace*, 1 Jones (N. C.) L. 251; *State v. Harper*, 35 Ohio St. 78; s. c., 35 Am. Rep. 596; *Robbins v. State*, 8 Ohio St. 131; *Montgomery v. State*, 11 Ohio 424; *State v. Garrard*, 5 Oreg. 276; *State v. Fitzhugh*, 2 Oreg. 227; *Goodall v. State*, 1 Oreg. 333; s. c., 80 Am. Dec. 396; *Railing v. Com.*, 113 Pa. St. 37; *Kane v. Com.*, 109 Pa. St. 541; *Allison v. Com.*, 99 Pa. St. 17; *Sullivan v. Com.*, 93 Pa. St. 284; *Small v. Com.*, 91 Pa. St. 304; *Brown v. Com.*, 73 Pa. St. 321; s. c., 13 Am. Rep. 740; *Com. v. Williams*, 2 Ashm. (Pa.) 69; *Com. v. Murray*, 2 Ashm. (Pa.) 41; *State v. Belcher*, 13 S. C. 459; *State v. McEvoy*, 9 S. C. 208; *State v. Ferguson*, 2 Hill (S. C.) L. 619; s. c., 27 Am. Dec. 412; *State v. Quick*, 15 Rich. (S. C.) L. 342; *State v. Freeman*, 1 Spear (S. C.) 57; *Hudson v. State*, 3 Coldw. (Tenn.) 355; *Smith*

v. State, 9 Humph. (Tenn.) 9; *Nelson v. State*, 7 Humph. (Tenn.) 542; *Curtis v. State*, 14 Lea (Tenn.) 502; *Stewart v. State*, 2 Lea (Tenn.) 598; *Brakefield v. State*, 1 Sneed (Tenn.) 215; *Drake v. State*, (Tex.) 7 S. W. Rep. 868; *Wright v. State*, 41 Tex. 246; *Benavides v. State*, 31 Tex. 579; *Burrell v. State*, 18 Tex. 713; *Irby v. State*, (Tex. App.) 7 S. W. Rep. 705; *Labetta v. State*, (Tex. App.) 5 S. W. Rep. 226; *Warren v. State*, 9 Tex. App. 619; s. c., 35 Am. Rep. 45; *State v. Wood*, 53 Vt. 560; *State v. Patterson*, 45 Vt. 308; s. c., 12 Am. Rep. 200; *State v. Center*, 35 Vt. 378; *Puryear v. Com.*, (Va.) 9 Cr. L. Mag. 788; *Swisher v. Com.*, 26 Gratt. (Va.) 963; s. c., 21 Am. Rep. 330; *Jackson v. Com.*, 19 Gratt. (Va.) 656; *Bull v. Com.*, 14 Gratt. (Va.) 613; *Hill v. Com.*, 2 Gratt. (Va.) 594; *Vass v. Com.*, 3 Leigh (Va.) 786; s. c., 24 Am. Dec. 695; *Crookham v. State*, 5 W. Va. 510; *State v. Dickinson*, 41 Wis. 299; *State v. Cameron*, 2 Chand. (Wis.) 172; *U. S. v. Woods*, 4 Cr. C. C. 484; *U. S. v. Veitch*, 1 Cr. C. C. 115; *Reg. v. Sparhan*, 25 Up. Can. C. P. 143; *Reg. v. Smith*, 23 Up. Can. C. P. 312; *Rex v. Mead*, 2 B. & C. 605; s. c., 4 Dan. & R. 120; *Reg. v. Megson*, 9 Car. & P. 418; *Rex v. Hayward*, 6 Car. & P. 157; *Rex v. Crockett*, 4 Car. & P. 544; *Rex v. Van Vechten*, 3 Car. & P. 631; *Rex v. Van Butchell*, 3 Car. & P. 629; *Reg. v. Hubbard*, 14 Cox C. C. 565; *Reg. v. Beddingfield*, 14 Cox C. C. 341; s. c., 28 Moak. Eng. Rep. 587; *Reg. v. Morgan*, 14 Cox C. C. 337; s. c., 28 Moak. Eng. Rep. 583; *Reg. v. Steele*, 12 Cox C. C. 168; *Reg. v. Qualter*, 6 Cox C. C. 357; *Reg. v. Nicolas*, 6 Cox C. C. 120; *Reg. v. Mooney*, 5 Cox C. C. 318; *Reg. v. Dalmás*, 1 Cox C. C. 95; *Reg. v. Thomas*, 1 Cox C. C. 52; *People v. v. Green*, 1 Den. C. C. 614; *Reg. v. Howell*, 1 Den. C. C. 1; *Reg. v. Reaney*, *Dears & B. C. C.* 151; *Rex v. John*, 1 East P. C. 357; *Reg. v. Peel*, 2 Fost. & F. 21; *Reg. v. Whitworth*, 1 Fost. & F. 382; *Reg. v. Jenkins*, 38 L. J. M. C. 82; *Reg. v. Smith*, 12 L. T. 608; s. c., L. & C. 607; *Rex v. Woodcock*, 1 Leach C. C. 503; *Errinton's Case*, 2 Lew. C. C. 148; *Rex v. Mosley*, 1 Moo. C. C. 97.

injury inflicted by defendant.¹ But statements offered as dying declarations are not admissible merely because made after being told that the wound was necessarily fatal, unless accompanied by a proof that this information deprived declarant of the expectation of recovery.² There is no particular mode prescribed for the proof of this condition of the mind of the deceased; and it may be shown in any way which the court deems sufficient, either by proof of expressions by deceased of his conviction that he would die,³ or by other circumstances of the case;⁴ or, as far as may be, in the absence of better evidence, by the length of time elapsing between the making of the declaration and the declarant's death.⁵

The admissibility of dying declarations does not at all depend upon the amount of other evidence for the prosecution, but they are admissible, even if there be little or no additional evidence of the killing.⁶ Nor does it depend upon the kind of defence set up; whether the defendant pleads insanity, self-defence, or an *alibi*, the same rule governs the admission of dying declarations in evidence against him.⁷ But where several were killed in an affray, and defendant is indicted for the homicide of one of them, dying declarations of others who were killed are not admissible.⁸

The fact that a declaration is partly in writing and part parol cannot be made ground for an objection to it.⁹ The weight of dying declarations admitted in evidence is a question for the determination of the jury. The theory upon which dying declarations, being mere hearsay, are made admissible is that when an individual is in constant expectation of impending death, all temptation or inducement to falsehood is removed, and the solemnity of his situation is supposed to impress him as strongly with the necessity of strict truthfulness as the obligation of a judicial oath; but the circumstances attending and immediately surrounding the making of such declarations—the absence of all cross questioning, the presence, usually, of only friends and sympathizers, whose interest in the affair is identified with that of the deceased—together with the likelihood of feebleness of mind and misunderstanding, all create an element of uncertainty as to the proper weight of such declarations which necessarily makes the degree of such weight a question of fact in each particular case; and it is error to instruct the jury that the credibility of the dying declarations is to be measured by the weight which the testimony of declarant would have received had he been present and testified at the trial.¹⁰ And it is, therefore, competent to show any

1. See *Jordan v. State*, 82 Ala. 1; *State v. Schmidt*, 73 Iowa 469; *State v. Newhouse*, 39 La. 862.

2. See *State v. Partlow*, 90 Mo. 608; s. c., 59 Am. Rep. 31.

3. *Jordan v. State*, 82 Ala. 1; *State v. Schmidt*, 13 Iowa 469.

4. *State v. Schmidt*, 73 Iowa 469.

5. *State v. Schmidt*, 73 Iowa 469.

6. *Luker v. State*, (Ky.) 5 S. W. Rep. 354.

7. *Boyle v. State*, 105 Ind. 469.

8. *State v. Fitzhugh*, 2 Oreg. 277.

9. *State v. Schmidt*, 73 Iowa 469.

10. See *State v. Mathes*, 90 Mo.

fact or circumstance which would probably impair the credit of declarations made by the deceased in the belief of approaching death, as, for instance, his lack of religious belief, and consequent rejection of all faith in the doctrine of future rewards and punishments.¹

There is no prescribed limit of the time before death in which the dying declarations must have been made, in order to be admissible in evidence as such; but the question as to declarant's full belief of impending death is one to be determined according to all the facts and circumstances of each particular case, as they may appear or be shown to the court, upon hearing the preliminary proof upon which their admission is sought to be predicated.²

c. CHARACTER, DISPOSITION AND HABITS OF DECEASED.—(1) Proof by Prosecution.—It is not competent for the prosecution to show the peaceable disposition or character of the deceased, or

1. *Hill v. State*, 64 Miss. 431.

2. See *Jordan v. State*, 82 Ala. 1; *People v. Ramirez*, 73 Cal. 403; *People v. Brady*, 72 Cal. 490; *People v. Lee Sare Bo*, 12 Cal. 623; *Bryant v. State*, (Ga.) 4 S. E. Rep. 853; *People v. Johnson*, 72 Iowa 393; 34 N. W. Rep. 177; *People v. Com.*, (Ky.) 9 S. W. Rep. 509; *Luker v. Com.*, (Ky.) 5 S. W. Rep. 354; *Puryear v. Com.*, (Va.) 9 Cr. L. Mag. 785.

Dying Declarations — Declarations Made Two Hours After Injury.—The declarations of the deceased, made about two hours after receiving the wounds which proved fatal, and before the arrival of the physician, that "J shot me and H cut me, and all for nothing," were promptly admitted as evidence, on the testimony of the witness that the deceased said just before, "he did not think he would get well," although the witness declared to him his own opinion that he would recover. *Jordan v. State*, 82 Ala. 1.

Same—On the Day After the deceased was wounded, when a physician had stated in his hearing that his wound was mortal, and that he was going to die, and he had announced repeatedly that he had no hope of recovery, he made a statement before a justice of the peace, in the presence of several persons, which was taken down by a reporter in short-hand, written out, read, and assented to by deceased, who signed and swore to it, and died soon after. *Held*, that the statement was admissible in evidence on a trial for murder as a dying declaration, it not appearing that there were any questions put or answers given, after the statement had commenced, which did not appear in it as presented, or that anything was said by

the deceased previous to the formal dying declaration which conflicted with it. *People v. Brady*, 72 Cal. 490.

Same—Form of.—A dying declaration commenced: "I, A, believing I am about to die, do make this, my dying statement." The surgeon who attended deceased testified to his condition, and the character of his wounds, and that on the day before the declaration was made witness informed deceased that he was going to die, and he thereupon expressed a wish to make a dying declaration. *Held*, admissible. *People v. Ramirez*, 73 Cal. 403.

Same—Charging Defendant with Poisoning.—On a trial for murder, evidence that the deceased, while in the agonies of death which quickly followed, charged the accused (her husband) who was present with having killed her by poison administered in whisky a short time before, is admissible as a dying declaration. *Puryear v. Com.*, (Va.) 9 Cr. L. Mag. 788.

Dying Declarations — Declarations Near the Time of Death.—A declaration by a dying man as to the manner in which he came by his death, made within three or four minutes before his death, and about the same time as a statement by him that he was going to die, is admissible in evidence as a dying declaration, whether it was made before or after the statement that he knew he was going to die, as all the circumstances showed in him at the time a knowledge of impending death. *People v. Lee Sare Bo*, 72 Cal. 623.

Dying declarations were properly admitted where they were made within an hour of the death of the deceased, after his physician had told him that

his good reputation, except in rebuttal, when it has been assailed by the defence; for it is to be presumed, until otherwise shown, that the character, disposition or habits of the person killed had no influence upon defendant in committing the homicide.¹

(2) *Proof by Defence*.—The reputation of deceased as a violent, quarrelsome, turbulent, dangerous or vindictive man, or of his habit of going armed, is admissible under the plea of self-defence, where the evidence does not conclusively show that defendant was solely in fault, and that he had no reason to fear that his life or safety was in danger from deceased.² But such evidence is

there was no more than one chance in a hundred that he would recover, and asked him if he had any statement to make, and where the deceased had, shortly after he was stabbed, stated that he was going to die. *Walton v. State*, (Ga.) 5 S. E. Rep. 203.

The declarations of the murdered man, made after he was found insensible, and shortly before he died, as to who had assaulted and robbed him, were given in evidence by his wife, who nursed him, and who testified at the time they were made her husband "knew he was going to die." The wife was not cross-examined as to that point, and there was nothing in the record to impeach her knowledge of her husband's then state of mind. *Held*, that the declarations were admissible. *State v. Johnson*, 72 Iowa 393.

Same—Five Days Before.—Evidence that witness saw deceased five days before he died, that deceased said he was going to die, and stated that a number of men had taken him into the woods, and whipped him with a buggy trace, and that defendant was one of them, is competent. *Bryant v. State*, (Ga.) 4 S. E. Rep. 853.

Upon a trial for homicide, a witness testified: "I asked the deceased if he was much hurt. He said, 'I am killed.' Asked him if he knew who did it. Said, 'Yes, Charley Luker;' said they had no fuss." *Held*, that the above statement of the deceased, including the clause, "We had no fuss," relating directly to the act of killing, and the evidence showing that deceased was at the time mortally wounded, and fully conscious of approaching death, the statement was admissible as a dying declaration. *Luker v. Com.*, (Ky.) 5 S. W. Rep. 354.

1. *Ben v. State*, 37 Ala. 103; s. c., 1 Ala. Sel. Cas. 9; *Pound v. State*, 43 Ga. 88; *State v. Hockett*, 70 Iowa 442; s. c., 9 Cr. L. Mag. 208; *State v. Potter*, 13 Kan. 414; *Graves v. State*, 14 Tex. App.

113. See *Jackson v. State*, 77 Ala. 18; *Franklin v. State*, 29 Ala. 14; *People v. Bezy*, 67 Cal. 223; *People v. Anderson*, 39 Cal. 703; *People v. Lombard*, 17 Cal. 316; *People v. Murray*, 10 Cal. 309; *People v. Garbutt*, 17 Mich. 9; s. c., 97 Am. Dec. 162; *Chase v. State*, 46 Miss. 683; *State v. Hogue*, 6 Jones (N. C.) L. 381; *State v. Pearce*, 15 Nev. 188. *Thomas v. People*, 67 N. Y. 218. *Compare Dukes v. State*, 11 Ind. 557; s. c., 71 Am. Dec. 370; *Russell v. State*, 11 Tex. App. 288.

Proving Character, etc., of Deceased.—In a trial for murder, the court should not allow the prosecution to prove, against the objection of the defence, that the deceased was not in fact a dangerous man. His reputation may be proved, where the circumstances of the case render it doubtful whether the homicide was committed in self-defence, in order to show that the defendant may reasonably have believed himself in danger; but his actual character is not material in this connection. *People v. Anderson*, 39 Cal. 703.

Deceased a Convict.—The crime charged was committed in state's prison, where the prisoner and the deceased were confined. The prisoner gave evidence to show that the character of the deceased before he came to the prison was bad; that he was quarrelsome and vindictive. The prosecution then called witnesses, who were permitted to testify, under objection, that, in the respects stated, his character while in prison was good. *Held*, no error. *Thomas v. People*, 67 N. Y. 218.

"Good Soldier".—Evidence was offered to show that defendant while in the army was reputed a good and valiant soldier. *Held*, to be irrelevant. *People v. Garbutt*, 17 Mich. 9; s. c., 97 Am. Dec. 162.

2. See *Lang v. State*, (Ala.) 4 So. Rep. 193; *Franklin v. State*, 29 Ala. 14; *Williams v. State*, 74 Ala. 18; *Eiland v.*

admissible only where the proof leaves open the question of self-defence; and then it must be proved, not by opinions of witnesses, but by evidence of reputation.¹ Nor can such reputation

State, 52 Ala. 322; *People v. Lombard*, 17 Cal. 316; *Bond v. State*, 21 Fla. 738; *State v. Graham*, 61 Iowa 608; *People v. Stock*, 1 Idaho N. S. 218; *People v. Garbutt*, 17 Mich. 9; s. c., 97 Am. Dec. 162; *State v. Dumphrey*, 4 Minn. 438; *State v. Downs*, 91 Mo. 19; *State v. Rider*, 90 Mo. 54; *State v. Hayden*, 83 Mo. 198; *State v. Elkins*, 63 Mo. 159; *State v. Harris*, 59 Mo. 550; *State v. Bryant*, 55 Mo. 75; *State v. Floyd*, 6 Jones (N. C.) L. 392; *State v. Claude*, 35 La. An. 71; *State v. Matthews*, 78 N. C. 523; *State v. Pearce*, 15 Nev. 188; *Nichols v. People*, 23 Hun (N. Y.) 165; *Rippy v. State*, 2 Head (Tenn.) 217; *Moore v. State*, 15 Tex. App. 1; *Williams v. State*, 14 Tex. App. 102; s. c., 46 Am. Rep. 237; *Creswell v. State*, 14 Tex. App. 1; *Harrison v. Com.*, 79 Va. 374; s. c., 52 Am. Rep. 634; *Tiffany v. Com.*, (Pa.) 15 Atl. Rep. 462; *State v. Nett*, 50 Wis. 524. See *Bowles v. State*, 58 Ala. 335; *Dupree v. State*, 33 Ala. 380; s. c., 73 Am. Dec. 422; *Campbell v. State*, 38 Ark. 498; *People v. Moan*, 65 Cal. 532; *People v. Murray*, 10 Cal. 309; *May v. People*, 8 Colo. 210; *Jones v. People*, 6 Colo. 453; s. c., 45 Am. Rep. 526; *Drake v. State*, 75 Ga. 413; *Pound v. State*, 43 Ga. 88; *Doyal v. State*, 70 Ga. 134; *Patterson v. State*, 66 Ind. 185; *Fahnestock v. State*, 23 Ind. 231; *State v. Hockett*, 70 Iowa 442; s. c., 9 Cr. L. Mag. 208; *State v. Riddle*, 20 Kan. 711; *Payne v. Com.*, 1 Met. (Ky.) 370; *State v. Jackson*, 37 La. An. 896; *State v. Janvier*, 37 La. An. 645; *State v. Labuzan*, 37 La. An. 489; *State v. Ford*, 37 La. An. 443; *State v. Birdwell*, 36 La. An. 859; *State v. Watson*, 36 La. An. 148; *State v. Vance*, 32 La. An. 1177; *State v. Jackson*, 33 La. An. 1087; *State v. Jackson*, 12 La. An. 679; *Com. v. Mead*, 78 Mass. (12 Gray) 167; s. c., 71 Am. Dec. 741; *Com. v. Barnacle*, 134 Mass. 215; s. c., 45 Am. Rep. 319; *Costley v. State*, 48 Md. 175; *Newcomb v. State*, 37 Miss. 383; *Chase v. State*, 46 Miss. 683; *Spivey v. State*, 58 Miss. 858; *State v. Brown*, 63 Mo. 439; *State v. Keene*, 50 Mo. 357; *State v. Hogue*, 6 Jones (N. C.) L. 381; *State v. Tilly*, 3 Ired. (N. C.) L. 424; *People v. Druse*, 103 N. Y. 655; 9 Cr. L. Mag. 88; *Sindram v. People*, 88 N. Y. 196; *Abbott v. People*, 86 N. Y. 460; *Thomas v. People*, 67 N.

Y. 218; *McKenna v. People*, 18 Hun (N. Y.) 580; *Blackburn v. State*, 23 Ohio St. 146; *Marts v. State*, 26 Ohio St. 162; *Alexander v. Com.*, 105 Pa. St. 1; *State v. Smith*, 12 Rich. (S. C.) L. 430; *West v. State*, 18 Tex. App. 640; *Brunet v. State*, 12 Tex. App. 521; *Grissom v. State*, 8 Tex. App. 386; *Lewallen v. State*, 6 Tex. App. 475; *Plasters v. State*, 1 Tex. App. 673. *Compare Com. v. Hilliard*, 68 Mass. (2 Gray) 294; *State v. Field*, 14 Me. 244; s. c., 31 Am. Dec. 52; *Com. v. Farrigan*, 44 Pa. St. 386.

"Ruffianly" Character.—In a prosecution for murder in the first degree, under the Wisconsin statute, where it appeared that the fatal blow was inflicted with a pocket-knife, and that deceased made the first assault. *Held*, that it was error to reject evidence offered by defendant to show that deceased was a man of great physical strength, and was "a desperate, fighting, ruffianly man," and that defendant had knowledge of these facts. *State v. Nett*, 50 Wis. 524.

Affray Sought by Deceased.—On a trial for murder, it was in evidence that the defendant, H, charged deceased with perjury, adding: "I can prove it. Come up here, M." Whereupon the defendant, M, stepped up, when deceased struck him, knocked him on his knees, and stamped on him; M rose up, and deceased immediately thereafter staggered back mortally wounded, one witness stating that both M and deceased had knives in their hands. It was further in evidence that M was small, crippled, and one-eyed, and deceased was a strong man. *Held*, that evidence of the character of deceased for violence was admissible. *State v. Matthews*, 78 N. C. 523.

Suicidal Disposition.—On a trial for murder, the defendant, for the purpose of showing that the deceased came to her death by suicide, may show that six years previously the deceased was of a melancholy disposition and threatened to commit suicide. The remoteness of the period goes merely to the weight and not to the competency of the evidence. *Blackburn v. State*, 23 Ohio St. 146.

1. *Harrison v. Com.*, 79 Va. 374; s. c., 52 Am. Rep. 634. See *Dupree v.*

be proved by evidence of specific acts of violence or turbulence, or of isolated facts, which are not part of the *res gestæ*.¹

State, 33 Ala. 380; *People v. Moan*, 65 Cal. 532; *May v. People*, 8 Colo. 210; *Drake v. State*, 75 Ga. 413; *Patterson v. State*, 66 Ind. 185; *State v. Riddle*, 20 Kan. 711; *State v. Jackson*, 37 La. An. 896; *State v. Janvier*, 37 La. An. 645; *State v. Labuzan*, 37 La. An. 489; *State v. Ford*, 37 La. An. 443; *State v. Watson*, 36 La. An. 148; *Com. v. Mead*, 78 Mass. (12 Gray) 167; s. c., 71 Am. Dec. 741; *State v. Brown*, 63 Mo. 439; *State v. Elkins*, 63 Mo. 159; *Abbott v. People*, 86 N. Y. 460; *Thomas v. People*, 67 N. Y. 218; *Marts v. State*, 26 Ohio St. 162; *West v. State*, 18 Tex. App. 640; *Plasters v. State*, 1 Tex. App. 673.

Overt Act Necessary.—Evidence of threats, or of the dangerous character of the deceased, is not admissible without proof of an overt act of attack on the accused, and that accused was in imminent danger therefrom. *State v. Jackson*, 37 La. An. 896; *State v. Janvier*, 37 La. An. 645; *State v. Labuzan*, 37 La. An. 489; *West v. State*, 18 Tex. App. 640.

Habitual Use of Liquors.—On a prosecution for homicide, evidence that the deceased was in the habit of using liquor to excess is inadmissible. *People v. Moan*, 65 Cal. 532.

Other Wounds on Deceased.—On the trial of P for the murder of W by the discharge of a pistol while being wrenched from W's hands by P and others, *held*, that P could not properly be allowed, for the purpose of showing that certain wounds upon W's person, not contributing to his death, had been received prior to the assault, to prove that W had been intoxicated, violent and quarrelsome during the day on which he was killed. *Patterson v. State*, 66 Ind. 185.

Character in Foreign Country.—The character of the deceased for violence, a quarrelsome disposition, etc., many years before in a foreign country, is immaterial, and evidence thereof is properly rejected. *May v. People*, 8 Colo. 210.

Garroter.—On a trial for manslaughter, evidence that the deceased was a man of great muscular strength, and practiced in seizing persons by the throat in a peculiar way, which would at once render them helpless, and shortly take away life, is inadmissible for the defendant. *Com. v. Mead*, 78

Mass. (12 Gray) 167; s. c., 71 Am. Dec. 741.

Defendant the Aggressor.—Where the evidence showed that the accused pursued the deceased with a drawn knife, with which he gave the mortal stroke, *held*, that evidence of the dangerous character of the deceased was properly excluded. *State v. Watson*, 36 La. An. 148.

Character of Defendant—When Excluded.—Upon the trial of an indictment for murder, deceased having been struck and killed with an iron wrench, evidence of the reputation of the deceased as to being quarrelsome, *held*, properly excluded, where no assault or threat on the part of the deceased had been made, and where there could be no pretence that the blow was struck in self-defence. *Abbott v. People*, 86 N. Y. 460.

Where the evidence tends to show that defendant killed his wife with an axe and cut her throat, evidence that she had a violent temper is properly rejected. *Drake v. State*, 75 Ga. 413.

Upon the trial, the prisoner offered to prove that the deceased had been engaged in several fights with other parties, in each of which he used a knife and cut his opponent; also declarations of his as to his cutting people with razors, and that all these matters had been communicated to the prisoner; the offers were overruled. *Held*, no error. *Thomas v. People*, 67 N. Y. 218.

Reputation of Deceased for Honesty.—In a trial for murder, it was *held* incompetent for the accused to prove that the general character of the deceased for honesty was bad. Such evidence could neither explain the actions of the deceased at the time he was killed nor show that the accused committed the homicide in self-defence, or under circumstances justifying it. *Plasters v. State*, 1 Tex. App. 673.

The Uncorroborated Testimony of a single witness to the fact that the deceased began the conflict in which he was killed, contradicted by other witnesses, and disbelieved by the judge *a quo*, does not establish such a foundation as to render evidence of the deceased's bad and dangerous character admissible. *State v. Ford*, 37 La. Ann. 443.

1. *Dupree v. State*, 33 Ala. 380; *Franklin v. State*, 29 Ala. 14; *Campbell v. State*, 38 Ark. 498; *Newcomb v.*

d. ACTS, THREATS AND DECLARATIONS BY DEFENDANT.—(1) *Threats.*—On the trial of an indictment for murder, proof of previous threats by defendant against deceased is competent as showing malice, and, if made long enough before the homicide, as evidence of premeditation or deliberation.¹ The threats may

State, 37 Miss. 383; *People v. Druse* 103 N. Y. 655; s. c., 5 N. Y. Cr. Rep. 10; 3 N. Y. St. Rep. 617; 9 Cr. L. Mag. 88; *Nichols v. People*, 23 Hun (N. Y.) 165; *McKenna v. People*, 18 Hun (N. Y.) 580; *Alexander v. Com.*, 105 Pa. St. 1.

Escaped Convict.—The bad character of the deceased cannot be shown by evidence of particular facts, showing misconduct, etc., as that he was an escaped convict. *Dupree v. State*, 33 Ala. 380.

Cruel and Depraved Disposition.—At the trial of an indictment for murder, the only defence being justification, evidence was offered by defendant that deceased treated his domestic animals with cruelty; and that he robbed his father, when in his coffin, of his grave clothes and wore them at his funeral. *Held*, that it was properly excluded, under the rule that, after evidence has been given by a defendant, tending to show that the homicide was committed in self-defence, he may follow it by proof of the general reputation of the deceased for quarrelsomeness and violence, but evidence of specific acts is inadmissible. *People v. Druse*, 103 N. Y. 655; s. c., 5 N. Y. Cr. Rep. 10; s. c., 3 N. Y. St. Rep. 617; 9 Cr. L. Mag. 88.

Deceased Beat Prisoner.—The mere fact that the deceased severely beat the prisoner six weeks before the killing, is inadmissible. *Newcomb v. State*, 37 Miss. 383.

1. *Harrison v. State*, 79 Ala. 29; *Jordon v. State*, 79 Ala. 9; *Anderson v. State*, 79 Ala. 5; *Jones v. State*, 76 Ala. 8; *Redd v. State*, 68 Ala. 492; *Marler v. State*, 67 Ala. 55; s. c. 42 Am. Rep. 95; *Johnson v. State*, 17 Ala. 618; *Pitman v. State*, 22 Ark. 354; *Dunn v. State*, 2 Ark. 229; s. c., 35 Am. Dec. 54; *State v. Hoyt*, 47 Conn. 518; s. c., 36 Am. Rep. 89; *State v. Hoyt*, 46 Conn. 330; *State v. Alford*, 31 Conn. 40; *State v. Green*, 1 Houst. Cr. Cas. (Del.) 217; *Dixon v. State*, 13 Fla. 636; *Everett v. State*, 62 Ga. 65; *Schoolcraft v. People*, 117 Ill. 271; *Westbrook v. People*, (Ill.) 18 N. E. Rep. 104; *Goodwin v. State*, 96 Ind. 550; *State v. McCahill*, 72 Iowa 111; s. c., 9 Cr. L. Mag. 37; *Brewer v. Com.*, (Ky.) 8 S. W. Rep.

339; *Short v. Com.*, (Ky.) 4 S. W. Rep. 810; *Smith v. Com.*, (Ky.) 4 S. W. Rep. 798; *Hart v. Com.*, (Ky.) 2 S. W. Rep. 673; *Nichols v. Com.*, 11 Bush (Ky.) 575; *State v. Birdwell*, 36 La. An. 859; *Riggs v. State*, 30 Miss. 635; *State v. Partlow*, 90 Mo. 608; s. c., 59 Am. Rep. 31; *State v. Grant*, 79 Mo. 113; s. c., 49 Am. Rep. 218; *State v. Adams*, 76 Mo. 355; *State v. Nugent*, 71 Mo. 136; s. c., 8 Mo. App. 563; *State v. Guy*, 69 Mo. 430; *State v. Hymer*, 15 Nev. 49; *State v. Wentworth*, 37 N. H. 196; *LaBeau v. People*, 34 N. Y. 223; *Friery v. People*, 2 Abb. App. Dec. (N. Y.) 215; *Jefferd v. People*, 5 Park. Cr. Cas. (N. Y.) 522; *Stephens v. People*, 4 Park. Cr. Cas. (N. Y.) 396; *State v. Rash*, 12 Ired (N. C.) L. 382; s. c., 55 Am. Dec. 420; *State v. Hildreth*, 9 Ired. (N. C.) L. 429; s. c., 51 Am. Dec. 364; *State v. Shepperd*, 8 Ired. (N. C.) L. 195. *Compare Mimms v. State*, 16 Ohio St. 221; *Stewart v. State*, 1 Ohio St. 66; *Hopkins v. Com.*, 50 Pa. St. 9; s. c., 88 Am. Dec. 518; *State v. Belton*, 24 S. C. 185; s. c., 58 Am. Rep. 245; *Heath v. Com.*, 1 Rob. (Va.) 735; *White v. Territory*, (Wash. Tr.) 19 Pac. Rep. 377; *Benedict v. State*, 14 Wis. 423; *U. S. v. Neverson*, 1 Mackey (D.C.) 152. See *Alston v. State*, 63 Ala. 178; *Dixon v. State*, 13 Fla. 636; *Cluck v. State*, 40 Ind. 263; *State v. Sterrett*, 71 Iowa 386; *Johnson v. Com.*, 9 Bush (Ky.) 224; *People v. Curtis*, 52 Mich. 616; *State v. Downs*, 91 Mo. 19; *Carr v. State*, (Neb.) 37 N. W. Rep. 630; *State v. Barfield*, 7 Ired. (N. C.) L. 299; *Moore v. State*, 2 Ohio St. 500; *Albernathy v. Com.*, 101 Pa. St. 322; *Maxwell v. State*, 3 Heisk. (Tenn.) 420; *Lander v. State*, 12 Tex. 462; *Phillips v. State*, 22 Tex. App. 139.

Killing by Mob of Miners.—Where, on a trial of murder, it is shown that a mob of miners on a strike, in carrying out a conspiracy to drive away new men who had been brought there to work the mines, surrounded the house in which deceased was, and fired shots into the house, and inside it, killing deceased, evidence of threats to kill a superintendent of the mines who was in the house, followed by immediate firing, made during the attack but subsequently to the

be admissible, although they were not directed toward any particular person;¹ but where they specify the person against whom they are made, they are not admissible against the defendant upon trial for killing another person;² and they may not have been to commit any specific act or injury, if they tend to show a malicious condition of defendant's mind.³ And where a threat is specific, the fact that the injury was threatened to be done by other means than the evidence shows to have been used in the commission of the homicide, will not render it incompetent.⁴ Evidence of conditional threats by defendant is also admissible.⁵

It is immaterial to whom the threats were made, or whether they were made to any particular person; threats made by de-

killings of deceased, is admissible, as showing the desperate character of the mob, and that murder was part of their program. *State v. McCahill*, 72 Iowa 111; s. c., 9 Cr. L. Mag. 37.

Threats Made After Quarrel.—Evidence is admissible on the part of the state that the defendant, after an altercation with the deceased, said: "I'll kill him before day, God damn him," although the defendant had gone away from the deceased. *State v. Guy*, 69 Mo. 430.

1. *Harrison v. State*, 79 Ala. 29; *Jordon v. State*, 79 Ala. 9; *Anderson v. State*, 79 Ala. 5. See *State v. Hoyt*, 47 Conn. 518; s. c., 36 Am. Rep. 89; *Dixon v. State*, 13 Fla. 636; *State v. Grant*, 79 Mo. 113; s. c., 49 Am. Rep. 218; *State v. Hymer*, 15 Nev. 49; *State v. Belton*, 24 S. C. 185; s. c., 58 Am. Rep. 245; *Benedict v. State*, 14 Wis. 423.

Against "Policemen."—On a trial for murder of a policeman, proof is admissible of threats of violence made by the accused shortly before the homicide against "policemen," though not particularly against the deceased. *Dixon v. State*, 13 Fla. 636; *State v. Grant*, 79 Mo. 113; s. c., 49 Am. Rep. 218.

Threat Against a Certain Family.—Defendant had threatened "the Deans." *Held*, on his trial for the murder of one of the family, that evidence of the threat was admissible, although defendant's quarrel was with other members of the family. *State v. Belton*, 24 S. C. 185; s. c., 58 Am. Rep. 245.

"Two or Three Men."—Upon a trial for murder, evidence that, three hours before the homicide, the defendant, while in a bar-room, exclaimed: "This is the first time I have been drunk since I have been in town. I got drunk just to kill two or three men in this town tonight, and I'll do it, too." *Held*, ad-

missible, as tending to show that he had the deceased in his mind at the time of uttering the threats. *State v. Hymer*, 15 Nev. 49.

"Someone."—A remark made by the defendant a few days before the homicide, after speaking of his father, that he did not know but he should kill someone in a week, *held*, to be admissible against him as a threat, and as showing a revengeful and murderous spirit. *State v. Hoyt*, 47 Conn. 518. See *Benedict v. State*, 14 Wis. 423; *Hopkins v. Com.*, 50 Pa. St. 9; s. c., 88 Am. Dec. 518.

2. *Carr v. State*, (Neb.) 37 N. W. Rep. 630.

Threats to Kill Somebody.—Defendant had a quarrel with K, which much excited defendant, who made threats to kill K, or somebody, and borrowed a pistol. Later in the day, defendant had a quarrel with B, whom he shot and killed. *Held*, that evidence of his threats to kill K or somebody was inadmissible upon his trial for killing B, with whom he had had no quarrel at the time he uttered the threats. *Albernathy v. Com.*, 101 Pa. St. 322.

3. **What Admissible to Show Threats.**—Testimony that defendant said, in speaking of a difficulty that he had had with the deceased, that he was "part Indian; bad medicine," and that something serious would grow out of this trouble, *held* admissible, as tending to show a threat. *Schoolcraft v. People*, 117 Ill. 271.

4. On the trial of a prisoner for the crime of murder by poisoning, it is competent to prove that he had threatened injury to the deceased with other instruments; *e. g.*, a slung-shot, as tending to prove the *animus* of the prisoner towards the deceased. *La Beau v. People*, 34 N. Y. 223.

5. *State v. Adams*, 76 Mo. 355.

fendant while talking to himself may be admissible,¹ and the threats may be proved by any person who heard them uttered.² It is immaterial how long before the homicide the threats were made, as the remoteness of their utterance goes to their weight and not to their competency.³

(2) *Acts.*—(a) *Before the Homicide.*—(a') *In General.*—Evidence of prior acts of defendant, though they are not shown to be a part of the *res gestæ*, is admissible when such acts legitimately tend to establish motive or intention in defendant to commit the crime with which he is charged; and such evidence is admissible for that purpose only.⁴ Its admissibility is not limited as to the time or place of the act or acts, but they may be shown whenever they will serve to cast light upon the question whether defendant committed the homicide, or whether he did it with malice, or with premeditation and deliberation. Thus, where the parties were together previous to the homicide, the defendant's whole conduct from the time of the meeting until the consummation of the crime may be shown;⁵ proof of menaces towards

1. *Showing Previous Quarrel or Threats by Accused.*—A witness was permitted to testify that defendant, while drunk and alone, talked to himself and threatened to kill deceased. *Held*, properly admissible, as tending to show the state of defendant's feeling towards the deceased. *Smith v. Com.*, (Ky.) 4 S. W. Rep. 798.

2. A witness was permitted, against defendant's objection, to testify that while the witness was in the front room, and the accused was with deceased and several persons, in a back room, immediately before the affray, he heard a conversation containing insults and threats, and that soon thereafter the deceased and the accused, with the other persons, passed through the room where witness was, out into the crime. *Held*, that said testimony was admissible, though the witness could not, while in the front room, see any of the parties, nor recognize the voices; that the accused was sufficiently connected with the conversation by the portion of the testimony in italics. *Short v. Com.*, (Ky.) 4 S. W. Rep. 810.

3. See *Redd v. State*, 68 Ala. 492; *State v. Hoyt*, 46 Conn. 330; *Everett v. State*, 62 Ga. 65; *Goodwin v. State*, 96 Ind. 550; *Jefferd v. People*, 5 Park. Cr. Cas. (N. Y.) 522.

Threats Thirty Days Before.—The fact that the threats by the accused against the life of deceased were made thirty days before the homicide, affects their weight and not their admissibility. *Goodwin v. State*, 96 Ind. 550.

Same—Over a Year Before.—On trial of E for the murder of F, who had been his paramour, there was evidence that, on the evening of her death, she had been escorted by another mulatto, who was growing attentive to her. *Held*, that a threat by E, that he would sooner kill F than see her married to any other man than himself, was admissible in evidence, although made more than a year before the killing. *Everett v. State*, 62 Ga. 65.

Same—Two Years.—Upon a trial for murder the court admitted evidence of threats made by the prisoner two years prior to the murder. *Held*, that this was not improper. Long continued animosity and ill-will are better evidence of a state of mind which would ripen into deliberate murder than the hasty ebullition of passion. Murder is not on premeditation and the motives for such an act are not the less powerful because they are the result of ill feelings entertained for years. *Jefferd v. People*, 5 Park. Cr. Cas. (N. Y.) 522.

Same—Thirteen Years.—On a trial for murder, evidence that thirteen years before the homicide the accused had said that he would like to put a ball through the head of the deceased, and that he had made like declarations three or four years before the homicide. *Held*, to be admissible; the remoteness of time went solely to the weight. *State v. Hoyt*, 46 Conn. 330.

4. *State v. Edwards*, 34 La. An. 1012.

5. See *People v. Potter*, 5 Mich. 1; s. c., 71 Am. Dec. 673.

the deceased is always legitimate evidence;¹ and occurrences not necessarily connected with the deceased, occurring nearly at the same time, may be proved to show a desperate, reckless or mischievous state of mind in defendant.² Previous maltreatment of deceased by the accused may aid to raise a powerful presumption of malice, especially if of the same nature of the fatal assault;³ and other acts of violence may also be proved on the trial of an indictment for manslaughter.⁴

Proof that defendant purchased or carried deadly weapons may also afford a presumption of malice;⁵ and where such proof is made, it is immaterial that carrying weapons is a general custom within the locality where the homicide was committed.⁶ But defendant should be allowed to explain his motive in carrying such a weapon.⁷

Where defendant sets up certain facts in mitigation, it is admissible to show previous acts committed by him, although remote, inconsistent with the existence of such facts.⁸ But it is not proper to prove actions not in any way connected with the homicide, and which could not have had any influence in its commission.⁹

1. *Anderson v. State*, 15 Tex. App. 447.

2. *Kernan v. State*, 65 Md. 253.

3. See *William v. State*, 64 Md. 384; s. c., 1 St. Rep. 704; *State v. Rash*, 12 Ired. (N. C.) L. 382; s. c., 55 Am. Dec. 420; *Stone v. State*, 4 Humph. (Tenn.) 27.

4. **Proof of Other Acts of Violence.**—On the trial of an indictment for manslaughter, by hauling the deceased by the hair of the head, and throwing her violently upon the sofa, other acts of violence upon the same evening may be shown. *State v. Pike*, 65 Me. 111.

5. See *State v. Brown*, 75 Me. 456; *Creswell v. State*, 14 Tex. App. 1.

6. *Creswell v. State*, 14 Tex. App. 1.

7. *Aaron v. State*, 31 Ga. 167.

8. Testimony was introduced showing the wild action and demeanor of defendant, and that it had been aggravated by the belief that deceased had debauched defendant's wife. The state introduced testimony that prior to his marriage, he wanted to rent a room in which he proposed to keep the woman he afterwards married, for the purpose of general prostitution for his pecuniary benefit. *Held*, that it was properly admitted. *State v. Bryant*, 93 Mo. 273.

9. See *Com. v. Campbell*, 89 Mass. (7 Allen) 541; s. c., 83 Am. Dec. 705; *U. S. v. King*, 34 Fed. Rep. 302.

Evidence of Saloons near Military Reservation.—It appeared on the trial of

a private soldier charged with a murder committed by him on a military reservation, that the soldiers stationed there were frequently allowed to go out and come in without a pass. It was also in evidence that there were many saloons in the neighborhood. *Held*, that this fact should not work to the prejudice of the accused, who had availed himself of the privilege on the night of the murder. *U. S. v. King*, 34 Fed. Rep. 302.

Former Riotous Acts.—In an indictment for murder, committed during a riot in which the prisoner was engaged, evidence is incompetent to prove other riotous acts by him at a different place and several hours earlier, unless it is first shown that the various acts were all parts of one continuous transaction. *Com. v. Campbell*, 89 Mass. (7 Allen) 541; s. c., 83 Am. Dec. 705.

Indecent Proposals to Wife of Deceased.

—Where the wife of O, the deceased, was the only witness to the killing, *held*, erroneous to allow her to testify that a few minutes before G, the accused, shot O, he made indecent proposals to her; O not being apprised of the fact, and nothing indicating that it influenced the acts of either O or G. *Gardner v. State*, 11 Tex. App. 265.

Abortion—Application for Information.—In the trial of an indictment for murder by poison, in which one count alleges that the deceased was pregnant, and was induced to take the poison by

(a²) *Other Crimes*.—Where two persons are killed at the same time and place, and apparently in the same transaction or approximately so, evidence as to the circumstances of the killing of one is admissible on the trial of an indictment for the killing of the other;¹ and such is also the case where there is evidence to prove that another person killed at a different time and place was murdered as a part of the same deliberate plan, and for the same purpose, and with the same motive, as was the person for whose murder defendant is on trial.² But proof of other homicides or crimes having no connection with the one for which defendant is on trial is irrelevant and inadmissible.³ The prosecution may

assurances of the defendant that it was a medical preparation which would produce a miscarriage, evidence of a conversation two or three years before the time of the acts charged, in which the defendant applied to a witness for information upon the subject of procuring abortions, is inadmissible. *Com. v. Hersey*, 84 Mass. (2 Allen) 173.

1. *Brown v. Com.*, 76 Pa. St. 319; *Com. v. Ferrigan*, 44 Pa. St. 386. See *Fernandez v. State*, 4 Tex. App. 419; *Heath's Case*, 1 Rob. (Va.) 735; *People v. Foley*, (Mich.) 9 Cr. L. Mag. 345.

Bodies Found a Mile Apart.—On the trial for the murder of one of two travelling companions whose bodies were found about a mile apart, evidence of the condition in which the body of the other was found, *held*, to be admissible, there being proof that they were murdered in the same onset. *Fernandez v. State*, 4 Tex. App. 419.

Twin Infants.—On the trial of an indictment for the murder of one of two infants, where it appears that the infants were twins, and that both were put into one crib at night in good health, and both found dead in the morning with similar marks on each, testimony showing the death of the other infant, and the appearance of its body, is properly admitted on the question whether the one for the killing of which the indictment was found, came to its death by violence, as from the circumstances it is apparent that they both came to their death in the same manner. *People v. Foley*, (Mich.) 9 Cr. L. Mag. 345.

Evidence that Defendant Shot Another Person.—Evidence was offered that the prisoner, on the same day that deceased was killed and shortly before the killing shot a third person. *Held*, that the evidence was admissible, under the circumstances of the case, though it tend-

ed to prove a distinct felony committed by the prisoner; such shooting, and the killing of the deceased, appearing to be connected as parts of one entire transaction. *Heath's Case*, 1 Rob. (Va.) 735.

2. See *Com. v. Robinson*, 146 Mass. 571; s. c., 10 Cr. L. Mag. 444. *Compare Shaffner v. Com.*, 72 Pa. St. 60; s. c., 13 Am. Rep. 649.

Scheme to Secure Insurance Money.—At the trial of defendant for the murder of her brother-in-law A, the government offered evidence to prove, that A's wife, who was defendant's sister, had died; that before her death, defendant had formed a scheme to secure certain insurance on the life of A, which was then payable to his wife; that, as a part of such scheme, defendant had determined to kill her sister, then to induce A to assign the insurance to her (defendant), and then to kill A. *Held*, that the court correctly ruled that if evidence should be offered and admitted tending to show that the defendant knew, before her sister's death, of the existence of the insurance, and that it could be transferred on the latter's death to herself, and made payable to herself at A's death, then evidence might be offered that the sister died from poison administered by defendant, as a part of her method of carrying out her intention, in connection with evidence that she poisoned A, as another part of the same plan, and with the same general intention. *Com. v. Robinson*, 146 Mass. 571; s. c., 10 Cr. L. Mag. 544.

3. *State v. Sterrett*, 71 Iowa 386. See *State v. Martin*, 74 Mo. 547.

Other Indictments.—In a murder trial, two indictments against the accused for felonious assaults, in no way connected with the homicide, were allowed to be read. *Held*, error. *State v. Martin*, 74 Mo. 547.

also show other crimes leading to, or connected with, the homicide for which defendant is on trial.¹

(b) *After the Homicide.*—(b') *Conduct and Appearance Indicating Mental Condition.*—Where the charge that defendant is the slayer is disputed, it is proper to show, for the consideration of the jury, the conduct and appearance of the defendant at or near the time of the commission of the homicide, as indicating his mental condition.² And for this purpose actions showing nervousness, excitement or fear when first informed of, or charged with, the crime,³ or silence,⁴ or conduct manifesting a lack of concern at the death of deceased, where deep sorrow is natural and to be expected,⁵ may be proved against defendant.

1. See *People v. Rogers*, 71 Cal. 565; *Kernan v. State*, 65 Md. 253; *State v. Thomas*, (N. C.) 10 Cr. L. Mag. 443; *Washington v. State*, 8 Tex. App. 377.

Prior Assault.—Upon the trial of an indictment for murder, evidence of an assault by defendant with a pistol, at a place not far from the place of the homicide, and a very short time before the killing, is admissible as showing the general conduct of defendant at the time; and what was said and done by others in company with him, is also admissible. *Kernan v. State*, 65 Md. 253; *Washington v. State*, 8 Tex. App. 377.

Prior Burglaries.—Evidence of the commission of two burglaries by the accused is admissible, notwithstanding the rule that such evidence is objectionable as, in effect, trying the accused for an offence not charged in the information, and as prejudicing the jury against him, when the evidence tends to show that the person who killed the deceased gained entrance to his house by means of a knife and chisel taken in one of the burglaries, and killed him with a pistol taken in the other. *People v. Rogers*, 71 Cal. 565.

2. See *Clough v. State*, 7 Neb. 320.

3. *State v. Nash*, 7 Iowa 347; *State v. Baldwin*, 36 Kan. 1; s. c., 9 Cr. L. Mag. 49; *Miller v. State*, 18 Tex. App. 232; *Noftsinger v. State*, 7 Tex. App. 301.

"Very Nervous."—The demeanor of one charged with crime, at or near the time of its commission, or of his arrest for the same, may always be shown; and the testimony of the officer who subpoenaed and took the defendant before the coroner's jury, that "he was very nervous and showed a great deal of fear," was admissible. *State v. Baldwin*, 36 Kan. 1; s. c., 9 Cr. L. Mag. 49.

"Excited."—One who met three-quarters of an hour after a murder, the

person indicted for having committed it, may testify that he appeared excited. *Miller v. State*, 18 Tex. App. 232.

Evidence of Mistakes in Business

Transactions.—The rule admitting evidence of any peculiarity of conduct of the accused, however slight, where the evidence is wholly circumstantial, applied, on a trial of a clerk for murder, to mistakes made by the accused in selling goods, and apparent preoccupation or absence of mind. *Noftsinger v. State*, 7 Tex. App. 301.

4. *State v. Reed*, 62 Me. 129; *O'Mara v. Com.*, 75 Pa. St. 424.

Silence Proof of Guilt.—The fact that one remains silent, when told that he is suspected of murder, may properly be considered by the jury as evidence of guilt. *State v. Reed*, 62 Me. 129.

On the trial for murder, a witness testified that he saw O's wife when she came where the body of the deceased lay; and she said to O, "If I had been at home this would not have happened," and that O made no reply to this. *Held*, to be a statement to the prisoner, to be judged by his conduct and not by the declarations of the wife only, and therefore to be a part of the *res gestae*. *O'Mara v. Com.*, 75 Pa. St. 424.

5. *State v. Baldwin*, 36 Kan. 1; s. c., 9 Cr. L. Mag. 49; *Greenfield v. People*, 85 N. Y. 75; s. c., 39 Am. Rep. 636.

Lack of Concern at Death of Wife.—Evidence is admissible upon the trial of one for the murder of his wife, to show that on the morning after the murder he manifested no concern and shed no tears. *Greenfield v. People*, 85 N. Y. 75; s. c., 39 Am. Rep. 636.

Lack of Grief for Sister.—Whether defendant manifested evidence of grief on account of his sister's death was a proper inquiry of the state. "Such inquiry, however, must be confined to a reasonable time after the death, or its

(b⁷) *Flight or Escape*.—On a trial for homicide it is always proper to show, as circumstances tending to prove defendant's guilt, that he fled after its commission;¹ and the action of officers in seeking him to arrest may be shown;² but defendant has the right to explain his flight, or prove that it was caused by some other occurrence or in some other manner,³ except where it is clearly and sufficiently proved that the homicide was the result of defendant's act.⁴ But it is incompetent for the defendant to prove his conduct and statements in refusing to flee, where there is no evidence as to flight, or as to defendant's statements in regard thereto, offered by the prosecution.⁵ Proof of escape or attempts to escape, after arrest for the homicide, is also competent;⁶ but defendant has the right to be heard in explanation.⁷

(3) *Declarations*.—(a) *Before the Homicide*.—Declarations and statements made by defendant, before the homicide, regarding matters connected therewith, are not admissible in his defence, unless they form a part of the *res gestæ*;⁸ but where they tend

discovery; and where the inquiry relating to his conduct covered a period of four months thereafter, it is *held* to be unreasonable time, but, under the testimony and circumstances of the case, it is not prejudicial error. *State v. Baldwin*, 36 Kan. 1; s. c., 9 Cr. L. Mag. 49.

1. *Batten v. State*, 80 Ind. 394; *People v. Ogle*, 104 N. Y. 511; *People v. Giancoli*, 74 Cal. 642.

Flight—Inference of Guilt.—In the trial of an indictment for murder, an instruction that flight is not an inference of guilt, and the timid might seek safety thereby, while innocent, was properly refused. *People v. Giancoli*, 74 Cal. 642.

2. *People v. Ogle*, 104 N. Y. 511.

3. *State v. Barham*, 82 Mo. 67; *State v. Phillips*, 24 Mo. 475; *Arnold v. State*, 9 Tex. App. 435.

To Rebut the Presumption Arising from Flight, a prisoner may show that his life was threatened by relatives of the deceased. *State v. Barham*, 82 Mo. 67.

Warning of a Mob.—On A's trial for murder, the state proved that A fled soon after the killing. *Held*, that it was error thereupon to exclude evidence offered by A that his flight was occasioned by a warning that his life was menaced by a mob. *Arnold v. State*, 9 Tex. App. 435.

Same—Evidence of Subsequent Public Excitement to justify an anticipation of violence after a homicide, and thus rebut a presumption of guilt from flight,

is admissible, but the excitement must exist before the flight; the interval may be so short that an apprehension cannot arise. *State v. Phillips*, 24 Mo. 475.

4. Explaining Motives in Running Away.—Upon a trial for murder, it was clearly proved that defendant struck the blow from which the death resulted. *Held*, that defendant could not be heard to complain that his explanations or his motive in running away were not received in evidence. Such evidence could have no bearing upon the case. *People v. Ah Choy*, 1 Idaho 317.

5. *Jordan v. State*, 79 Ala. 9; *State v. Harris*, 73 Mo. 287.

6. *Hittner v. State*, 19 Ind. 48; *State v. Dufour*, 31 La. An. 804; *State v. Sanders*, 76 Mo. 35.

Attempt to Escape from Bystander.—Upon a trial for homicide it appeared that immediately after the killing, the prisoner was seized by a bystander whom he attempted to stab in order to escape. *Held*, that evidence of the attempt to stab was admissible. *State v. Sanders*, 76 Mo. 35.

7. An Escape by one arrested for murder, may be shown to be from fear of immediate violence, and is not necessarily evidence of conscious guilt. *Golden v. State*, 25 Ga. 527.

8. See *People v. Wyman*, 15 Cal. 70; *Lewis v. State*, 72 Ga. 164; s. c., 53 Am. Rep. 835; *State v. Walker*, 77 Me. 488; *State v. Holcomb*, 86 Mo. 371; *Johnson v. State*, 22 Tex. App. 206.

to show motive for committing the homicide, or malice in its commission, they may be proved by the prosecution.¹

Statement of Purpose in Obtaining Weapon.—On the trial of one for murder, it is not competent for him to show by his statement, made at the time he purchased the pistol with which he killed the deceased, that his purpose in buying it was to kill mad dogs. *State v. Holcomb*, 86 Mo. 371.

The defendant was shown to have borrowed a chisel on the day of the murder. *Held*, that his declarations as to what he intended to do with the chisel, not being shown to have any apparent connection with the commission of the offence charged, were not admissible as part of the *res gestæ*. *People v. Wyman*, 15 Cal. 70.

Declarations of the Accused During Continuance of Cruel Treatment, which resulted in death, are not admissible when offered by her to account for scars on the person of deceased. *Lewis v. State*, 72 Ga. 164.

Statement of Intent in Going.—For the purpose of showing that the defendant had no deadly purpose of executing prior threats, it cannot be shown that, the night before he went to the place of the homicide, he told his mother that he was going to organize an entertainment. *Johnson v. State*, 22 Tex. App. 206.

Statements at Moment of Shooting.—Defendant being boisterously serenaded on his wedding night rose from his bed and discharged his pistol through the side-light in the door, fatally wounding one of the serenaders. *Held*, that defendant's statements to his father at the moment of shooting were admissible as a part of the *res gestæ* to show the motive of the shooting. *State v. Walker*, 77 Me. 488.

1. See *Redd v. State*, 68 Ala. 492; *Evans v. State*, 62 Ala. 6; *People v. Taylor*, 36 Cal. 255; *Shaw v. State*, 60 Ga. 246; *Stafford v. State*, 55 Ga. 592; *Thompson v. State*, 55 Ga. 47; *State v. Nash*, 7 Iowa 374; *State v. Gillick*, 7 Iowa 287; *State v. Crowley*, 33 La. An. 782; *Penn v. State*, 62 Miss. 450; *Newcomb v. State*, 37 Miss. 383; *State v. Stair*, 87 Mo. 268; s. c., 56 Am. Rep. 449; *State v. Ellis*, (N. C.) 7 S. E. Rep. 704; *State v. Howard*, 82 N. C. 623; *Mimms v. State*, 16 Ohio St. 221; *McMeen v. Com.*, 114 Pa. St. 300; s. c., 34 Pittsb. L. J. 365; *Jones v. State*, 4 Tex. App. 436.

Declarations of Husband Beating Wife.—On trial of a husband for the murder of his wife, declarations by him that he had beaten her, and thought he had a right to do so, though made about four years before the homicide, *held*, to be admissible to show the probability of his committing the crime, it having been done partly by beating. *Shaw v. State*, 60 Ga. 246.

Declarations Two or Three Years Before Killing.—A remark of defendant to a witness, on seeing deceased ride up to a church, two or three years before the killing, "There is a man I cannot get along with," though of little weight of itself, is relevant and admissible testimony, and is properly admitted when the only objection urged is that it is not legal or lawful evidence. *Evans v. State*, 62 Ala. 6.

Statements Concerning Masonic Lodge.—On a trial for murder, there was evidence tending to inculpate the accused and several other members of a colored Masonic Lodge whereof he was master, also expert testimony that words pencilled upon a piece of paper found pinned to the clothes of the deceased were in the handwriting of the accused. *Held*, that a witness for the state might properly be allowed to testify that, three or four months prior to the murder, the accused, in soliciting him to join the lodge, said any one who injured a member of it would pass away and be no more heard of. *Jones v. State*, 4 Tex. App. 436.

Declarations Between Two Defendants.—On an indictment for murder, where it appeared that the prisoner and his brother went to the house of deceased to wait until he came home; that they had knives, which they sharpened, each turning the grindstone for the other—evidence that while the prisoner was grinding his knife both laughed, and the brother said, "Somebody will be surprised to-night," which remark the prisoner repeated, is admissible; the declaration being made shortly before the homicide, while both were engaged in a conversation of which it was a part, and which declaration the prisoner, by repeating, made his own. *State v. Ellis*, (N. C.) 7 S. E. Rep. 704.

Expressions Showing Enmity Towards "White Men."—In a prosecution for murder it is competent for the state to prove that the deceased challenged the

(b) *After the Homicide.*—(b') *Proof by Prosecution.*—The voluntary declarations or extra judicial admissions of one charged with the homicide, concerning its commission, are admissible in evidence against him.¹

vote of the defendant on the morning of the day of the homicide, and that about an hour previous to the giving of the fatal wound the witness heard the defendant say that "he be damned if he did not wish every white man was in hell." *Thompson v. State*, 55 Ga. 47.

Statement in Defendant's Writing.—A man and his wife being arrested for murder, there was found in his pocket-book a paper with the following words in his handwriting: "Do you think it safe to kill them, and wrap them up in the clothes, and tell that they went off in a buggy?" *Held*, that the writing was competent evidence against him, the proof tending to show that he acted on the suggestion contained therein, but that it was not competent as against his wife, it not being shown by the state when it was written, or that she had any knowledge of it, and it not being proved to be a part of the *res gesta*. *State v. Stair*, 87 Mo. 268; s. c., 56 Am. Rep. 449.

Declarations When Obtaining Poison.—It is competent on the trial of a husband for the murder of his wife, to show the relations between them prior and up to the time she took the poison which caused her death, and to prove false and contradictory statements made by him as to the purchase of the poison and his whereabouts immediately afterwards. *McMeen v. Com.*, 114 Pa. St. 300; s. c., 34 Pittsb. L. J. 365.

Declarations Showing Desire for Money of Deceased.—Upon a trial for murder, evidence that the prisoner had said that if he had a chance he would take every cent that W had, is admissible when taken in connection with proof that the deceased was an employe of W's, and had charge of his money, and that this was known to the prisoner. *Mimms v. State*, 16 Ohio St. 221.

On the trial of H for murder of A, who was proved to have been robbed on the night of the murder, evidence that H, a year before the killing, said to a person: "Don't you reckon if any one was to run in on old man A he would get a lot of money?" *Held*, to be admissible as showing H's knowledge of the reputation that A kept money in his house. *State v. Howard*, 82 N. C. 623.

Same—Proposal to Rob.—Upon a trial for murder, where the only incentive to the act appears to have been robbery, it is competent to show that the defendant, a week or ten days prior to the homicide, proposed to a witness to rob an old man and woman who lived on the edge of a town, and who had money "piled up." *Stafford v. State*, 55 Ga. 592.

A witness may testify that she heard one of the accused say, in the presence of the others, that they were going to rob the deceased. The credibility only, not the competency, of the witness is affected by the fact that she was an associate of the accused. *State v. Crowley*, 33 La. An. 782.

"Wouldn't Mind Killing a Negro."—A remark by defendant, a few days before the killing, that he "didn't mind killing a negro, if he fooled with him, any more than he would a buck rabbit," *held*, irrelevant. *Redd v. State*, 68 Ala. 492.

1. *U. S. v. Beebe*, 2 Dak. 292. See *Perkins v. State*, 60 Ala. 7; *McManus v. State*, 36 Ala. 285; *Aikin v. State*, 35 Ala. 399; *Fraser v. State*, 55 Ga. 325; *Goodwin v. State*, 96 Ind. 550; *State v. Hinkle*, 6 Iowa 380; *State v. Carroll*, 31 La. An. 860; *State v. Mickle*, 81 N. C. 552; *Moore v. State*, 2 Ohio St. 500; *Powers v. State*, 23 Tex. App. 42; *Steagald v. State*, 22 Tex. App. 464; s. c., 9 Cr. L. Mag. 515; *Brunet v. State*, 12 Tex. App. 521; *Clampitt v. State*, 9 Tex. App. 27; *Toney v. State*, 8 Tex. App. 452.

Firing Upon Deceased—Immediately After the Homicide—defendant voluntarily admitted to a witness that he had fired upon deceased in self-defence, and proposed to surrender himself. *Held*, admissible as part of the *res gesta*. *Brunet v. State*, 12 Tex. App. 521.

Declarations to Pursuers.—Testimony of a witness that the defendant, having fled on horse-back immediately after the killing, on being told by a bystander that the deceased was dead, the witness pursued him, and in about five minutes overtook him, and told him to hold up; if he did not he would kill him, and that the defendant, having held up, in reply to witness's statement that he must go back to town with

(b⁷) *Proof by Defence*.—As a general rule, no declarations made by defendant after the time of the commission of the homicide with which he is charged, are admissible in his favor, unless they form part of the *res gestæ*;¹ but where the prosecution has

him, that he had killed deceased, stated if he did nobody saw him, is admissible as part of the *res gestæ*, although the confession was made at the time when the defendant was under arrest and in fear of death. *Powers v. State*, 23 Tex. App. 42.

Same—Apprehensions of Defendant.—On trial of A for murder of B, evidence of A's doings and sayings, indicating apprehension on his own account because of B's condition, *held*, admissible. *Tooney v. State*, 8 Tex. App. 452.

Declarations as Proving Malice.—On trial of C for murder of M, testimony of A that M, after being mortally wounded by C, was carried to A's house, and that on the next night afterwards, A heard some one near the house say, "I wish I had a double-barrelled shot-gun; I would turn both barrels loose in that room," and, looking out, saw C, and no other person, *held*, to be admissible as tending to prove malice. *Clampitt v. State*, 9 Tex. App. 27.

Where it was shown that deceased was killed by a blow from a brickbat in a fight with the prisoner, evidence is admissible to show that the prisoner returned to the scene of the fight, about an hour after the blow was given, with a pistol in his hand, saying that he had come to kill the deceased. *McManus v. State*, 36 Ala. 285.

On a Trial for Murder by Poisoning the Prisoner's Wife with Strychnine, evidence was admitted that, upon being asked, while in jail, whether he did not get arsenic to kill rats with, the prisoner answered that he did, and being asked where he got it, replied that it was none of the inquirer's business. *Held*, that these facts formed a link in the chain of proof and were therefore admissible. *State v. Hinckle*, 6 Iowa 380.

Declarations as to Speed of Horse—When Admissible.—Where the capacity of the horse defendant is said to have been riding, for swiftness, is material on account of the distance he had to ride and the time within which he had to make it, his sayings are admissible about such capacity. *Fraser v. State*, 55 Ga. 325.

Proposition to "Tell all He Knew" About the Homicide.—On a trial for murder, the prisoner's voluntary offer to the jailer who had him in charge, to tell all he knew about the homicide of which he was accused, if the jailer would promise that he should not be hurt for it; and his similar offer to a fellow-prisoner, if the latter would promise never to tell anyone else; which proposals being rejected, no confessions were made by him, are admissible evidence for the prosecution. *Perkins v. State*, 60 Ala. 7.

Declarations Made by the Defendant to or in the Hearing of a Physician in Professional Attendance upon him do not, under the statutes of Texas, come within the class of privileged communications. See the statement of the case for evidence of this character. *Held*, both pertinent and admissible. *Steagald v. State*, 22 Tex. App. 464; s. c., 9 Cr. L. Mag. 515.

1. *State v. Brandon*, 8 Jones (N. C.) L. 463. See *Thomas v. State*, 27 Ga. 287; *Doles v. State*, 97 Ind. 555; *State v. Johnson*, 35 La. An. 968; *Dillin v. People*, 8 Mich. 357; *Territory v. Clayton*, (Mont. Tr.) 19 Pac. Rep. 293; *State v. Tilly*, 3 Ired. (N. C.) L. 424; *Honeycutt v. State*, 8 Baxt. (Tenn.) 371; *Bonnard v. State*, (Tex. App.) 7 S. W. Rep. 862; *Lynch v. State*, (Tex. App.) 6 S. W. Rep. 190; *Gibson v. State*, 23 Tex. App. 414; *Harrison v. State*, 20 Tex. App. 327; s. c., 44 Am. Rep. 529; *Pharr v. State*, 9 Tex. App. 129; s. c., 10 Tex. App. 485; *Foster v. State*, 8 Tex. App. 248; *Shrivers v. State*, 7 Tex. App. 450; *Little v. Com.*, 25 Gratt. (Va.) 921; *State v. Abbott*, 8 W. Va. 741; *U. S. v. Neverson*, 1 Mackey (D. C.) 152.

Prisoner's Own Account of Transaction Made After Occurrence.—On an indictment for murder, it is not competent for the prisoner to give in evidence his own account of the transaction, related immediately after it occurred, though no third person was present when the homicide was committed. *State v. Tilly*, 3 Ired. (N. C.) L. 424. See *U. S. v. Neverson*, 1 Mackey (D. C.) 152.

Declarations of the Defendant, made fifteen or twenty minutes after the killing, and after he had gone some twelve

been permitted to prove a conversation or declaration by defendant, it is proper for him to put in evidence any other declaration necessary to make it understood, or to explain it.¹

hundred yards from the place of the killing, are no part of the *res gestæ*. *Lynch v. State*, (Tex. App.) 6 S. W. Rep. 190.

Declarations of the accused, made an hour after the time, and a mile from the place of the homicide, are not admissible as part of the *res gestæ*. *State v. Johnson*, 35 La. An. 968.

Evidence that on the night of the homicide the accused had, at a place at about a mile and a quarter from the scene of the killing, stated that he had just been waylaid by the deceased. *Held*, not admissible as part of the *res gestæ*. *Doles v. State*, 97 Ind. 555.

On a trial for murder, the state proved the acts and declarations of defendant just before and after the homicide. *Held*, that defendant could not put in evidence his statements made to a witness twelve days after the homicide with respect to defendant's declarations at the time of the homicide. And the statute declaring that when a detailed act or declaration is given in evidence, any other act or declaration necessary to explain it may also be given in evidence, does not affect the case. *Gibson v. State*, 23 Tex. App. 414.

Confessions of One Accused of Murder are Admissible, but declarations of the accused that such confessions are false, and were made through fear, are inadmissible. *Honeycutt v. State*, 8 Baxt. (Tenn.) 371.

Declarations of Prisoner—Admissible When Part of Res Gestæ.—On the trial of a prisoner for murder, a statement made by him to a person, a few minutes after the homicide was committed, and near to the place, and in the presence and hearing of eye-witnesses of the homicide, who were not introduced as witnesses by the commonwealth, should be admitted as evidence at the instance of the prisoner as part of the *res gestæ*. *Little v. Com.*, 25 Gratt. (Va.) 921.

A party on trial for murder, is entitled to prove his declarations made at the time of the shooting, which caused the death of the party killed. Such declarations, made at that time, are part of the *res gestæ*. *Thomas v. State*, 27 Ga. 287; *State v. Abbott*, 8 W. Va. 741.

Evidence offered by F when on trial for murder, that within less than a minute after he shot the deceased, he, F, exclaimed, "I would shoot any man who was trying to cut my throat." *Held*, to be improperly excluded; the exclamation was part of the *res gestæ*. *Foster v. State*, 8 Tex. App. 248.

Statements made by defendant three or four minutes after he had shot the deceased, to the effect that he did it to "protect his wife and child," *held*, to be admissible in his defence, as of the *res gestæ*, and as explanatory of nearly similar statements made at about the same moment, and introduced in evidence by the prosecution. *Harrison v. State*, 20 Tex. App. 387.

1. See *Territory v. Clayton*, (Mont.) 19 Pac. Rep. 293; *Bonnard v. State*, (Tex.) 7 S. W. Rep. 862; *Pharr v. State*, 9 Tex. App. 129; s. c., 10 Tex. App. 485; *Shrivers v. State*, 7 Tex. App. 45.

Declarations of the Accused—Texas Doctrine.—Shortly after defendant shot deceased he made a false statement to certain persons about the shooting, which was given in evidence by the state. *Held*, that under Tex. Code Cr. Pro., art. 751, providing that when a detailed conversation is given in evidence, any other declaration necessary to make it understood, or explain the same, may also be given, defendant was entitled to show that later on the same evening he made a different statement to his brother, and explained to him the reasons for making the former statement. *Bonnard v. State*, (Tex. App.) 7 S. W. Rep. 862.

A statement made by the accused when arrested thirty miles from the scene of the homicide, as to his purpose in abruptly departing, *held*, not to be admissible in his behalf as part of the *res gestæ*. But where the state had elicited testimony that P, the accused, claimed certain property found in his possession and supposed to belong to the deceased, *held*, that the defence had a right to show what P said about the killing. Tex. Code, art. 751, declaring that, when part of a conversation has been given, the whole may be inquired into. *Pharr v. State*, 9 Tex. App. 129; s. c., 10 Tex. App. 485.

(4) *Confessions*.—A confession made by the prisoner is admissible in evidence against him only when made voluntarily and not under the pressure of undue influence, exercised through menaces or threats or promises of reward, or of immunity from prosecution.¹ It should be made voluntarily and deliberately, and under circumstances which show the calm condition of the mind, and the consciousness of the effect of confessing the commission of the act charged.² It is immaterial to whom the confession is

Declaration Respecting Possession of Deceased's Property.—Where, on a trial for murder, the state had been allowed, without objection, to prove what the defendant, after arrest and uncautioned, said respecting his possession of the deceased's pistol. *Held*, that he should have been permitted to prove any fact or circumstance, or any declaration made by himself at the time or immediately afterwards, tending to explain or impair such proof. *Shrivers v. State*, 7 Tex. App. 450.

1. *Lang v. State*, (Ala.) 4 So. Rep. 43; *Steele v. State*, (Ala.) 3 So. Rep. 547; *Kelsoe v. State*, 47 Ala. 573; *Mose v. State*, 36 Ala. 211; *Stafford v. State*, 55 Ga. 592; *Holsenbake v. State*, 45 Ga. 43; *State v. Sopher*, 70 Iowa 494; s. c., 6 Cr. L. Mag. 218; *Ruberts v. Com.*, (Ky.) 7 S. W. Rep. 401; *People v. Coughlin*, (Mich.) 35 N. W. Rep. 72; *People v. Foley*, (Mich.) 31 N. W. Rep. 94; *Alfred v. State*, 37 Miss. 296; *State v. Walker*, (Mo.) 9 S. W. Rep. 647; *People v. Deacons*, 109 N. Y. 374; *People v. Druse*, 103 N. Y. 655; s. c., 9 Cr. L. Mag. 88; *Murphy v. People*, 63 N. Y. 590; *State v. Crowson*, 98 N. C. 595; *State v. Dildy*, 72 N. C. 325; *State v. Mitchell*, *Phill.* (N. C.) L. 447; *Brown v. Com.*, 76 Pa. St. 319; *Maples v. State*, 3 Heisk. (Tenn.) 408; *Ake v. State*, 31 Tex. 416; *Ross v. State*, (Tex. App.) 10 S. W. Rep. 218; *Boyett v. State*, (Tex. App.) 9 S. W. Rep. 275; *State v. McDowell*, 32 Vt. 491; *Jim v. Territory*, 1 Wash. Tr. 76. See *Com. v. Cuffee*, 108 Mass. 285.

A Confession of Homicide Made to Three Armed Men, upon their arresting and accusing the defendant, *held*, to be involuntary and inadmissible. *State v. Dildy*, 72 N. C. 325.

Confessions to Marshal of Police.—A, suspected of murder, on being brought to the marshal of police, was asked by the officer where he got the body that was taken by him to a certain place on a specified evening, and being satisfied that he was evading, the officer said to him: "You are not telling the truth."

Afterwards, the officer being informed that A wished to tell all about the crime, said to him, "Go on now if you want to make your statement." *Held*, that on the trial of A for the murder his confession made under the circumstances to the officer was admissible in evidence, and did not contravene the rule prohibiting involuntary confessions. *Ross v. State*, (Tex. App.) 10 S. W. Rep. 218.

Confessions Under Menace.—On the trial of an indictment for the murder of a child by drowning, it appeared that the prisoner had been told that she had to tell what she had done with the child, and that otherwise they would get after her about it. Evidence was admitted to show that prisoner then accompanied a deputy sheriff to a stream, in which the body was afterwards found, and had said if any one wanted their negroes drowned to bring them to her. *Held*, that the confession was made under menace, and was not admissible. *State v. Crowson*, 98 N. C. 595.

Forced Confessions to Officers.—The fact that two officers had arrested a negro boy thirteen years old, without a warrant, searched and stripped him, confined him in a police cell, and questioned him for two hours without warning him of his right not to answer, or offering to permit him to consult friends. *Held*, not to render his confessions inadmissible, on his trial for murder. It was for the jury to judge of the effect. *Com. v. Cuffee*, 108 Mass. 285.

2. **A Confession Under Notice to the Accused**, that he could not be compelled to tell, and that his statement would be evidence against him, *held*, to be admissible, although on being arrested, one day previously, he had confessed to another person without such notice, and under advice that it might procure his release. *Maples v. State*, 3 Heisk. (Tenn.) 408.

Confession to Officer—When Admissible.—On the trial of an indictment for murder, testimony of the officer who

made, the weight of the evidence setting it out being for the jury to determine.¹ The confession must be taken as a whole, and all together, for it is neither justice nor reason to accept the statements of the defendant as to his connection with the homicide, unless in its entirety and full significance.²

Where two or more persons are jointly indicted for the same homicide, a confession by one, made in the presence of the others, can only affect him. It is not admissible in evidence against the others, and its proof, as against him, creates no proof or presumption against his co-defendant.³

arrested him showing an admission, made by the defendant that he committed the crime, is competent when it appears that the admission was made voluntarily and without the influence of hope or fear, and not even made in response to questions asked by the officers. *State v. Sopher*, 70 Iowa 494; s. c., 9 Cr. L. Mag. 218.

Same—Confessions to Private Person.—Defendant, charged with murder, while confined in a closed room with a man after arrest, made an improbable statement as to the circumstances of the killing, and being afterwards told by the man's brother that his story was impossible and would not be believed; that physicians would be put on the stand to refute it, and that he "must tell a straighter tale if he hoped to be believed," thereupon made confessions. *Held*, that these were admissible. *Steele v. State*, (Ala.) 3 So. Rep. 547.

Confessions—Written Statement to Public Prosecutor.—In an indictment for murder, it appearing that full examination of the manner in which a written statement was obtained from the accused by the public prosecutor was gone into before it was admitted; and the record disclosing no undue influence in obtaining it, and it further appearing that the accused was one of the two persons who alone could have known of the facts of the homicide at the time it occurred. *Held*, that such statement was properly admitted in evidence. *People v. Foley*, (Mich.) 31 N. W. Rep. 94.

Greenleaf, in his work on Evidence (14th ed., vol. 1, § 214) says: "Besides the danger of mistake, from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner himself is oppressed by the calamity of his situation, and that he is often in-

fluenced by motives of hope or fear to make an untrue confession."

1. See *Stafford v. State*, 55 Ga. 592; *State v. Mitchell*, Phill. (N. C.) L. 447; *Brown v. Com.*, 76 Pa. St. 319.

Confessions of Fellow-Prisoner.—Confessions of a murder are admissible in evidence, although only made to a fellow-prisoner after his assurance that one criminal cannot testify against another. *State v. Mitchell*, Phill. (N. C.) L. 447.

A confession made by a defendant indicted for murder to a fellow-prisoner who was in jail for stealing, and who was grossly irreligious, but who read the bible and sang psalms to him, and told him that if he was guilty he had better confess and seek his God, is admissible. *Stafford v. State*, 55 Ga. 592.

Same—Conversation Through Soil-pipes.—One confined in jail with B testified that he held a conversation with B through the soil-pipes, in which B confessed that he was guilty of the homicide charged, and that the witness knew that it was B from his voice. *Held*, that the testimony was admissible; its weight was for the jury. *Brown v. Com.*, 76 Pa. St. 319.

2. See 1 Greenl. Ev. (14th ed.), § 218.

3. *Kelsoe v. State*, 47 Ala. 573; *Ake v. State*, 31 Tex. 476; s. c., 30 Tex. 466; *State v. Weasel*, 30 La. An. pt. II. 919; *Com. v. Thompson*, 99 Mass. 444; *Spencer v. State*, 31 Tex. 64; *Reg. v. Blake*, 6 Q. B. 126; *Reg. v. Hinks*, 1 Den. C. C. 84; *Rex v. Turner*, 1 Moo. C. C. 347; *Rex v. Appleby*, 3 Stark. 33.

Statements by one Jointly Indicted—Failure to Contradict.—Where statements are made by one of two jointly charged with an offence, the silence of the other, and his failure to make any explanation is not to be used against him. *Com. v. McDermott*, 123 Mass. 441; *Com. v. Walker*, 95 Mass. (13 Allen) 570.

e. **PHYSICAL SUPERIORITY OF DEFENDANT.**—Where, upon a trial of an indictment for homicide, the accused relies upon the plea of self-defence, it is proper for the prosecution to prove the great physical superiority of the defendant over the deceased as tending to rebut any inference of great danger of death or of bodily harm to defendant from deceased; but otherwise, the physical powers of the defendant are immaterial.¹

f. **CHARACTER AND DISPOSITION OF DEFENDANT.**—Where there is a doubt whether the homicide was committed by defendant, or whether his commission of it was felonious, it is competent for the defendant to prove his peaceable character and good reputation in any and all respects related to the subject-matter of the prosecution;² and the defendant is not limited to

Same—The Declarations of an Accomplice are receivable against his fellows only when they are either in themselves, or accompany and explain acts, for which the others are responsible; but not where they are in the nature of narratives, descriptions, or subsequent confessions. *Gone v. State*, 58 Ala. 391; *Priest v. State*, 10 Neb. 393; *State v. Thibault*, 30 Vt. 100.

1. See *Hinch v. State*, 25 Ga. 699.

2. *Dupree v. State*, 33 Ala. 380; s. c., 73 Am. Dec. 422; *Hopps v. People*, 31 Ill. 385; *State v. Cross*, 68 Iowa 180; *State v. Sterrett*, 68 Iowa 76; *Wesley v. State*, 37 Miss. 327; s. c., 75 Am. Dec. 62; *McDaniel v. State*, 16 Miss. (8 Smed. & M.) 401; s. c., 47 Am. Dec. 93; *Stephens v. People*, 4 Park. Cr. Cas. (N. Y.) 396; *People v. Hammill*, 2 Park. Cr. Cas. (N. Y.) 223; *Cathcart v. Com.*, 37 Pa. St. 108. See *People v. Stewart*, 28 Cal. 395; *Murphy v. People*, 9 Colo. 435; *Davis v. State*, 10 Ga. 101; *McCarty v. People*, 51 Ill. 231; *Achey v. State*, 64 Ind. 56; *Beauchamp v. State*, 6 Blackf. (Ind.) 300; *State v. Moelchen*, 53 Iowa 310; *State v. Dumphrey*, 4 Minn. 438; *People v. Garbutt*, 17 Mich. 9; *State v. Grate*, 68 Mo. 22; *Thomas v. People*, 67 N. Y. 218; *Warren v. Com.*, 37 Pa. St. 45; *Gibson v. State*, 23 Tex. App. 414. Compare *Walker v. State*, 102 Ind. 502.

Evidence of Character.—Where a prisoner is charged with the commission of a crime, and evidence of good character is introduced by him, which is not controverted on the part of the people, such evidence is to be considered by the jury, and is not merely of value in doubtful cases, but will of itself sometimes create a doubt when, without it, none could exist; and if good character be proved to the satisfaction of

the jury, it should produce an acquittal, even in cases where the whole evidence slightly preponderated against the accused. *Stephens v. People*, 4 Park. Cr. Cas. (N. Y.) 396.

Same—Defendant's Acts of Kindness to Deceased.—Where there has been no attempt by the prosecution to show that the accused had ever been unkind to the deceased prior to the killing, it is not error in the court to refuse to admit cumulative evidence of acts of kindness by him. *Murphy v. People*, 9 Colo. 435.

A witness for the defence, in a trial for murder, having testified that the defendant was a peaceable man, was asked on cross-examination whether there was any difference in the defendant's disposition when under the influence of liquor and when not, and replied that he was peaceable when he was intoxicated. *Held*, that the question and answer, taken together, did not injure the defendant. *Achey v. State*, 64 Ind. 56.

Same—Somnambulism as a Defence.—On a trial for killing a stranger on his sudden and roughly awakening the defendant, evidence is competent to show that the defendant had always been a somnambulist, had lately lost much sleep, and had recently had his life threatened by another than the deceased. *Fain v. Com.*, 78 Ky. 183; s. c., 39 Am. Rep. 213.

Same—Peacefulness of Character.—On an indictment for murder, it is not error to reject an offer to prove that the prisoner "always had been known as a kind hearted man," if the rejection be accompanied by permission to show his character for peacefulness and regularity of conduct towards the deceased, or in any other respect which

proof of such reputation in the community where he lives.¹

Where such proof is introduced by defendant, it is proper for the prosecution to introduce evidence in rebuttal thereof;² but this evidence must be of general character or reputation, and not of individual acts.³

As a general rule, defendant's character cannot be attacked by the prosecution in the first instance, nor is it a proper subject for consideration,⁴ unless inseparably connected with the *res gestæ*, and forming a part thereof.⁵

g. ACTS, THREATS AND DECLARATIONS BY THIRD PERSONS.—(1) *By Confederates and Co-Conspirators.*—(a) *Before the Homicide.*—Where, on a trial for homicide, a conspiracy is shown,

had a proper relation to the subject-matter of the prosecution. *Cathcart v. Com.*, 37 Pa. St. 108.

In the trial of a defendant, indicted for murder, when the defendant admitted the homicide, but rested his defence on the ground that it was justifiable homicide, it was *held* to be error in the court to charge the jury, that defendant's evidence of good character as a peaceable man, applied only to cases where it was a question whether the homicide had been committed by the accused. *Davis v. State*, 10 Ga. 101.

After the witness had testified that the prisoner was a quiet man and good natured, as far as he knew, he was asked to "state what his disposition was when crossed or misused." This was objected to, and excluded. *Held*, no error. *Thomas v. People*, 67 N. Y. 218.

Same—Use of Intoxicants.—On the trial of an indictment for murder, it is not error to reject questions, as to whether the prisoner was not generally drunk when out of work, whether he did not move more quickly when drunk than sober, to be followed with proof that he did move quickly on the occasion of the killing, and as to the effect of liquor on his constitution and brain, when there was no proof of actual intoxication, or that he was out of work at the time. Nor was it error to reject a question relating to the acts and declarations of the wife, on the day when the murder was committed; they were not evidence in favor of the prisoner, and were irrelevant. *Warren v. Com.*, 37 Pa. St. 45.

1. *State v. Cross*, 68 Iowa 180; *State v. Sterrett*, 68 Iowa 76.

2. See *Beauchamp v. State*, 6 Blackf. (Ind.) 300.

3. *McCarty v. People*, 51 Ill. 231.

4. *State v. Merrill*, 2 Dev. (N.C.) L.269.

5. See *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829; *Gibson v. State*, 23 Tex. App. 414.

Res Gestæ.—**Shown When.**—It is proper to show that the homicide took place in a bawdy-house, and that defendant was its proprietress, where these facts make the *res gestæ* more intelligible. *Gibson v. State*, 23 Tex. 414.

Same—Purposes and Principles of Conspirators, Socialists, Communists or Anarchists.—If there be a conspiracy, and crime has resulted from it, it becomes material to show the purposes and objects of the conspiracy with the view of determining whether and in what respects it is unlawful. Anarchy is the absence of government; it is a state of society where there is no law or supreme power. If the conspiracy had for its object the destruction of the law and the government, and of the police and militia as the representatives of law and government, it had for its object the bringing about of practical anarchy. And when murder has resulted from the conspiracy, and the perpetrators are on trial for the crime, whether or not the defendants were anarchists may be a proper circumstance to be considered, in connection with other circumstances in the case, with a view of showing what connection, if any, they had with the conspiracy and what were their purposes in joining it. So it would be putting it too broadly to instruct the jury in such a case that it could not be material in the case that the defendants, or some of them, were or might be "socialists, communists, or anarchists," and such an instruction might well be refused. *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

in furtherance of which the homicide is charged to have been committed, declarations and threats of co-conspirators as to the common design of the conspiracy, and acts committed and things done in furtherance thereof, are admissible in evidence.¹ Only

1. *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. Mag. 829. See *People v. Geiger*, 49 Cal. 643; *McRae v. State*, 71 Ga. 96; *State v. McCahill*, 72 Iowa 111; s. c., 9 Cr. L. Mag. 37; *State v. Fitzgerald*, 2 Oreg. 227; *Kehoe v. Com.*, 85 Pa. St. 127; *Cook v. State*, 22 Tex. App. 511; *Armstead v. State*, 22 Tex. App. 51; *Tow v. State*, 22 Tex. App. 175; *Kunde v. State*, 22 Tex. App. 65; *Preston v. State*, 4 Tex. App. 186.

The "International Association" in Chicago was an illegal organization engaged in making bombs and drilling with arms for the unlawful purpose of attacking the police force of the city in case the latter should assume to do their duty in the preservation of the public peace. Its members were conspirators, and, by their act of conspiring together, they jointly assumed to themselves, as a body, the attribute of individuality, so far as regarded the prosecution of the common design. Newspapers, conducted by members of the organization, as its organs, advocated the purposes of the conspiracy, and speakers addressed public meetings, called by some of the conspirators, inciting the people to resist the police, and advising riot and murder. The police were attacked, and several of them killed. On a prosecution of some of the conspirators for murder, it was *held*, that the utterances of these papers and speakers were competent evidence against the defendants, as showing the purposes and intentions of the conspiracy which they represented. *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

Same.—Adopting the Writings of Others—Most's Science of Revolutionary Warfare.—On the same trial, Johann Most's book on the Science of Revolutionary Warfare, was admitted in evidence against the defendants. This book is a treatise upon the most improved methods of making bombs and preparing dynamite and other explosives, and contained suggestions as to how to apply the results of modern science to the work of destruction of the "capitalistic system," and advice to persons who, as members of the so-

called revolutionary forces, might purpose to engage in the use of these weapons and explosives. The treatise was distributed among the members of the international groups at their picnics and meetings through the agency of the International Association. Its circulation was an act of the illegal organization to which all the defendants belonged, and was one of the methods by which that organization instructed and advised its members to get ready for the murder of the police during the excitement among the striking workmen, at the time existing. Their newspaper organs commended it and quoted from it. Some of the conspirators read it and acted upon the suggestions contained in it. When the leaders of the organization thus made use of this treatise, they adopted it as a manual of tactics, and it became a book of their written advice and instructions to their followers. It was competent evidence as showing the purposes and objects which they had in view and the methods by which they proposed to accomplish those objects. *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

As to the fact that some of these bombs and cans, like some which had been shown to certain of the conspirators during their drill, were found buried near one of the designated meeting places where certain of the armed men were assembled on the night of the attack on the police, this was a circumstance proper to be considered by the jury in determining the nature and character of the conspiracy and its connection with the events of the night of the killing. *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

Same—History of Strike.—On a trial for murder, it appeared that defendant was one of a mob of striking miners which surrounded and entered a house in which some new workmen had taken refuge, and fired several shots in the direction of a chamber in which the men were, one of which killed deceased; but there was no evidence to show that defendant fired the fatal shot. *Held*, that the prosecution might prove the history of the strike, both before and

those declarations of each member of a conspiracy, however, which are in furtherance of the common design, can be introduced in evidence against the other members. Declarations that are merely narrative as to what has been done, or will be done, are incompetent, and should not be admitted, except as against the defendant making them, or in whose presence they were made.¹

(b) *After the Homicide.*—Acts and declarations by a co-defendant, not shown to be a co-conspirator, committed or made after the time of the commission of the homicide are not admissible against the defendant, unless shown to have taken place in his presence.²

(2) *By Others.*—(a) *Before the Homicide.*—While, as a general rule, mere declarations made before the homicide by third persons not shown to be co-conspirators with defendant are incompetent and inadmissible, yet all that was said and done by all persons at the mortal combat or the scene of the homicide is a

after the acts of violence, and also a conspiracy to forcibly drive out new men. *State v. McCahill*, 72 Iowa 111; s. c., 9 Cr. L. Mag. 37.

Same—Recent Discharge of Gun.—On the trial of one of several persons indicted for murder, defendant offered the reproduced testimony of a deceased witness to show acts and declarations on the part of K, one of his co-defendants, occurring shortly prior to the homicide, tending to show malice on the part of K towards deceased, and a motive to commit the crime. *Held*, it having been shown by other evidence that K was near the place of the crime at the time it occurred, and had equal opportunity with defendant to commit it, and that K had furnished two Mexicans each with a double-barrelled shot-gun, and that the Mexicans left K's house the night before the homicide, carrying the guns with them, and returned next morning with one barrel of each of the guns appearing to have been recently discharged, that the rejection of such evidence was error warranting a reversal. *Kunde v. State*, 22 Tex. App. 65.

Same—Inciting a Riot.—Where A incites a riot and takes part in it, and the mob kills a man, and A is put on trial for murder, evidence of cries of "kill him," uttered by other members of the mob is admissible. *McRae v. State*, 71 Ga. 96.

1. *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829. See 1 Greenl. Ev. (14th ed.), § 133.

2. See *Cobb v. State*, 27 Ga. 648;

Mimms v. State, 16 Ohio St. 221; *Armstead v. State*, 22 Tex. App. 51.

Defendant and H were jointly indicted for murder. On the trial of defendant alone, the state offered to prove that after the killing H was taken by a deputy sheriff to the vicinity of the crime, and pointed out to the deputy a place where a cartridge shell was found which fitted H's gun. *Held*, that the evidence was not admissible. *Armstead v. State*, 22 Tex. App. 51.

Confession by Codefendant—Refusal to Confess.—When a defendant, who is jointly indicted for murder with another, who has pleaded guilty, is appealed to by that other who must know his guilt, if guilty, to confess the crime, and he simply refuses to confess, but does not deny his guilt, the circumstances may be given in evidence to the jury. *Cobb v. State*, 27 Ga. 648.

In a trial for murder, where it is shown that certain property was in the possession of the deceased, and that, afterwards, part of the property was found in the possession of the prisoner, and the prisoner is shown to have been in communication with B in whose premises another portion of the property was found, evidence of the conduct and declaration of B is admissible to show that the property was in fact, in the possession or custody of B, leaving it for the jury to determine whether he was such custodian, and if so, whether, under the proof, he had been made so by the prisoner, with or without reference to any conspiracy between them. *Mimms v. State*, 16 Ohio St. 221

part of the *res gestæ*, and is, therefore, competent.¹ Where it is clearly shown that defendant did the killing, evidence of threats by third persons against the deceased is not admissible; but where the prosecutions relied on circumstantial evidence, or the proof leaves a doubt whether the defendant was the slayer, evidence of threats or acts tending to show malice on the part of a third person to commit the homicide, is admissible in defendant's favor,² unless such threats or ill-feeling are remote, and the enmity has disappeared.³ But the name of such third persons must be shown, and also the circumstances under which threats were made or the hostile acts committed.⁴ If such evidence is introduced for the purpose of showing malice or motive of another to commit the crime, the proof must be of something which shows positive personal ill-feeling, and not merely of a controversy not liable to engender enmity.⁵ But if the homicide is made to depend upon some other act by defendant leading to it, it may be shown that an act of the same nature towards the deceased was committed by another person.⁶ Defendant may also show, by acts and declarations of third parties, a conspiracy against him between such parties and the deceased,⁷ or the liability of an attack from deceased on account of enmity between persons of different families or classes.⁸

In the absence of proof of a conspiracy between defendant and third persons against deceased, evidence of threats or of enmity, or of ill-feeling by such third persons against deceased is inadmissible against defendant; and if it be admitted, should be

1. *State v. Corcoran*, 38 La. An. 949.

2. *Morgan v. Com.*, 14 Bush (Ky.) 106; *Sawyers v. State*, 15 Lea (Tenn.) 604; *Kunde v. State*, 22 Tex. App. 65. (Overruling *Holt v. State*, 9 Tex. App. 571; *Walker v. State*, 6 Tex. App. 576; *Boothe v. State*, 4 Tex. App. 202; *Bowen v. State*, 3 Tex. App. 617.) See *State v. Johnson*, 31 La. An. 368; *State v. Testerman*, 68 Mo. 408; *Rufer v. State*, 25 Ohio St. 464; *Wright v. State*, 43 Tex. 170; *Leonard v. Territory*, 2 Wash. Tr. 381. Compare *Banks v. State*, 72 Ala. 522; *Com. v. Abbott*, 130 Mass. 472; *State v. Lambert*, 93 N. C. 618.

3. On trial of A for the murder of B's wife, evidence of hostile feelings and acts on B's part towards her while living in another town, on account of alleged adulterous conduct on her part, said acts being followed by a period of amicable cohabitation up to the time of the murder, *held*, inadmissible. *Com. v. Abbott*, 130 Mass. 472.

4. *State v. Johnson*, 31 La. An. 368.

5. **The Facts and Details of a Civil Suit Between Deceased and other parties is**

not competent evidence on a trial for homicide. *State v. Brooks*, (La.) 2 So. Rep. 498.

6. There being evidence tending to show that A and defendant agreed that A should call deceased out of church, and that defendant should kill him, defendant may introduce testimony tending to prove that a certain woman called out deceased to walk home with her. *Harrison v. State*, 78 Ala. 5.

7. See *Simmons v. State*, (Ga.) 4 S. E. Rep. 894.

8. **Foed Between Families.**—Where the accused pleads self-defence, and there is evidence tending to show a standing feud between the families of the accused and deceased, statements of the deceased's father made in the presence of the deceased, and to which he listened in silence, to the effect that if the accused's family did not look after themselves deceased would shoot some of them, are admissible as tending to establish any matter in controversy at the trial, and not only for the purpose of impeaching the credibility of deceased's father, who had denied

excluded, upon the failure of the state to show a conspiracy.¹ But testimony by a third person that he advised defendant to do violence to deceased may be admissible if the proof shows that prisoner acted upon such suggestion;² and declarations of a third person so closely identified with the defendant as to show a motive connected with such person, may also be competent.³

(b) *After the Homicide.*—As a general rule, declarations or exclamations made after the homicide by third persons not shown to be co-conspirators with defendant against deceased are inadmissible, as being mere hearsay.⁴ But where, on the trial, the testimony of certain witnesses implicates the defendant in the homicide, their declarations to the contrary made at the time of the

making such statements on cross-examination. *Mayfield v. State*, 10 Ind. 591.

1. *State v. Perry*, 16 La. An. 444; *Rufert v. State*, 25 Ohio St. 464; *Wright v. State*, 43 Tex. 170.

2. *Fisher v. State*, 77 Ind. 42.

3. See *Stephens v. People*, 19 N. Y. 549.

4. *Bradshaw v. Com.*, 10 Bush (Ky.) 576; *State v. Oliver*, (La.) 2 So. Rep. 104. See *State v. Sneed*, 88 Mo. 138; *Greenfield v. People*, 85 N. Y. 75; s. c., 39 Am. Rep. 636; *State v. Shuford*, 69 N. C. 486; *Grigsby v. State*, 4 Baxt. (Tenn.) 19; *Felder v. State*, 23 Tex. App. 477; s. c., 59 Am. Rep. 777; *Hoyt v. State*, 9 Tex. App. 571. Compare *Flanagan v. State*, 64 Ga. 52; *People v. Foley*, (Mich.) 31 N. W. Rep. 94.

Cries or Exclamations of Bystanders, who are in no way acting in concert with either of the parties to a homicide, constitute no part of the *res gesta*. So *held* where B was accused of shooting P and then throwing him from a moving train, which passed over P's body, and bystanders exclaimed "B has shot P." *Bradshaw v. Com.*, 10 Bush (Ky.) 576.

When A arrived at the place where a homicide had just been committed, a person in the crowd pointed to defendant and said, "There is the man that did the shooting." It did not clearly appear that defendant knew that he was the man referred to, although he was within hearing of the remark. *Held*, that evidence of this exclamation was inadmissible on defendant's trial for murder. *Felder v. State*, 23 Tex. App. 477; s. c., 59 Am. Rep. 777.

On Trial of an Indictment for Murder by Burning a House Containing two Children, three witnesses testified that they had identified certain clothing left in the

house and claimed by the accused. *Held*, that the admission of testimony, that these three and another person had, when the accused was not present, examined the clothes, and declared them to be the clothes so left, was ground for setting aside the conviction. *Grigsby v. State*, 4 Baxt. (Tenn.) 19.

On the Trial of the Mother for the Murder of her Infant Child, a witness shall not be permitted to relate a statement made by the mother of the prisoner, and in her presence, that the prisoner "had a child this way before and put it away," to which the prisoner made no reply, and the reception of such evidence entitles the prisoner to a new trial. *State v. Shuford*, 69 N. C. 486.

Although, on the Principle of Acquiescence, Declarations Made by Third Persons in the Presence of the Accused, respecting the matter in question, are ordinarily evidence against him, yet this principle does not apply to declarations which called for no response or disclaimer by him. So *held* as to the words of the father of one of the accused of the murder of M: "I said M should go dead; and now you see he's dead." *Loggins v. State*, 8 Tex. App. 434.

Where a Homicide was Committed in the Dark, in the Midst of a Crowd, and there is a question whether a wound in the back, from which the death may have resulted, was made by the prisoner or another, a declaration made by a bystander immediately after the encounter, to the effect, that he, the bystander, cut the accused in the back with a knife, when the accused had no such cut in the back, but deceased had, is admissible for all purposes as part of the *res gesta*; and a charge of the court confining such evidence to the single object of impeaching the testimony of

homicide or afterwards, may be proved to discredit their testimony.¹ But where a part of a conversation is introduced by one party as *res gestæ*, the remainder may be shown by the other party.² While actions of the parties subsequent to the homicide are usually incompetent against the defendant, yet where the evidence leaves a doubt whether the defendant was the slayer, actions by the other party immediately after the killing showing conclusively that they could not have killed the deceased in the manner in which it was done, may be admissible.³

h. PREVIOUS RELATIONS EXISTING BETWEEN DECEASED AND DEFENDANT.—(1) *Previous Quarrelling or Ill-Feeling.*—(a) *Shown by the Prosecution.*—A former difficulty or quarrel between deceased and defendant is admissible against the latter, as tending to show malice;⁴ and the incompetency of such evidence is not affected by the length of time before the homicide that such

the bystander is error, for which a new trial should be granted. *Flanegan v. State*, 64 Ga. 52.

A Letter Written by Another than the Defendant to a third person, containing expressions possibly capable of being construed as a confession that the writer committed the murder, is incompetent as evidence for the prisoner. *Greenfield v. People*, 85 N. Y. 75; s. c., 39 Am. Rep. 636.

Evidence of Threats of a Crowd to Lynch Defendant.—*Held*, inadmissible on his trial. *State v. Sneed*, 88 Mo. 138.

1. *Smith v. State*, 9 Ala. 990; *Mixon v. State*, 55 Miss. 525.

Identification—Rebuttal.—Where, on a trial for murder, two witnesses had testified that they had selected the accused from several persons and identified him as the one they saw kill the deceased. *Held*, that it was error to reject evidence offered by him to show what were the words and acts on such occasion, and that there was in fact no such identification, although he had not thereon examined the two witnesses so testifying for the State. *Mixon v. State*, 55 Miss. 525.

2. In a trial for murder, a witness had testified to hearing one M state in a conversation, shortly after the killing, that he did not shoot deceased; that M, on the stand, testified he did not discharge a pistol that night. Defendant had shown that deceased had charged M in his presence with killing her, and the declaration of M denying it was made at that time. *Held*, that it was properly admitted as a part of the conversation introduced by defendant.

People v. Driscoll, 107 N. Y. 414; s. c., 10 Cr. L. Mag. 244.

3. In a trial for murder, a witness had testified, without objection, that one M had, after the homicide, given up his pistol to an officer; that it was loaded, and the barrel was cold. The court repeated the testimony, and asked the witness if that was right. He answered "Yes," and the defendant asked to have the answer stricken out. *Held*, that it was properly denied. *People v. Driscoll*, 107 N. Y. 414; s. c., 10 Cr. L. Mag. 244.

4. *Finch v. State*, 81 Ala. 41; *Garrett v. State*, 76 Ala. 18; *Commander v. State*, 60 Ala. 1; *Pound v. State*, 43 Ga. 88; *Choice v. State*, 31 Ga. 424; *Koerner v. State*, 98 Ind. 7; *Binns v. State*, 66 Ind. 428; *State v. Perigo*, 70 Iowa 657; *State v. Cole*, 63 Iowa 695; *Williams v. State*, 64 Md. 384; *Dillin v. People*, 8 Mich. 357; *People v. Lyons*, 110 N. Y. 618; s. c., 10 Cr. L. Mag. 690; *Sayres v. Com.*, 88 Pa. St. 291; *Boyle v. State*, 61 Wis. 440. See *People v. Stonecipher*, 6 Cal. 405.

On a Trial of a Man for Murdering His Wife, evidence of ill-treatment and want of affection is admissible. *State v. Cole*, 63 Iowa 695; *Boyle v. State*, 61 Wis. 440.

On a trial of B for murder of his wife, parol evidence that a suit for divorce had been pending wherein she was plaintiff and he defendant, *held*, to be admissible. *Binns v. State*, 66 Ind. 428.

A remark addressed by a wife to her husband, the defendant in a murder trial, five hours prior to the killing and in the presence of the deceased, "Mr.

quarrel or ill-feeling is shown to have occurred or existed, but the remoteness goes entirely to its weight.¹ But it has been said that evidence of previous quarrels, or of prior particular acts, to be admissible against the prisoner, must not be of a separate and independent act, but there must be some link of association which draws together the preceding and subsequent acts, and sheds light upon the motive of the parties, to render such evidence admissible; and the state of feeling, generally, between them may be admitted to illustrate their conduct at the time.²

Where two or more persons are jointly indicted for the same homicide, proof of a previous difficulty or of ill-feeling between one of them and the deceased can be admitted only as evidence

G, don't you and Mr. F (deceased) have any difficulty. Mr. G, you take me home," *held* admissible to prove the facts of a prior difficulty. *Garrett v. State*, 76 Ala. 18.

Defendant's Confession Concerning a Previous Difficulty with the deceased, *held* admissible on the question of malice and motive. *Finch v. State*, 81 Ala. 41.

The Fact of Litigation Between the Deceased and the Prisoner, who were connected by marriage, or of family litigation in which the prisoner felt an interest, connected with his declaration that he would kill any one who sued him under like circumstances, *held* to be admissible evidence for the prosecution as bearing on the question of the relations subsisting between him and the deceased, and the state of his feelings towards the deceased; but evidence touching the merits of such litigation not to be admissible for him in rebuttal. *Commander v. State*, 60 Ala. 1.

Beating and Maltreatment by Sea Captain.—A captain was charged with murdering one of his seamen by inhumanly beating him. *Held*, that evidence of beatings and maltreatment on preceding days was admissible on the question of malice. *Williams v. State*, 64 Md. 384.

Upon a trial for murder, the state, having proved the homicide, rested. The defendant set up insanity, and introduced evidence to prove it. *Held*, that evidence on the part of the state of a difficulty between the defendant and the deceased on the night before the homicide, which tended to show express malice, was strictly in rebuttal, and the decision of the court below admitting it would not be reviewed in the supreme court. *Choice v. State*, 31 Ga. 424.

1. See *Koerner v. State*, 98 Ind. 7; *State v. Perigo*, 70 Iowa 657; *Dillin v. People*, 8 Mich. 357; *People v. Lyons*, 110 N. Y. 618; s. c., 10 Cr. L. Mag. 690; *Sayres v. Com.*, 88 Pa. St. 291.

Evidence of a Quarrel Between Defendant and Deceased, three or four weeks before the homicide, is admissible as showing the commencement of the history of the relations between the parties. *People v. Lyons*, 110 N. Y. 618; s. c., 10 Cr. L. Mag. 690.

On a Trial for the Murder of the Prisoner's Wife, it being shown that he had domestic troubles for many years, *held*, that evidence was admissible of a quarrel occurring about two years before the killing to show malice. *Sayres v. Com.*, 88 Pa. St. 291.

In such case, evidence that the prisoner had exhausted his bank deposit, *held* to be admissible to show that his destitute circumstances were the motive of his desiring to return to live with her. *Sayres v. Com.*, 88 Pa. St. 291.

Where one is charged with murdering his wife, evidence of quarrels between them even four years before is admissible. *Koerner v. State*, 98 Ind. 7.

Where it appeared that the deceased had been absent from the neighborhood of the prisoner some eight or ten months preceding the alleged offence, *held* competent for the prosecution to show the state of feeling between the prisoner and the deceased immediately preceding such absence. *Dillin v. People*, 8 Mich. 357.

On the trial of an indictment for murder, evidence of a quarrel between defendant and deceased about a year before the killing was admitted. *Held*, that it was competent to prove ill will on the part of defendant towards deceased. *State v. Perigo*, 70 Iowa 657.

2. *Pound v. State*, 43 Ga. 88.

of malice and motive in him to commit the homicide, and his co-defendant cannot, therefore, complain of its admission.¹

(b) *Shown by the Defence.*—Where the evidence leaves a doubt whether the homicide was committed with malice, or whether the defendant was the aggressor, and where the defendant pleads provocation or self-defence, he may adduce evidence of previous quarrels or difficulties with the deceased, or of ill-feeling by the deceased toward him tending to show the deceased to have been in fault in bringing on or maintaining the fatal encounter,² unless such a quarrel was ended by a reconciliation, and no ill-feeling is shown to have existed afterwards.³ The length of time before the killing that such quarrel occurred or such ill-feeling existed is immaterial, its remoteness going to its weight and not to its competency.⁴

(2) *Business and Social Relations.*—Where it appears that the homicide may have been committed in order to enable the slayer to possess himself of property belonging to the deceased,⁵ or to obtain or destroy evidence of indebtedness from himself to the

1. *Finch v. State*, 81 Ala. 41.

2. See *Jordan v. State*, 81 Ala. 20; *Stewart v. State*, 78 Ala. 436; *Prior v. State*, 77 Ala. 56; *Tidwell v. State*, 70 Ala. 33; *People v. Smith*, 26 Cal. 665; *Coxwell v. State*, 66 Ga. 309; *McGinnis v. State*, 31 Ga. 236; *Haynes v. State*, 17 Ga. 465; *De Forest v. State*, 21 Ind. 23; *State v. Moelchen*, 53 Iowa 310; *State v. Cooper*, 32 La. An. 1084; *State v. Johnson*, 30 La. An., pt. II 921; *Wellar v. People*, 30 Mich. 16; *Nelson v. State*, 61 Miss. 212; s. c., 34 Am. Rep. 444; *Skiwey v. State*, 58 Miss. 88; *State v. Grayor*, 89 Mo. 600; *McMeen v. Com.*, 114 Pa. St. 300; *Haile v. State*, 1 Swan. (Tenn.) 248; *Russell v. State*, 11 Tex. App. 288; *Marnock v. State*, 7 Tex. App. 269.

On the trial of an indictment for murder, the state introduced in evidence declarations made by one of the defendants, half an hour before the killing, in which he threatened to "put a light hole" through any one who should strike T. Deceased subsequently knocked down T, and, after being remonstrated with by said defendant, was shot and killed by him. *Held*, that the occurrence in which deceased, defendants, and T, were involved at the place of the homicide, on the same evening, might be regarded as constituting a single transaction; and that the evidence was admissible to show defendant's motive and purpose in remonstrating with deceased. *Jordan v. State*, 81 Ala. 20.

3. *Tidwell v. State*, 70 Ala. 33.

4. *De Forest v. State*, 21 Ind. 23; *Russell v. State*, 11 Tex. App. 288. Compare *People v. Smith*, 26 Cal. 665; *State v. Cooper*, 32 La. An. 1084; *State v. Grayor*, 89 Mo. 600.

Evidence of a Fight Between the Deceased and the Defendant, six hours before the homicide, is not admissible in favor of the defendant, either as part of the *res gestæ*, or to show a provocation for the murder. *People v. Smith*, 26 Cal. 665.

On a trial for murder, the accused, after proving that the deceased had threatened his life, should not be allowed to prove that they had a fight the day before the killing, for the purpose of showing to the jury the state of mind of the deceased towards him, and the apprehensions he had that his life was exposed, and the threats against it would be carried into execution. *State v. Cooper*, 32 La. An. 1084.

5. *Clough v. State*, 7 Neb. 320.

The Theory of the Prosecution being that the homicide was committed by the prisoner to enable him to possess himself of his brother's property, the business and social relations subsisting between them, not only just about the time of the murder, but also for a reasonable time before, are competent evidence. *Clough v. State*, 7 Neb. 320.

And where it is shown that the deceased was possessed, just before his death, of a considerable sum of money, it is competent for the prosecution to prove payments of money by the prisoner just before, as well as after, the

deceased,¹ it is competent to prove the business and social relations existing between the defendant and the deceased for a reasonable time before the commission of the homicide.

i. PROOF AS TO THE WEAPON.—Where it is shown that the injuries, or part of them, causing the death of the deceased could have been inflicted with weapons or instruments of a certain kind, evidence that defendant had such instruments in his possession before the killing is admissible.² It is also competent to show that the size of the shot or missile, and the range of the gun, as proved on the trial, corresponded with the circumstances of the killing in those respects,³ and it is competent for a witness to say whether a weapon, which he has heard described but has never before seen, corresponds with the description given.⁴

Where the charge against the defendant is the making of the weapon or instrument with which the killing was done, in furtherance of a conspiracy of which he was a member, it is proper to introduce in evidence other weapons or instruments made by him of the same kind, in order that the jury may compare them with the one with which the killing was done, and so be aided in determining whether defendant was its maker.⁵ But it is improper to allow a witness to experiment with the weapon with which the

homicide was committed. *Clough v. State*, 7 Neb. 320.

1. *Webster v. Com.*, 59 Mass. (5 Cush.) 386.

2. *Finch v. State*, 81 Ala. 41; *State v. Rainsbarger*, 71 Iowa 476.

Borrowing Knife.—Upon the trial of an indictment for manslaughter, the evidence tended to show that deceased was killed by being cut with a knife. *Held*, that evidence that defendant had borrowed a knife a short time before the homicide, as an act of preparation for an expected difficulty, and as to the description of the knife, was relevant. *Finch v. State*, 81 Ala. 41.

3. *Mose v. State*, 36 Ala. 211; *Dean v. Com.*, 32 Gratt. (Va.) 912. See *Dukes v. State*, 11 Ind. 557.

Size of Shot and Range of Gun.—Where it is shown, by the confessions of a defendant on trial for murder by shooting, and the dying declarations of the deceased, what the range of the gun used in shooting, and the size of the buckshot was with which it was loaded, evidence is admissible to show, that a party, after the murder, found a buckshot of said size in a tree within said range. *Mose v. State*, 36 Ala. 211.

On a trial for murder by shooting, evidence in relation to the examination of guns in the neighborhood, to ascer-

tain whether any of them carried a ball of the size of the one found in the body of the murdered man, *held*, admissible. *Dean v. Com.*, 32 Gratt. (Va.) 912.

4. *Cobb v. State*, 27 Ga. 648.

5. **Dynamite Bombs and Cans.**—The policeman for whose murder the defendants were indicted, was killed by the explosion of a bomb thrown in the midst of the police force. On the trial the court allowed to be given in evidence, bombs and cans containing dynamite, and prepared with contrivances for exploding it, which had been found under sidewalks and buried in the ground at certain points in the city, placed there by certain of the conspirators. As specimens of the kind of weapons which Lingg, the one of the conspirators who had charge of their manufacture, and his associates, were preparing, and as showing the malice and evil heart which the intended use of such weapons indicated, the introduction of bombs made by him was not improper. The jury had a right to see them and compare their structure with the description of the bomb that killed the policemen, with a view of determining whether Lingg, as was charged, was the maker of the latter or not. *Spies v. People (Anarchists' Case)*, 122 Ill. 5; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

homicide was charged to have been committed, in order to determine its manner of working.¹

j. **COMPARISON OF HANDWRITING.**—Where the identity of the prisoner with the slayer is in dispute, it is competent for the jury to compare handwriting by the prisoner with signatures or other writing shown to have been written or signed by the slayer; or they may consider signatures of different names, where it is claimed that all were written by defendant, in order to determine if such be the case;² and a writing may be part introduced by one side, and the remainder by the other.³

k. **COMPARISON OF TRACKS AND FOOTPRINTS.**—Where the evidence leaves a doubt whether defendant committed the homicide, it is always competent to compare tracks or footprints shown to have been made by him with tracks or footprints found at or near the scene of the homicide, and apparently connected therewith;⁴ and so also it is competent to prove that the feet or shoes of his horse, or other animal of like kind, fitted corresponding tracks found at or near the place of the homicide.⁵

It has been held that the requiring of defendant to make an impression with his foot or shoe in a soft substance, in order that such impression may be compared with a footprint or track which is apparently connected with the homicide, is not compelling him "to give evidence against himself," provided against by constitutional provision;⁶ but the better opinion is to the contrary.

1. Trial of Weapon.—On a trial for murder, *held*, that the sheriff could not be allowed to discharge the revolver used by the prisoner to see whether it would go off at half-cock, as he claimed. *Polin v. State*, 14 Neb. 540.

2. See *Crist v. State*, 21 Ala. 137.

3. *Early v. State*, 9 Tex. App. 476.

4. *People v. McCurdy*, 68 Cal. 576; *Dillin v. People*, 8 Mich. 357; *Murphy v. People*, 63 N. Y. 590; *Stokes v. State*, 5 Baxt. (Tenn.) 619; s. c., 30 Am. Rep. 72; *Bouldin v. State*, 8 Tex. App. 332; *Walker v. State*, 7 Tex. App. 245; s. c., 32 Am. Rep. 595.

Measurements of Footprints.—On the trial, evidence of the measurements of certain footprints found in the vicinity of the place of the homicide, and corresponding with the footprints of the defendant, was admitted. The measurements were made respectively about five days and two weeks after the date of the homicide. *Held*, that the evidence was admissible. *People v. McCurdy*, 68 Cal. 576.

The Imprint of a Footstep Was Found on the Night of the Murder on a flower-bed near and under the window through which the shot was fired. A witness, who had made certain measurements, was asked to state what they were. He

commenced by stating: "I measured from the outside of the flower-bed where the man stood," and then upon objection being made, said: "From where the footprints were up to the window," etc. The prisoner's counsel moved to strike out the answer on the ground that there was no proof that the witness knew where the man stood. The motion was denied. *Held*, no error; as, if the forepart of the answer was objectionable, it was immediately corrected. *Murphy v. People*, 63 N. Y. 590.

In a trial of B for an assassination, the principal inculpatory proof was that B's shoe fitted a certain track and that fresh horse-tracks led towards his house from the vicinity of the crime, which tracks, according to the theory of the prosecution, were those of B and his horse. *Held*, that B might prove his willingness to put his foot and shoe in the track, and his request that the horse-tracks might be measured and compared with the feet and tracks of his horse. *Bouldin v. State*, 8 Tex. App. 332.

5. *Campbell v. State*, 23 Ala. 44; *Bouldin v. State*, 8 Tex. App. 332.

6. See *Walker v. State*, 7 Tex. App. 245; s. c., 32 Am. Rep. 595.

It has been said that the action of a prosecuting officer in bringing into court a vessel filled with mud, and requesting defendant to put his foot into it is reversible error, although the court instructed the defendant that his compliance was optional with himself, and he refused to do as requested.¹

1. EVIDENCE GIVEN AT FORMER INQUIRIES INTO THE HOMICIDE.—(1) *At Coroner's Inquest.*—The statement of the defendant at the coroner's inquest upon the body of deceased, made after he has been told that he is not obliged to testify in any manner which might criminate himself, is admissible upon the trial of an indictment against him for the homicide.²

(2) *At Preliminary Examination.*—Testimony voluntarily given by defendant on his preliminary examination, and reduced to writing and signed by him, may, when properly identified, be demanded in evidence against him.³ But evidence given by other witnesses at the preliminary examination cannot be introduced as evidence in chief unless it be shown that the witness is dead,⁴ or out of the jurisdiction of the court;⁵ but he may be cross-ex-

1. *Stokes v. State*, 5 Baxt. (Tenn.) 619; s. c., 30 Am. Rep. 72.

In this case the court say: "Because of this action of the attorney-general, and the assent of the court thereto, this cause is reversed and remanded. In the presence of the jury the prisoner is asked to make evidence against himself. The court should not have permitted the pan of mud to have been brought before the jury and the defendant asked to put his foot into it. We are satisfied the jury was improperly influenced thereby. And it is no sufficient answer that the judge afterward told the jury that the refusal to put his foot in the mud was not to be taken as evidence against him. The bringing in of the pan of mud and the request of the attorney-general was improper, and should not have been permitted by the court. We greatly deprecate the practice into which some circuit judges have fallen, in permitting incompetent and illegal testimony to be placed before the jury, and afterwards, at the close of the case, withdrawing it and telling the jury not to be influenced thereby. Such testimony should be promptly rejected, and not permitted to go to the jury at all, for jurors with minds untrained to legal investigations and discriminations are sometimes likely to be influenced thereby, although such incompetent evidence may be afterwards withdrawn."

2. *State v. Gilman*, 51 Me. 206; *Kirby v. State*, 23 Tex. App. 13. See *Lovett v. State*, 60 Ga. 257; *State v.*

Young, 1 Winst. (N. C.) L. No. 1, 126; *State v. Zellers*, 7 N. J. L. (2 Halst.) 220. Compare *Snyder v. State*, 59 Ind. 105.

On a trial for murder, a charge to the jury that a false account given by the prisoner in his evidence at the coroner's inquest might, by law, be considered by the jury as a suspicious circumstance. *Held*, not to be erroneous. *Lovett v. State*, 60 Ga. 257.

Parol evidence of what was sworn before the coroner's inquest, and reduced to writing by him, cannot be received. *State v. Zellers*, 7 N. J. L. (2 Halst.) 220.

3. *State v. Miller*, 35 Kan. 328. See *Bailey v. State*, (Tex. App.) 9 S. W. Rep. 270. Compare *State v. Dufour*, 31 La. An. 804.

4. *State v. Taylor*, Phill. (N. C.) L. 508.

5. *Steagald v. State*, 22 Tex. App. 464; s. c., 9 Cr. L. Mag. 515.

As a Predicate for the Introduction of the Written Testimony of certain witnesses taken before an examining court, the state introduced the affidavit of one M, which in conformity with the statute recited the fact that the said witnesses were beyond the limits of this state, having removed to the state of Tennessee. The defence disputed the truth of this recital of the affidavit, and requested the trial court to place the affiant M, who was present in the court room, upon the stand, so that he might be tested as to his means of knowledge of the allegations made in

amined as to statements made by him at the preliminary examination, if they are shown to him at the time.¹ Proof that the examining court refused bail to the defendant is not admissible.²

(3) *At a Former Trial.*—Upon a second or subsequent trial of an indictment for homicide the statements of defendant, made at a former trial of the same indictment, are admissible in evidence.³

m. LEGAL PROCESS BEING SERVED BY DECEASED WHEN KILLED.—Where deceased was an officer of the law, and it is charged that he was killed while executing legal process, it is proper to introduce in evidence and read to the jury the warrant, or other process in the execution of which it is claimed deceased came to his death.⁴

n. DEFENDANT'S AFFIDAVIT FOR CONTINUANCE.—It is sometimes proper for the court to allow the voluntary statements made by defendant in an affidavit made by him on an application for a continuance, the facts of which have been demanded by the prosecution; but where such is the case, the whole affidavit should be read.⁵

o. PROOF AS TO MOTIVE.—(1) *Immunity from Prosecutions for an Offence Charged.*—Where a homicide is charged to have been committed by defendant in order to escape prosecution or punishment for some other offence of which it is claimed he had been guilty, it is competent to prove the commission of such other offence, and the facts and circumstances which may be connected therewith, in order to show a motive in defendant for killing the deceased. Thus it is proper, where deceased was an officer, killed while attempting to make an arrest, to show the commission by defendant of a crime for which it is claimed that deceased was attempting to arrest defendant.⁶ So also it is admissible to show

the affidavit. The trial court sustained the predicate as laid, and refused to allow the examination of M as to his means of knowledge. *Held*, that in the latter ruling the court erred. *Steagald v. State*, 22 Tex. App. 464; s. c., 9 Cr. L. Mag. 515.

1. See *Gunter v. State*, (Ala.) 10 Cr. L. Mag. 428.

2. *Richardson v. State*, 9 Tex. App. 612.

3. *Dumas v. State*, 63 Ga. 600.

4. See *Boyd v. State*, 17 Ga. 194; *Com. v. Murphy*, 65 Mass. (11 Cush.) 472.

5. See *Coker v. State*, 20 Ark. 53; *Wheeler v. State*, 8 Ind. 113; *State v. Twiggs*, 1 Winst. (N. C.) L. No. 1, 142.

Admission in Evidence of Affidavit for Continuance.—The respondent in a trial for murder, made an affidavit, in order to obtain a continuance, in which he stated what he expected to prove by absent witnesses. The prosecuting at-

torney said he "would admit the affidavit," and the court permitted the trial to proceed. The court refused to permit the entire affidavit to be read to the jury. The respondent was convicted of manslaughter. On appeal, the court *held*, that the respondent was entitled to have the whole affidavit read to the jury, and for that reason ordered that the judgment be reversed; and it appearing, from the record in this cause, that the appellant had served out more than half the period of time in the State's prison, for which he was sentenced, it was ordered that the same be certified to the governor, to the end that the appellant might be discharged. *Wheeler v. State*, 8 Ind. 113.

6. *Floyd v. State*, 82 Ala. 16; *People v. Pool*, 27 Cal. 572.

A Policeman Having Attempted While on Duty to arrest the defendant, for whom he had a warrant, but who was at the time charged with a felony, and

a former crime, for which the deceased was the prosecutor, as showing an inducement to defendant to kill deceased.¹

(2) *Prevention of Testimony by Deceased.*—On the trial of an indictment for homicide it is competent to prove that defendant might be benefited by the death of deceased, because deceased would have been a witness against defendant in some judicial proceeding against him, or between him and a third person, either civil or criminal.²

being shot by defendant while fleeing and pursued, evidence of the pendency of the indictment against defendant and forfeiture of his bail bond, the reward offered for his arrest by his sureties, his acquaintance with the deceased as a policeman, and the knowledge of all these facts by the deceased, is relevant and material as shedding light on the animus of the defendant, and as bearing on the question of self-defence. *Floyd v. State*, 82 Ala. 16.

1. *Carden v. State*, (Ala.) 4 So. Rep. 823; *Dunn v. State*, 2 Ark. 229; s. c., 35 Am. Dec. 54; *Turner v. State*, 70 Ga. 765; *Roberts v. Com.*, (Ky.) 8 S. W. Rep. 270; *State v. Patza*, 3 La. An. 512; *Gillum v. State*, 62 Miss. 547; *McCann v. People*, 3 Park. Cr. Cas. (N. Y.) 272; *McConkey v. Com.*, 101 Pa. St. 416; *Coward v. State*, 6 Tex. App. 59; *Kunde v. State*, 22 Tex. App. 65; overruling *Holt v. State*, 9 Tex. App. 571; *Walker v. State*, 6 Tex. App. 576; *Booth v. State*, 4 Tex. App. 202; *Bowen v. State*, 3 Tex. App. 617.

Where a Person was Indicted as Accessory Before the Fact to the crime of murder and it appeared that the inducement to the murder was the exertions of the deceased to ascertain the perpetrators of a former murder, *held*, competent to show the guilt of the prisoner as to the former murder, for the purpose of showing a motive for his conduct respecting the murder in question. *Dunn v. State*, 2 Ark. 229; s. c., 35 Am. Dec. 54; *State v. Patza*, 3 La. An. 512.

Showing a Motive.—Evidence that defendant had stolen money from deceased is admissible as showing motive, the deceased having accused defendant of the stealing. *Roberts v. Com.*, (Ky.) 8 S. W. Rep. 270.

Same—Connecting Murder with Robbery.—Upon a trial for murder alleged to have been committed in an attempt to conceal stolen goods, evidence tending to connect the murder with the robbery is admissible, in order to show

motive, and as part of the history of the occurrence. *McConkey v. Com.*, 101 Pa. St. 416.

Same—With Theft.—On a trial for murder, an indictment against the defendant's brother for theft from the deceased, accompanied by testimony of the brother identifying himself, *held*, to be competent to show the motive. *Coward v. State*, 6 Tex. App. 59.

Same—Deceased Witness Before Grand Jury.—Evidence to show motive for the killing, a pending indictment, on the finding of which deceased was witness, against defendant for burglary of deceased's house, is admissible, where there is evidence of threats made by defendant against deceased in reference to the charge of stealing contained in the indictment, and because deceased appeared as a witness before the grand jury. *Carden v. State*, (Ala.) 4 So. Rep. 823.

In such case, it is not competent to introduce evidence of defendant's guilt or innocence of the crime charged in the former indictment, as that he was seen with a large amount of money soon after the alleged burglary; money having been stolen from the deceased at that time. *Carden v. State*, (Ala.) 4 So. Rep. 823.

Same—Indictment for Illegal Liquor Selling.—Where, on a trial for murder, it appeared that the defendant thought a previous indictment against him for illegal liquor-selling was procured by deceased, *held*, that that indictment was competent as tending to show a motive for the killing. *Gillum v. State*, 62 Miss. 547.

2. See *Marler v. State*, 68 Ala. 580; *Mask v. State*, 32 Miss. 405; *Murphy v. People*, 63 N. Y. 590; *State v. Brantley*, 84 N. C. 766; *State v. Morris*, 84 N. C. 756; *Kunde v. State*, 25 Tex. App. 65.

Motive—Deceased a Witness.—In order to establish a motive in a murder trial, it may be shown that defendant had filed a bill for divorce against his wife, and that deceased was a principal

(3) *Promotion of Plans of Secret Criminal Organizations.*—It is competent, upon a trial for murder, to introduce evidence to the effect that defendant is an agent or member of a secret organization or association, criminal in its character and object, and that the homicide was committed in the carrying out of the common designs and purposes of such secret organization, in order to prove a motive in defendant for its commission.¹

(4) *Avarice.*—Upon the trial of an indictment for murder it is admissible to show that deceased was, at or near the time of the homicide, possessed of a considerable amount of money, or things

witness for her. *Marler v. State*, 68 Ala. 580.

Same—Suits Pending.—Upon the trial of an indictment for murder, it appeared that the deceased was killed by a shot fired through a window. G, who sat near the deceased at the time, and was wounded by the same shot, after having testified, upon the trial as a witness for the prosecution that he was defendant in three suits commenced against him by the prisoner which were pending at the time of the murder, and that the deceased had accompanied him several times to attend the trial of said actions, was permitted to testify, under a general objection, as to what the actions were brought for. *Held*, no error; that the evidence was proper as showing a motive for the commission of the crime, and that the strength of the motive might depend upon the nature of the controversy and the extent of the pecuniary interests involved; also that in the absence of a specific objection to the form of the proof, *i. e.*, that the fact could not be proved by parol evidence, it was to be assumed that the question intended to be raised by the objection was as to the competency of proof of the fact, not to the mode of proving it. *Murphy v. People*, 63 N. Y. 590.

Same—Deceased Witness in Prosecution.—Where the deceased was killed by an assault made by the three defendants on her father and brother, the state may show that one of the defendants, who was indicted as principal in the first degree, had been prosecuted for stealing, and that the father and brother were witnesses against him, it appearing that the quarrel was in relation to what they had said about the stealing. *Mask v. State*, 32 Miss. 405.

On the trial of one of several defendants indicted for murder, the state introduced in evidence certain indictments found subsequent to the homicide, charging defendants with the theft of

hogs, the property of deceased, and with perjury; and also the testimony of the justice of the peace before whom defendants were prosecuted for the offences for which they were afterwards indicted, at which trials deceased was an indispensable witness for the state. *Held*, that the evidence of the justice, though meager and indefinite, together with the indictments, were admissible to show a motive for the crime. *Kunde v. State*, 22 Tex. App. 65.

1. *McManus v. Com.*, 91 Pa. St. 57; *Campbell v. Com.*, 84 Pa. St. 187; *Carroll v. Com.*, 84 Pa. St. 107.

Secret Criminal Organization.—*Molly Maguires.*—Upon a trial for murder, attributed to agents of a secret association known as Molly Maguires, the prosecution, in order to show the motive, may prove the existence of such criminal organization, and may show that one division of such organization furnished men to commit murder in compensation for a like crime by members of another division. *Carroll v. Com.*, 84 Pa. St. 107; *Campbell v. Com.*, 84 Pa. St. 187.

Bald-knobs.—Evidence that defendant and others met in a secluded place, in the night, armed and masked; that they discussed the propriety of whipping different persons; that they went two miles to a house, killed two of its inmates, of whom one was a person they had contemplated whipping; and that, in defendant's presence, instructions were given by one of the number to the others as to what they should swear in case of prosecution, sufficiently establishes a conspiracy, the scope of which included the homicide committed, to admit evidence that defendant belonged to a secret organization, whose object was the destruction of property and maltreatment of persons; and that some of the party, on the way from the rendezvous to the scene of the homicide, attacked the

of value, which tempted the avarice of defendant, and so constitute a motive for killing the deceased;¹ and it is also proper to prove possession, by the defendant, of unusual sums of money, or of other property, after the homicide.²

(5) *Improper Devotion to or Criminal Intimacy with a Female.*—On the trial of an indictment for murder, it is proper for the prosecution to introduce against defendant evidence of improper devotion to or criminal intimacy with a female, to which devotion or intimacy deceased was an obstacle, in order to show motive in defendant for killing the deceased.³

house of one of the murdered men and found him absent. *State v. Walker*, (Mo.) 9 S. W. Rep. 646.

1. *State v. West*, 1 *Houst. Cr. Cas.* (Del.) 371; *State v. Rainsbarger*, 71 *Iowa* 746; *State v. Crowley*, 33 *La. An.* 782; *Marion v. State*, 20 *Neb.* 233; s. c., 57 *Am. Rep.* 825; *Kennedy v. People*, 39 *N. Y.* 245; *Early v. State*, 9 *Tex. App.* 476. See *Ettinger v. Com.*, 98 *Pa. St.* 338.

At the trial of an indictment for murder, where the evidence was circumstantial, the prosecution was permitted to prove a conversation between defendant and deceased, relating to a purchase of property of the latter by defendant, just prior to their departure from home together and to the alleged killing, defendant having returned alone and in possession of the property, the possession of which was to be retained by deceased until defendant had paid for it. *Held*, that the evidence was competent to show a motive for the killing, although the contract had been reduced to writing and given to deceased. *Marion v. State*, 20 *Neb.* 233; s. c., 57 *Am. Rep.* 825.

Possession of Money.—Upon a trial for murder, it is admissible to show, by the inventory of his succession, that the deceased had in his house a certain amount of money. The evidence is competent, as bearing upon the motive. *State v. Crowley*, 33 *La. An.* 782.

On a trial in Texas for the murder of W, evidence that W, before his removal to Texas, where he was killed soon afterwards, had \$2,500. *Held*, to be admissible for what it was worth, although remote. *Early v. State*, 9 *Tex. App.* 476.

Recent Receipt of Money.—On the trial of an indictment for murder, evidence of the receipt of a considerable sum of money by the deceased a few months previous to the murder is competent for the purpose of showing

a motive for the commission of the murder. *Kennedy v. People*, 39 *N. Y.* 245.

Threat to Expose Criminal Acts.—Upon a trial for murder, where it appears that defendant was bail for deceased, evidence that defendant said deceased had threatened to expose his (defendant's) criminal acts; that defendant had agreed to furnish money to deceased, and failed; and that deceased had a policy of insurance upon his life, which defendant was to receive, is admissible to show a motive for the crime. *State v. Rainsbarger*, 71 *Iowa* 746.

To Obtain Money on Life Insurance.—It is competent for the state to show that the defendant in a murder trial killed the deceased, and placing the body in his room set fire to it, in order that it might be supposed that he himself had been burned up, and so he might obtain money payable on insurance policies on his life. *State v. West*, 1 *Houst. Cr. Cas.* (Del.) 371.

Knowledge of Where Money Kept.—On trial for murder of a woman, in a house where she lived, an accomplice testified that defendant and others also murdered the woman's husband at the same time and place, and afterwards took and carried away money which was on the premises. *Held*, that evidence that defendant knew of the existence of this money, and where it was kept, was admissible to show motive. *Ettinger v. Com.*, 98 *Pa. St.* 338.

2. *State v. Wintzingrode*, 9 *Oreg.* 153.

3. See *Marler v. State*, 67 *Ala.* 55; *Hall v. State*, 40 *Ala.* 698; *Felix v. State*, 18 *Ala.* 720; *State v. Green*, 35 *Conn.* 203; *State v. Watkins*, 9 *Conn.* 47; s. c., 21 *Am. Dec.* 712; *Fraser v. State*, 55 *Ga.* 325; *State v. Hinkle*, 6 *Iowa* 380; *Pierson v. People*, 79 *N. Y.* 424; s. c., 35 *Am. Rep.* 524; *Stephens v. People*, 4 *Park. Cr. Cas.*

(6) *Marital Infidelity*.—Proof of infidelity of a wife towards her husband may be admissible upon the trial of an indictment against the husband for the murder of the wife, where it is shown that defendant knew of such infidelity of his wife at the time of the killing; but where such knowledge by him is not shown, such proof of infidelity is incompetent.¹

(N. Y.) 396; *Stout v. People*, 4 Park. Cr. Cas. (N. Y.) 71; *Com. v. Ferrigan*, 44 Pa. St. 386; *Traverse v. State*, 61 Wis. 144.

Improper Intimacy.—On a trial for wife murder, the state may prove an improper intimacy between the accused and a woman other than his wife. *Hall v. State*, 40 Ala. 698; *State v. Watkins*, 9 Conn. 47; s. c., 21 Am. Dec. 712; *St. Louis v. State*, 8 Neb. 405.

Murder of Wife—Immediate Remarriage.—Where the prisoner was indicted and tried for the murder of a woman to whom he had been married, and with whom he was living as his wife, *held*, that evidence by the prosecution was admissible to show that the accused had a former wife still living; that he had married the deceased under an assumed name, and that he had married another woman within five weeks after the murder; such evidence being admitted to repel the presumption of conjugal affection on the part of the accused. *State v. Green*, 35 Conn. 203.

Declarations of Intention.—On trial of M for murder of C, testimony of R that M stated to him that he, M, was tired of his wife, and intended to get a divorce from her, and wanted permission to marry his, R's, daughter, *held*, admissible in connection with evidence that C was an obstacle to the success of the divorce suit, already begun by M, to show motive. *Marler v. State*, 67 Ala. 55.

An Anonymous Letter, Proved to Have Been Written by the Prisoner, and sent to S C, reflecting upon the character of S B, a young lady of whom S C was the suitor, was *held* admissible in evidence against the prisoner, on a question of motive, on a trial for murder of the prisoner's wife by poisoning, it being charged, and there being circumstances tending strongly to show, that the object of the prisoner in committing the alleged murder was to enable him to marry S B. *Stephens v. People*, 4 Park. Cr. Cas. (N. Y.) 396.

Objecting to Visiting Daughter Because a Married Man.—On the trial of a

prisoner for the murder of his wife, proof that the prisoner, during the year preceding the homicide, applied to the mother of a single woman for permission to visit her daughter, and was denied it because he was a married man, is admissible, to show a motive for the commission of the crime. *Felix v. State*, 18 Ala. 720.

Incestuous Intercourse.—The prisoner and his sister, Mrs. L, were indicted for the murder of L. On the separate trial of the prisoner, evidence was given tending strongly to show that the prisoner and Mrs. L were both present at the homicide, and that it was the result of a violent struggle, in which all three were in some way engaged; that the deceased had been jealous of his wife; that they had lived unhappily together, and had quarreled and been partially separated; and that she had applied to an attorney to procure a divorce from her husband. The prosecution then offered evidence tending to show an incestuous connection between the prisoner and Mrs. L during a few months immediately preceding the homicide. *Held*, that such evidence was competent in the question of motive. *Stout v. People*, 4 Park. Cr. Cas. (N. Y.) 71.

Evidence of Malice.—Upon a trial for murder, all the testimony going to show motive is material to the issue, because there can be no murder without malice and no malice without motive. Therefore, testimony to the effect that defendant had step-children living with him, and who left him at night and went to deceased's residence, and the reasons which induced them to do so, particularly the fact that he had lived in illicit cohabitation with one of the girls, and wished to marry her, coupled with the other fact that deceased had taken care of these children, and refused to give them up, and resisted a habeas corpus suit for them, is admissible as showing motive for, and malice in, the homicide. *Fraser v. State*, 55 Ga. 325.

1. *Phillips v. State*, 22 Tex. App.

139.

(7) *Jealousy*.—In order to show a motive in defendant for the commission of the homicide, it is proper to prove that deceased and defendant were both suitors of the same woman, and that defendant was jealous of deceased.¹

(8) *Revenge*.—It is always proper to introduce evidence showing feelings of hatred and revenge by defendant toward the person killed, as showing a motive for the commission of the murder charged;² and it is proper to show also a reason or cause for the feeling of revenge.³

p. PROOF OF INSANITY.—The evidence which is required to establish the insanity of the defendant must be direct, positive, and applicable to the present condition of the prisoner. Insanity cannot be proved by reputation,⁴ nor can it be inferred from the unnatural homicide,⁵ nor from its overwhelming barbarity;⁶ neither can insanity be shown by the fact that no motive is proved in defendant for committing the homicide.⁷ But evidence of prior insanity is admissible as properly bearing upon the question;⁸ and so is proof of the insanity of other members of defendant's family.⁹

1. *Hunter v. State*, 43 Ga. 483; *McCue, v. Com.*, 78 Pa. St. 185; s. c., 21 Am. Rep. 7.

Rejected Suitor.—When upon trial of an indictment for murder, there is evidence that the accused was rejected and the deceased an accepted suitor for the same woman, the fact that rumors of such engagement, and of the approaching marriage, were repeated to the accused, may be admitted as a fact to show motive for the crime. *Hunter v. State*, 43 Ga. 483.

Visiting Same Woman.—On a trial for murder, for the purpose of showing motive, evidence is admissible that the prisoner and the deceased both visited the same woman, and that just after the homicide the prisoner said he had warned the deceased not to visit her, she would prove a curse to any man, and now it had come to pass. *McCue v. Com.*, 78 Pa. St. 185; s. c., 21 Am. Rep. 7.

2. *People v. Kern*, 61 Cal. 244.

3. See *Morrison v. State*, (Ala.) 4 So. Rep. 402; *State v. Lawlor*, 28 Minn. 216; *Powell v. State*, 13 Tex. App. 244.

Conviction of Burglarizing Deceased's House.—On a trial for murder, evidence that defendant had previously been convicted of burglary of deceased's house, and had just returned from serving out his sentence therefor, *held*, admissible to show motive. *Powell v. State*, 13 Tex. App. 244.

Discharge from Employment.—On a

trial for murder it is not error to permit a witness to testify that he, as foreman for the deceased and his partner, discharged the defendant twice from their employ, and that the last discharge was about six weeks before the killing, in order to show a motive for the killing. *Morrison v. State*, (Ala.) 4 So. Rep. 402.

Paramours.—Where, in a murder trial, the *corpus delicti* having been proved, and testimony introduced tending to connect the defendant with the commission of the crime, it appeared that the deceased, shortly before the homicide, had assaulted a woman in the defendant's company. *Held*, that the state might show that the defendant and the woman were paramours, as tending to show a motive on the part of the defendant to commit the crime. *State v. Lawlor*, 28 Minn. 216.

4. *State v. Hoyt*, 47 Conn. 518; s. c., 36 Am. Rep. 89; *Walker v. State*, 102 Ind. 502; *Hall v. Com.*, (Pa.) 10 Cr. L. Mag. 409.

5. *State v. Coleman*, 20 S. C. 441.

6. *U. S. v. Guiteau*, 10 Fed. Rep. 161; s. c., 2 Cr. Def. 163.

7. *State v. Stark*, 1 Strobb. (S. C.) L. 479; *U. S. v. Guiteau*, 10 Fed. Rep. 161; s. c., 2 Cr. Def. 163.

8. *State v. Felter*, 25 Iowa 67; s. c., 2 Cr. Def. 92; *U. S. v. Guiteau*, 10 Fed. Rep. 161; s. c., 2 Cr. Def. 163.

9. *State v. Hoyt*, 47 Conn. 518; s. c., 36 Am. Rep. 89; *State v. Felter*, 25 Iowa 67. See *Hall v. Com.*, (Pa.) 10

Defendant's coolness and unconcern may be considered, but where such is the case it is proper for the prosecution to show facts which may rebut the inference that such coolness and unconcern could only arise from an abnormal condition of the mind.¹ And it may be generally said that it is proper to consider the general conduct, condition, appearance and language of the defendant in determining the question raised by the plea of insanity.²

Cr. L. Mag. 409; *Hagan v. State*, 5 Baxt. (Tenn.) 615.

Insanity of Members of Family.—A defendant, for the purpose of proving his own insanity, introduced evidence that his sister had been insane. The counsel for the state, against defendant's objection, was allowed to inquire what caused her insanity, in order to show that it was not hereditary. *Held*, to be no error. *State v. Hoyt*, 47 Conn. 518; s. c., 36 Am. Rep. 89.

Insanity—On Trial of H for Murdering the Seducer of His Sister, a refusal to permit a witness to be asked what was the mental condition of H's brother as to sanity or insanity, *held*, to be error; such evidence being pertinent to the question of H's hereditary insanity. *Hagan v. State*, 5 Baxt. (Tenn.) 615.

Same—Epileptic Fits.—On a trial for murder, where the defence was insanity, it had been shown that defendant had, since his seventh year, been subject to epileptic fits. *Held*, that evidence tending to show that defendant's child, then a girl six years of age, had a spasm when born, and had been subject to such fits ever since, and that there was no one in her mother's family who had ever had such fits, was properly excluded. *Hall v. Com.*, (Pa.) 10 Cr. L. Mag. 409.

1. **Insanity—Coolness and Unconcern.**—But where the defence is insanity, and the coolness and unconcern of the prisoner at the time he committed the homicide are relied upon as justifying inferences favorable to the plea, it is competent to show that the prisoner had been in early years engaged in the perilous calling of smuggling, as tending to rebut the inference that his deportment on the fatal occasion was attributable to a want of sanity. *Hopps v. People*, 31 Ill. 385; s. c., 83 Am. Dec. 231.

2. See *State v. West*, 1 Houst. Cr. Cas. (Del.) 371; *State v. Jones*, 64 Iowa 349; *Spencer v. State*, (Md.) 13 Atl. Rep. 809; *State v. Shoultz*, 25 Mo. 128; *Sanchez v. People*, 22 N. Y. 147; *Pat-*

terson v. People, 46 Barb. (N. Y.) 625; *People v. Thurston*, 2 Park. Cr. Cas. (N. Y.) 49; *State v. Anderson*, 4 Nev. 265; *Jacobs v. Com.*, (Pa.) 15 Atl. Rep. 465; *Hall v. Com.*, (Pa.) 10 Cr. L. Mag. 409; *Coyle v. Com.*, 100 Pa. St. 573; s. c., 45 Am. Rep. 397; *Spence v. State*, 15 Lea (Tenn.) 539; *Burkhard v. State*, 18 Tex. App. 599.

Insanity—Collection of Valueless Articles.—In a murder trial, where the defence was insanity, counsel for defendant was allowed to produce in court a number of valueless articles collected by the defendant for a museum. *State v. West*, 1 Houst. Cr. Cas. (Del.) 371.

Same—Domestic Trouble.—Evidence tending to show the defendant's mind to have been unhinged by domestic trouble and by the use of liquor is admissible on his trial for murder. *Burkhard v. State*, 18 Tex. App. 599.

Same—Isolated Incidents, relied on to show insanity, are of little weight on a trial for murder, where their peculiarities can be traced to the excessive use of liquor, and where the person has generally been deemed sane, and has been always dealt with as such. *Spence v. State*, 15 Lea (Tenn.) 539.

Same—An Attempt to Commit Suicide raises no legal presumption of insanity, but may be considered in connection with other evidence bearing on the question of insanity. *Coyle v. Com.*, 100 Pa. St. 573; s. c., 45 Am. Rep. 397.

Same—Assault on Prisoner's Wife.—It appeared that deceased had assaulted prisoner's wife before her marriage; that, after her death, prisoner called on deceased, induced him to walk with him, accused him of his crime and then shot and killed him. Counsel for prisoner proposed to prove that before the wife's death she had attributed her illness immediately to the assault by deceased; that the dead body of his wife, with the scars inflicted by deceased, would appear to prisoner in his dreams; that he was haunted with the idea that

The inquiry may extend to a reasonable length of time before the homicide, as well as to the time of its immediate commission,¹ and also to the action of the defendant and to his condition subsequent thereto, if so connected with evidence of a previous state of insanity as to warrant an inference of its continuance at the time of the killing.²

7. **EXPERT AND OPINION EVIDENCE.**³—(1) *Experts*.—Upon the trial of an indictment for homicide, an expert witness may give his opinion upon any state of facts which is established, or which is assumed to have been established, not only as to the nature and effect of the injury which caused the death, but also as to the manner and the means employed;⁴ it is also competent

so long as deceased lived he would have no rest or peace of mind; and that since the death of deceased the prisoner had found rest and quiet. *Held*, that the court did not err in refusing to admit such testimony as evidence of insanity; counsel declining to assure the court that he would follow the proof of these facts with other proof that at the time of the homicide the prisoner was insane and not responsible for his actions. *Spencer v. State*, (Md.) 13 Atl. Rep. 809.

Crippled Condition—Nervous Fear.—In a trial for murder, evidence that, from the weak and crippled condition of the defendant, he was rendered nervous and peculiarly sensitive to fear and external violence, was properly rejected. *State v. Shoultz*, 25 Mo. 128.

1. *State v. Jones*, 64 Iowa 349; *Com. v. Pomeroy*, 117 Mass. 143; *Sanchez v. People*, 22 N. Y. 147; *Webber v. Com.*, (Pa.) 13 Atl. Rep. 427.

Where the Defence was Insanity, beginning in 1885, and defendant was permitted the greatest latitude in showing the change in his disposition from that date until the homicide, the refusal of evidence as to his kindly nature prior to 1885, worked no harm to defendant. *Webber v. Com.*, (Pa.) 13 Atl. Rep. 427.

2. *Com. v. Pomeroy*, 117 Mass. 143.

3. See 7 Am. & Eng. Encyc. of L. 490, title EXPERT AND OPINION EVIDENCE.

4. *Williams v. State*, 64 Md. 384. See *Territory v. Egan*, 3 Dak. 119; *Newton v. State*, 21 Fla. 53; *State v. Mahan*, 68 Iowa 304; *State v. Vincent*, 24 Iowa 570; s. c., 95 Am. Dec. 753; *State v. Hinkle*, 6 Iowa 380; *Batten v. State*, 80 Ind. 394; *State v. Baldwin*, 36 Kan. 1; s. c., 9 Cr. L. Mag. 50; *Com. v. Sturtivant*, 117 Mass. 122; s. c., 19 Am. Rep. 401; *People v. Foley*,

(Mich.) 7 West Rep. 344; *People v. Barker*, 60 Mich. 277; s. c., 1 Am. St. Rep. 501; *State v. Brooks*, 92 Mo. 542; *State v. Morgan*, 95 N. C. 641; *People v. Wilson*, 109 N. Y. 345; *Pierson v. People*, 18 Hun (N. Y.) 239; *Stephens v. People*, 4 Park. Cr. Cas. (N. Y.) 396; *Hartung v. People*, 4 Park. Cr. Cas. (N. Y.) 319; *People v. Williams*, 3 Park. Cr. Cas. (N. Y.) 84; *Soquet v. State*, (Wis.) 40 N. W. Rep. 391.

Medical Expert—Opinion as to Direction from which Blow was Received.—Testimony of a medical expert as to the direction from which blows were received, and the character of the instrument with which injuries were inflicted, is competent upon a trial for homicide. *Territory v. Egan*, 3 Dak. 119.

Same—A Witness Familiar with Blood, who had examined, with a lens, a blood stain on a coat, when it was fresh, may properly testify that it appeared to have come from below upwards, although he had never experimented with blood or other fluid in that respect. *Com. v. Sturtivant*, 117 Mass. 122; s. c., 19 Am. Rep. 401.

Same—How Wound in Hand was Made.—Medical experts *held* competent to testify, from the appearance of a wound through the hand, whether or not it was made while the hand was pressed over the muzzle of the revolver. *State v. Mahan*, 68 Iowa 304.

Same—Effect of Medicine and Extent of Wound.—In a murder trial, a medical witness who has testified as to the treatment of the deceased may, on cross-examination, be asked as to the effect of the medicines administered; also as to whether he was under the impression, at the time of treatment, that the deceased's intestines were severed by the knife used by the accused. *Batten v. State*, 80 Ind. 394.

Same—Sufficiency of Identification of Article.—In a trial for murder, it was claimed that the murder was committed by administering arsenic to the deceased in a bowl, from which tea and toast had been fed to the deceased by the prisoner. The evidence tended to show that the bowl was the one delivered to the physician who analyzed its contents at the request of the government. *Held*, that the question of sufficiency of identification of the bowl was for the jury, and that the physician might testify to the condition and contents of the bowl, and the results of his analysis, though the evidence as to the identity of the bowl was not positive. *People v. Williams*, 3 Park. Cr. Cas. (N. Y.) 84.

Same—Arsenical Poisoning.—It is competent to ask a physician, on his cross-examination, to give his opinion whether certain symptoms, particularly specified, were those of arsenical poisoning, when the witness has previously given testimony in relation to the same subject-matter, and where the symptoms inquired about are the same of which evidence had been previously given by another witness. *Stephens v. People*, 4 Park. Cr. Cas. (N. Y.) 396.

Same—By Strychnine.—The question being as to whether strychnine was found in the stomach of the deceased, two physicians testified that they were not practical chemists, but had considerable knowledge of chemistry from their reading and experimenting to some extent, as incident to their profession and otherwise, including a general knowledge of the tests of the presence of strychnine. *Held*, that they were experts, but that the jury should judge as to the value of their testimony. *State v. Hinkle*, 6 Iowa 380.

Expert Testimony—Knowledge Not Acquired by Experience.—On a trial for murder for poisoning, a medical witness is not qualified to give an opinion that the symptoms of the last sickness of the deceased indicated poison by arsenic, when he had never seen a case, or had any experience whatever in cases of arsenical poisoning, and that all he knows on the subject is derived from medical or scientific books and medical instruction. *Soquet v. State*, (Wis.) 40 N. W. Rep. 391.

Same—Chemist.—On the trial of an indictment for murder by poison, after an opinion adverse to the theory of the prosecution had been expressed by a physician, drawn from the appearance

of the autopsy, an experienced chemist, who had assisted at the *post mortem*, was asked: "In your opinion, can a physician, from the appearance of the stomach after death, determine with any degree of certainty the precise period when the poison (arsenic) first began to affect it." *Held*, that the question was competent. *Hartung v. People*, 4 Park. Cr. Cas. (N. Y.) 319.

Same—Looker On.—On a trial for murder, the testimony of a physician that he saw another physician, at an autopsy on the body of deceased, pass his finger down the trachea, and also up into the larynx, such testimony being for the purpose of showing that there was no obstruction by which deceased might have choked to death, is not objectionable because such looker-on could not tell whether the finger met any obstruction. *People v. Wilson*, 109 N. Y. 345.

Upon the Trial of an Indictment for Infanticide, where it appeared that there were no marks of violence upon the deceased, it was not erroneous to admit the testimony of an expert that there were several modes of causing death without leaving upon the body any evidence of the means employed. *State v. Morgan*, 95 N. C. 641.

In a prosecution for the murder of an infant, upon a hypothetical statement of the condition of the child's body when found, and also on *post mortem* examination some days afterwards, the question propounded to a physician, as an expert: "What, in your opinion caused the death of the child?" and "In your opinion is there any disease which would produce death, accompanied by the conditions stated in the hypothetical case, in an infant healthy and all right in every respect at birth?" were properly allowed. *People v. Foley*, (Mich.) 7 West Rep. 344.

Expert Testimony—Skilled Workmen.—A panel had been cut and taken from the outside door of the house where the offence was committed; and when the defendant, who was a carpenter, was arrested, a knife was found on his person. Witnesses who were skilled workers in wood were called, and testified that the panel had been cut out with a knife, and that the blade of defendant's knife exactly fitted the place where the panel had been pierced; that it had been cut from the outside by one skilled in the use of tools, and was evidently taken out by one who under-

for medical experts to testify upon the question of the insanity of the defendant according to an assumed state of facts hypothetically submitted to the witness,¹ or from his own opinion shown to have been formed by observation of the defendant—his language and conduct—and from association with him.²

(2) *Non-Experts*.—While it is a rule, generally recognized, that witnesses not called as experts must testify only to facts, yet facts which are made up of a great variety of circumstances, or combination of appearances, incompetent of full description, may be shown by the opinions of ordinary witnesses whose observation has been sufficient to justify it. Upon this principle, opinion evidence is competent as to matters involving quantity, magnitude, length of time, space, motion or value, and as to the appearance and condition of persons or things, as grief, excitement, anger or fear.³ But the observation of the witness and, consequently, his opportunity therefore, must have been sufficient to have afforded reasonable ground for the formation of an opinion; and the question must not be so special or technical as to exclude the idea of competent judgment by the opinion of professional witnesses.⁴

stood the construction of a door. *Held*, that the manner in which the cutting was done, and the effect of the tools upon the wood, involves skill and experience to judge of, and are not within common experience, and it was proper that the jury should be aided by the experience of experts. *State v. Baldwin*, 36 Kan. 1; s. c., 9 Cr. L. Mag. 50.

1. See *Gunter v. State*, (Ala.) 10 Cr. L. Mag. 428; *State v. Ridell*, (Del.) 15 Atl. Rep. 968; *Guetig v. State*, 66 Ind. 94; *State v. Hockett*, 70 Iowa 442; s. c., 9 Cr. L. Mag. 208; *State v. Townsend*, 66 Iowa 741; s. c., 32 Am. Rep. 99; *Brown v. Com.*, 14 Bush (Ky.) 398; *Sanchez v. People*, 22 N. Y. 147; *People v. Schuyler*, 43 Hun (N. Y.) 88; *State v. Hayden*, 51 Vt. 296.

A Hypothetical Question as to the Sanity of Defendant, put to a physician employed to treat prisoners confined in jail, which did not assume the existence of any fact which related to the defendant's physical or mental condition, or conduct, while in jail, or of any fact which the witness could have learned while attending defendant in a professional capacity, but simply called upon to give his opinion, based exclusively upon facts assumed to have occurred before defendant was known to the witness, *held*, competent under Code Civ. Proc., section 834. *People v. Schuyler*, 43 Hun (N. Y.) 88.

That the witness testified he did not

think it possible to answer the question without being influenced by the opinion formed while acting as defendant's physician, did not render his testimony incompetent. *People v. Schuyler*, 43 Hun (N. Y.) 88.

2. *Brown v. Com.*, 14 Bush (Ky.) 398; *State v. Hayden*, 51 Vt. 296. See *Gunter v. State*, (Ala.) 10 Cr. L. Mag. 428. *Compare Sanchez v. People*, 22 N. Y. 147; *People v. Schuyler*, 43 Hun (N. Y.) 88.

3. See *State v. Baldwin*, 36 Kan. 1; s. c., 9 Cr. L. Mag. 49.

4. *Rash v. State*, 61 Ala. 89; *People v. Bell*, 49 Cal. 486; *Blackman v. State*, (Ga.) 7 S. E. Rep. 626; *Thomas v. State*, 67 Ga. 460; *Everett v. State*, 62 Ga. 65; *McGinnis v. State*, 31 Ga. 236; *Fundy v. State*, 30 Ga. 400; *Hawkins v. State*, 25 Ga. 207; s. c., 71 Am. Dec. 166; *State v. Donnelly*, 69 Iowa 705; s. c., 58 Am. Rep. 234; *State v. Mahan*, 68 Iowa 304; *State v. Shelton*, 64 Iowa 333; *State v. Middleham*, 62 Iowa 150; *State v. Stackhouse*, 24 Kan. 447; *Wise v. State*, 2 Kan. 419; s. c., 85 Am. Dec. 595; *Kennedy v. Com.*, 14 Bush (Ky.) 340; *People v. Olmstead*, 30 Mich. 431; *State v. Houser*, 28 Mo. 233; *People v. Deacons*, 109 N. Y. 374; *People v. Fernandez*, 35 N. Y. 49; *People v. Wilson*, 3 Park. Cr. Cas. (N. Y.) 499; *Orderzook v. Com.*, 76 Pa. St. 340; *Smith v. State*, 43 Tex. 643; *Cooper v. State*, 23 Tex. 321.

Showing Death by Non-Professional Witness.—It is competent for the state

to show, on a trial for murder, the cause of the death without the aid of professional witnesses in a case where death did not ensue immediately after the infliction of a wound. *Smith v. State*, 43 Tex. 643.

One who is not a practicing physician may, after describing the wound, give his opinion that it caused death, and may give his opinion, with reasons therefor, that the deceased could not possibly have inflicted the wound himself. *Everett v. State*, 62 Ga. 65.

Same—Evidence of Nurse.—Upon the trial of a charge of manslaughter under the Michigan statute (Comp. L. 1871, § 7542), making the attempt to destroy an unborn child, in certain cases, is manslaughter where the death of such child or the mother is thereby produced, evidence of a woman who was with such mother and washed her and changed her clothes the day before she died, as to the appearance of the bed and clothes, and as to the peculiar offensive odor which she observed, *held*, competent. *People v. Olmstead*, 30 Mich. 431.

Same—As to Blood Spots.—If, on a trial for murder, the prosecution introduces testimony showing that colored spots were found on the prisoner's clothes and person, which it claims were blood, it is not obliged to show by scientific analysis that such spots were blood, but may rely on the opinion of a witness who saw the spots. *People v. Bell*, 49 Cal. 486.

It is not erroneous on a trial for murder to admit evidence from witnesses, who are not chemists, that the clothes worn by the accused on the night of the murder, and produced for inspection on the trial, were marked with stains apparently produced by blood, when found in possession of the accused at the time of his arrest. *People v. Fernandez*, 35 N. Y. 49.

Photograph of Deceased—Identification.—On the trial of an indictment for the murder of "Goss, alias Wilson," a photograph of Goss, testified to be like a mutilated body found, *held*, to be proper evidence to be submitted to the jury, that the body was that of Goss. *Udderzook v. Com.*, 76 Pa. St. 340.

Where a mutilated body, whose face was discolored and swollen, was found, having been buried apparently for some days, and the one who found it had never seen the person before, *held*, that he might testify that the face resembled a photograph of a person al-

leged to be the one found, but the question whether the witness could identify it was one for the jury. *Udderzook v. Com.*, 76 Pa. St. 340.

Opinion Evidence—Similarity of Tracks.

—A witness testified, on trial for murder, as to the resemblance between tracks found near the scene of the homicide and other tracks admitted to have been made by defendant. Some of the latter tracks were made under compulsion, and the evidence relating to these tracks, and the opinions of witnesses based thereon, were subsequently withdrawn from the jury. *Held*, that refusal to withdraw the opinion of a witness, who stated that he was as certain about the tracks before he saw those made under compulsion as after, was not error. *Blackman v. State*, (Ga.) 7 S. E. Rep. 626.

Same—"On Good Terms."—On the trial of an indictment for murder, a witness may be asked his opinion as to whether the defendant and deceased were on good terms or not. *State v. Stackhouse*, 24 Kan. 445.

A non-expert witness may testify whether defendant in a murder case, on a particular occasion, manifested any anger at deceased. *State v. Shelton*, 64 Iowa 333.

Same—Manner "Restless" or "Quiet."—On the question of self-defence in a murder trial, a witness cannot state whether deceased's manner was "reckless" or "quiet." *State v. Middleham*, 62 Iowa 150.

Same—Intent.—The opinion of a witness that a person, killing another in a fight, had an intent to kill the deceased before the fight commenced, is not competent evidence of such intent. *Fundy v. State*, 30 Ga. 400.

Same—Of Resemblance.—A brother of deceased on a trial for murder, testified that five months after the alleged murder he saw a body claimed to be the body of deceased, and examined it. He testified to several points of resemblance. He was asked by the government whether it was in his opinion the body of the murdered man. *Held*, that the question was incompetent, the question being for the jury, the body having been much decomposed and he having stated all the points of resemblance. *People v. Wilson*, 3 Park. Cr. Cas. (N. Y.) 199.

On trial of K for murder, the prosecution was allowed, in cross-examining H, a witness for K, to ask if H did not, soon after the killing, say to C and S that it was an unprovoked murder, and,

Where the defence set up is the insanity of the defendant, it is permissible for a non-expert witness to give his opinion upon the question of defendant's sanity, where such opinion is formed upon facts and circumstances within his personal knowledge and observation.¹

(3) *Experiments*.—The admission of testimony as to experiments made by experts and others in relation to the manner or means by which the homicide is charged to have been committed, is largely within the discretion of the court, to be decided according to the peculiar facts and circumstances surrounding each separate case. It is generally competent, however, to show the result of experiments made in the proper manner, and under corresponding circumstances to those which, it is claimed, surrounded the commission of the homicide.²

(4) *Medical and Scientific Books and Writings*.—Medical and scientific works are not admissible in evidence for the purpose of proving the declarations and opinions which they contain, unless sanctioned by the oath of an expert witness, who is not, however, confined wholly to his personal experience, but may give his opinion formed in part from the reading of books and writings prepared by other persons of acknowledged ability; and it is not improper for him to give the source of his opinion, and to state, if it be the case, that all the authorities on the subject have, as far as he knows, supported him in his opinion.³ And it has been held that scientific or medical books or writings treating of insanity cannot be regarded as legal authority, except as the views

on a negative answer, to prove by C and S that H said so. *Held*, to be error, as, in effect, making evidence of H's opinion that K had committed murder. *Kennedy v. Com.*, 14 Bush (Ky.) 340.

1. *Schlencker v. State*, 9 Neb. 241; *People v. Conroy*, 97 N. Y. 62.

2. See *State v. Smith*, 49 Conn. 376; *Com. v. Piper*, 120 Mass. 185; *State v. Justus*, 11 Oreg. 178; s. c., 50 Am. Rep. 470; *Com. v. Sullivan*, 13 Phila. (Pa.) 410.

Showing Result of Experiments.—Upon a trial for murder the government may show experiments made by shooting with the pistol which gave the fatal wounds at substances similar to the clothing worn by the deceased when killed. *Com. v. Sullivan*, 13 Phila. (Pa.) 410.

Same—With Pistol.—In a trial for murder, it being a question whether the fatal shot was fired from a pistol in the hand of deceased, or from one in the hand of the prisoner, both of which were produced, *held*, that it was not error for the judge to refuse to allow an expert to experiment with them to ascertain from

which the shot came, that being a matter wholly within the court's discretion. *State v. Smith*, 49 Conn. 376.

Evidence of experiments made by non-professional witnesses with guns and targets is inadmissible, on a trial for murder, to show that the shooting was done at short range. *State v. Justus*, 11 Oreg. 178; s. c., 50 Am. Rep. 470.

Same—With Dynamometer.—Upon such trial, a witness testified that he had made certain experiments upon a dynamometer, an instrument for the measuring of the force of blows and the weight of falling bodies, by striking it with a bat of substantially the same form and weight as that with which, as the government contended, the murder was committed. *Held*, that the court might properly, in its discretion, reject such evidence as tending to mislead the jury, unless the experiments were shown to have been made under the conditions the same as those existing in the case on trial. *Com. v. Piper*, 120 Mass. 185.

3. See *State v. Baldwin*, 36 Kan. 1; s. c., 9 Cr. L. Mag. 49; *State v. O'Brien*, 7 R. I. 336

set forth are enforced and supported by judicial rulings and decisions.¹

r. HEARSAY EVIDENCE.—Evidence is not usually admissible either for or against a person upon trial for a homicide, unless it be of the *res gestæ*, and where it is admitted against the defendant, a conviction will be reversed.²

s. IMPEACHING EVIDENCE.—The rules governing the impeachment of witnesses, and the admission of evidence for that purpose, are the same in cases of homicide as in other prosecutions. A witness may be impeached by proof of former acts or statements by him, contrary to his evidence;³ or his credibility may

1. *State v. West*, 1 Houst. Cr. Cas. (Del.) 371.

2. *Stephens v. State*, 20 Tex. App. 255; *Segura v. State*, 16 Tex. App. 221. See *People v. Simonds*, 19 Cal. 275; *People v. Bealoba*, 17 Cal. 389; *Forman v. Com.*, (Ky.) 6 S. W. Rep. 190; *Brown v. People*, 17 Mich. 429; s. c., 97 Am. Dec. 195; *Howser v. Com.*, 51 Pa. St. 332; *State v. Terrell*, 12 Rich. (S. C.) L. 321.

Hearsay Evidence.—In order to show that deceased had a weapon at the time he was killed, defendant offered to prove by a witness that the witness got from one T the number of a pistol which T claimed corresponded with the one delivered by defendant to the officer after shooting deceased, which defendant testified he took from the body of deceased. *Held*, hearsay. *Forman v. Com.*, (Ky.) s. c., 6 S. W. Rep. 190.

Same—Declarations of Third Person.—On a trial for murder, the declaration of a third person, who had as strong motives as the prisoner to commit the murder, against whom there were strong circumstances of suspicion, and who had left the state, that the prisoner was not the right man, was *held* to be mere hearsay, and inadmissible for the prisoner. *State v. Terrell*, 12 Rich. (S. C.) L. 321.

On the trial of an indictment for murder, a witness testified that he saw R, who was supposed to be a *particeps criminis*, with another person, at a certain place, where, if certain evidence introduced by the defendant to establish an *alibi* was true, neither R nor the defendant could have been at the time of the murder. For the purpose of fixing the date another witness was allowed to testify that the first witness told him on the following morning that he saw R and another person the night before. *Held*, that the evidence was

inadmissible. *Brown v. People*, 17 Mich. 429.

Same—Excluding from Jury After Admission.—Hearsay evidence, though plainly inadmissible, was admitted on a trial for murder, but afterward, in the charge of the judge, excluded. *Held*, that this was no error; and that at least the prisoner, upon the charge of exclusion, should have applied for leave to introduce other testimony, had he wished to, for establishing the point. *People v. Bealoba*, 17 Cal. 389.

3. See *People v. Williams*, 18 Cal. 187; *State v. Baldwin*, 36 Kan. 1; s. c., 9 Cr. L. Mag. 49; *State v. Walker*, (Mo.) 9 S. W. Rep. 646; *State v. Tabbutt*, 73 Mo. 347.

Former Conflicting Statement.—Where the defendant produced a witness who, with a view of showing the conscious innocence of the defendant, testified what his conduct and appearance was soon after the death of his sister, it was proper to inquire, on cross-examination, if the witness had not stated at the preliminary examination that the conduct of the defendant impressed him at once as being guilty of murder. *State v. Baldwin*, 36 Kan. 1; s. c., 9 Cr. L. Mag. 50.

Where, with a view of impeaching a witness, he is asked if he did not make a certain statement on a previous examination, and he replies that "it amounts to about the same thing," he thereby practically admits the making of the statement, and his answer is sufficient as a foundation for impeachment. *State v. Baldwin*, 36 Kan. 1; s. c., 9 Cr. L. Mag. 49.

In a trial of defendant for murder, a participator in the crime furnished the only direct evidence; he gave a full account of the affair, but in his account conveyed the idea that he was a reluctant and unwilling abettor, exonerating himself from any criminality beyond going

be affected by proof of complicity in the homicide, or the acts leading to it,¹ or of an especial interest in the prosecution for the defence.²

Dying declarations may be impeached by evidence of statements by the deceased contradictory thereto.³

t. THINGS IN EVIDENCE.—Upon the trial of an indictment for homicide, it is proper to introduce in evidence any and every thing which is shown to be of the *res gestæ*, or to be properly connected with the homicide, that may aid in explaining or determining any disputed question connected with the charge upon which defendant is being tried. Thus, it is competent to introduce photographs of deceased, taken during his life-time, in order to aid in his identification, if that is in question;⁴ or a photograph of the wound.⁵ Diagrams of the premises where the homicide is shown to have occurred are also admissible, after the proper foundation has been laid by a showing their accuracy and the skill of the draughtsman;⁶ or such diagrams or plans may be referred to by witnesses in order to render their testimony more easily intelligible.⁷ It is also proper for the jury to see and investigate the clothing of the deceased, and its condition, as shedding light upon the manner and means of death;⁸ and so of

with defendant for the purpose of chastising the deceased. On cross-examination, defendant's counsel asked witness if he did not, a few days before the murder, state that he intended to kill the deceased. The theory of the defence was, that the witness himself did the murder. *Held*, that this question was admissible, as tending to contradict, inferentially, witness's statements and prove them false. *People v. Williams*, 18 Cal. 187.

A son was tried for murdering his father. The state introduced evidence tending to show unfriendly relations between father and son. The father's widow testified that on the contrary their relations were friendly. *Held*, that the state might show in rebuttal, that the widow, before her husband's death, in speaking of a difficulty between father and son, had said that if the son had had a pistol he would have shot his father, and that he was prepared for him. *State v. Tabott*, 73 Mo. 347.

Same—Instructions to Swear to Alibi.—Evidence that one of the parties instructed others, in defendant's presence and hearing, to swear to an alibi in case of a prosecution for the homicide, is admissible. *State v. Walker*, (Mo.) 9 S. W. Rep. 646.

1. See *Craft v. State*, 3 Kan. 450; *Tow v. State*, 22 Tex. App. 175; *Dubose v. State*, 10 Tex. App. 230.

A state's witness may be shown to

have directed deceased to shoot defendant. *Tow v. State*, 22 Tex. App. 175.

Upon a trial for murder, in which the issue was the identification of the defendant as the murderer, the state introduced the testimony of a witness against whom there was some proof of complicity. Defendant offered to prove that the witness was at enmity with the deceased, had threatened his life, and carried weapons with which to take it. Defendant's offer to prove was rejected. *Held*, error, because such proof proximately tended to exculpate the defendant. *Dubose v. State*, 10 Tex. App. 230.

2. See *Beauchamp v. State*, 6 Blackf. (Ind.) 300.

3. *Felder v. State*, 23 Tex. App. 477; s. c., 59 Am. Rep. 777.

4. *Marion v. State*, 20 Neb. 235; s. c., 57 Am. Rep. 825. See *Walsh v. People*, 88 N. Y. 458; *Ruloff v. People*, 45 N. Y. 213; *Udderzook v. Com.*, 76 Pa. St. 340.

5. *Photographs as Evidence.*—On a trial of murder of one found with his throat cut, a photograph of the wound *held* admissible. *Franklin v. State*, 69 Ga. 36; s. c., 47 Am. Rep. 748.

6. *Territory v. Egan*, 3 Dak. 119; *Smith v. State*, 21 Tex. App. 107.

7. *State v. Lawlor*, 28 Minn. 216.

8. *Story v. State*, 99 Ind. 413; *Hart v. State*, 15 Tex. App. 202; s. c., 49

the clothing of defendant shown to have been worn by him at or about the time of the alleged commission of the homicide,¹ and their production in evidence is not a violation of the constitutional provision that no person shall be compelled to give testimony criminating himself.²

The weapon with which it is charged the homicide was committed is also competent evidence;³ and so is property shown to belong to defendant found at or near the place of the homicide, under such circumstances as show an apparent connection between the property and the killing.⁴

5. View of Premises by Jury.—It is usually proper for the court to allow the jury to visit the place where the homicide is charged to have occurred, where application is made for such view by the jury; but this is largely within the discretion of the court.⁵ The purpose of such a view is to aid the jury in weighing conflicting testimony, and what they see does not itself become a part of the evidence.⁶ The defendant should always be present at such a proceeding;⁷ but it has been held that he may waive his right by failing to make application for leave to accompany the jury.⁸

6. Presumptions and Burden of Proof.—*a. AS TO THE CORPUS DELICTI.*—The burden of proof is on the prosecution to establish the *corpus delicti* as well as all other material allegations in the indictment, to the satisfaction of the jury, before a conviction for a homicide can be justified;⁹ but it has been held that where the prosecution shows *prima facie* the *corpus delicti*, the defendant has the burden to show that the person for whose killing he is upon trial is still alive, if he sets up that claim.¹⁰

*b. AS TO MALICE.*¹¹—Where the proof shows an unlawful killing, by means calculated to produce death, and no circumstances

Am. Rep. 188; King v. State, 13 Tex. App. 277.

1. Drake v. State, 75 Ga., 413; State v. Stair, 87 Mo. 268; s. c., 56 Am. Rep. 449.

The fact that such garments cannot be filed with the bill of exceptions is no reason for excluding them. State v. Stair, 87 Mo. 268; s. c., 56 Am. Rep. 449.

2. Drake v. State, 75 Ga. 413.

3. Thomas v. State, 67 Ga. 460; Com. v. Sturtivant, 117 Mass. 122; s. c., 19 Am. Rep. 401.

4. Weapons and Articles.—Various articles, such as burglars' tools and part of a newspaper, found in a room occupied by the accused before the murder, and at the scene of the crime, and the possession of which was connected with the prisoner or his accomplices, and shoes found at the place where the murder was committed, fitting the prisoner, held admissible as evidence connecting him with the murder. Ruloff v. People, 45 N. Y. 213; s. c., *sub*

nom. Ruloff's Case, 11 Abb. (N. Y.) Pr. N. S. 245.

5. See People v. Bush, 68 Cal. 623; People v. Bonney, 19 Cal. 426; Bostock v. State, 61 Ga. 635; State v. Moran, 15 Oreg. 262; State v. Ah Lee, 8 Oreg. 204; Sasse v. State, 68 Wis. 530.

6. Sasse v. State, 68 Wis. 530.

7. See People v. Bush, 68 Cal. 623; overruling People v. Bonney, 19 Cal. 426.

View by Jury—California Doctrine.—While the California Penal Code, section 1119, does not in terms authorize a view unless in defendant's presence, he must be present or his constitutional rights are violated. People v. Bush, 68 Cal. 623.

8. State v. Moran, 15 Oreg. 262; State v. Ah Lee, 8 Oreg. 214.

9. See State v. Taylor, 1 Houst. Cr. Cas. (Del.) 436.

10. Fahnestock v. State, 23 Ind. 231; State v. Vincent, 24 Iowa 570.

11. As to legal presumptions of malice, see *supra*, V. 2, a. (2).

of mitigation appear, malice is presumed, and defendant has the burden of proof to show that the killing was not malicious; but where mitigating circumstances are shown by the evidence of the prosecution, they rebut the presumption equally as if shown by defendant.¹ Where the courts hold that malpractice of a surgeon or physician may be a defence to an indictment for murder partly caused by a wound inflicted with malicious intent, the defendant has the burden to show that the death resulted from the neglect or malpractice of the surgeon or physician, or from some other cause than the wound.²

It is frequently the case that persons upon trial for homicide are sought to be charged with the burden of proof in the first instance; but such a doctrine has no precedent nor foundation in authority, it should always be clearly understood that the prosecution has the burden of proof upon the whole case taken together, and only when it has proved facts relating to a specific element of the crime charged which raise a *prima facie* presumption of malice aforethought is the burden cast upon defendant in any respect. The defendant's burden of proof can only be in rebuttal of something shown by the prosecution.³

1. *McDaniel v. State*, 76 Ala. 1; *Wharton v. State*, 73 Ala. 366; *People v. Bush*, 71 Cal. 602; *People v. Raten*, 63 Cal. 421; *People v. Hong Ah Duck*, 61 Cal. 387; *People v. West*, 49 Cal. 610; *People v. Ah Kong*, 49 Cal. 7; *People v. Gibson*, 17 Cal. 283; *People v. Arnold*, 15 Cal. 476; *State v. West*, 1 Houst. Cr. Cas. (Del.) 371; *Dixon v. State*, 13 Fla. 636; *Gladden v. State*, 13 Fla. 623; *Reid v. State*, 50 Ga. 556; *Murphy v. People*, 37 Ill. 447; *State v. Vincent*, 24 Iowa 570; s. c., 95 Am. Dec. 753; *State v. Gillick*, 7 Iowa 287; *Tweedy v. State*, 5 Iowa 433; *State v. Briscoe*, 30 La. An. pt. 1, 433; *State v. Knight*, 43 Me. 11; *Com. v. Webster* 59 Mass. (5 Cush.) 295; s. c., 52 Am. Dec. 711; *Barcus v. State*, 49 Miss. 17; s. c., 19 Am. Rep. 1; *Green v. State*, 28 Miss. 687; *State v. Alexander*, 66 Mo. 148; *Territory v. McAndrews*, 3 Mont. Tr. 158; *People v. McCarthy*, 110 N. Y. 309; *People v. Schryver*, 42 N. Y. 1; s. c., 1 Am. Rep. 480; *Patterson v. People*, 46 Barb. (N. Y.) 625; *State v. Byers*, 100 N. C. 512; *State v. Jones*, 98 N. C. 651; *States v. Thomas*, 98 N. C. 599; s. c., 2 Am. St. Rep. 351; 10 Cr. L. Mag. 443; *State v. Smith*, 77 N. C. 488; *State v. Willis*, 63 N. C. 26; *State v. Johnson*, 3 Jones (N. C.) L. 266; *Com. v. Drum*, 58 Pa. St. 9; *Perry v. State*, 44 Tex. 473; *Murray v. State*, 1 Tex. App. 417; *Hill's*

Case, 2 Gratt. (Va.) 504. See *Brown v. State*, 74 Ala. 478; *McGinnis v. State*, 31 Ga. 236; *State v. Dillon* (Iowa) 38 N. W. Rep. 535; *Hawthorne v. State*, 58 Miss. 778; *Hogan v. State*, 36 Wis. 226; *Richardson v. State*, 9 Tex. App. 612; *United States v. Mingo*, 2 Curt. C. C. 1. Compare *Com. v. Hawkins*, 69 Mass. (3 Gray) 463; *People v. Coughlin*, (Mich.) 32 N. W. 905; *Maher v. People*, 10 Mich. 212; *Berris v. State*, (Neb.) 39 N. W. Rep. 790; *Goodall v. State*, 1 Oreg. 333; s. c., 80 Am. Dec. 396.

2. *State v. Briscoe*, 30 La. An., pt. 1, 433.

Malice—Reconciliation.—Where, on a trial of defendant for killing his wife, it appeared that eighteen months before the killing, he had said he did not like her, and would not live with her, and had separated from her, but that at the time of the killing they had resumed their marital relations, *held*, that there was no presumption of want of malice from this reconciliation. *Wharton v. State*, 73 Ala. 366.

"Heat of Passion" is a fact to be proved, like any other, and it is not to be presumed from good character, in the absence of direct evidence. *Hogan v. State*, 36 Wis. 226.

3. *Brown v. State*, 74 Ala. 478; *Maher v. People*, 10 Mich. 212; *Perry v. State*, 44 Tex. 473.

Under a charge of murder, the pre-

c. AS TO INSANITY.—Every person charged with the commission of a homicide is always presumed to be sane and of a sound mind until the contrary is shown; and while some courts are inclined to regard the question as yet unsettled, or have decided according to the opposite view,¹ the clear weight of authority is to the effect that when insanity is set up by the defendant as a confession and avoidance, he has the burden to prove it.² But there are exceptions to this rule, as, for instance, where the

sumption of defendant's innocence applies equally to the malicious intent necessary to be shown, and to the killing; and the *onus probandi*, as to each, is with the prosecutor. *Maier v. People*, 10 Mich. 212.

An Instruction in a Capital Case, that "the Law Implies Malice in case of unlawful killing by means calculated to produce death, and in such case the burden of proof is on the defendant, if he would reduce the offence to a lower grade than murder in the second degree," is erroneous. The law never casts the burden of proof on the accused in such a sense as to relieve the state from proving the facts constituting any degree of crime. *Perry v. State*, 44 Tex. 473; *Murray v. State*, 1 Tex. App. 417.

A Charge that "to Make out a Case of Justifiable Self-defence, the evidence must show that the difficulty was not provoked or encouraged by the defendant," is erroneous in misplacing the burden of proof, such provocation or encouragement not being presumed, and disproof not being required, except in rebuttal of the evidence thereof introduced by the state. *Brown v. State*, 74 Ala. 478.

1. See *Ogletree v. State*, 28 Ala. 701; *Chase v. People*, 40 Ill. 352; *Hopps v. People*, 31 Ill. 385; s. c., 83 Am. Dec. 231; 2 Cr. Def. 444; *Gueting v. State*, 66 Ind. 94; s. c., 32 Am. Rep. 99; 2 Cr. Def. 455; *State v. Crawford*, 11 Kan. 32; s. c., 2 Cr. Def. 459; *People v. Garbutt*, 17 Mich. 9; s. c., 97 Am. Dec. 162; 2 Cr. Def. 463; *Cunningham v. State*, 56 Miss. 269; s. c., 31 Am. Rep. 360; 2 Cr. Def. 470; *Wright v. People*, 4 Neb. 407; s. c., 2 Cr. Def. 477; *State v. Jones*, 50 N. H. 369; s. c., 9 Am. Rep. 242; 2 Cr. Def. 64; *State v. Bartlett*, 43 N. H. 224; s. c., 80 Am. Dec. 154; 2 Cr. Def. 480; *O'Connell v. People*, 87 N. Y. 377; s. c., 41 Am. Rep. 379; 2 Cr. Def. 499; *People v. McCann*, 16 N. Y. 58; s. c., 69 Am. Dec. 642; 2 Cr. Def. 490; *Dove v. State*, 3 Helsk. (Tenn.) 348; s. c., 2 Cr. Def. 502.

2. *Boswell v. State*, 63 Ala. 307; s. c., 35 Am. Rep. 20; 2 Cr. Def. 352; *Braswell v. State*, (Ala.) 2 Cr. L. Mag. 32; *State v. Brinyea*, 5 Ala. 244, 349; s. c., 2 Cr. Def. 249; overruling *State v. Marler*, 2 Ala. 43; s. c., 36 Am. Dec. 398; s. c., 2 Cr. L. Mag. 346; *Casat v. State*, 40 Ark. 511; *McKenzie v. State*, 26 Ark. 334; *People v. McDonnell*, 47 Cal. 134; *People v. Myers*, 20 Cal. 118; *State v. Hoyt*, 46 Conn. 330; *State v. Riddell*, (Del.) 15 Atl. Rep. 968; *State v. Pratt*, 11 Houst. Cr. Cas. (Del.) 249; s. c., 2 Cr. Def. 327; *State v. Danby*, 1 Houst. Cr. Cas. (Del.) 167; s. c., 2 Cr. Def. 331; *State v. Hurley*, 1 Houst. Cr. Cas. (Del.) 28; *McDougal v. State*, 88 Ind. 24; s. c., 4 Cr. L. Mag. 509; *State v. Felter*, 32 Iowa 49; s. c., 2 Cr. Def. 371; *Kriel v. Com.*, 5 Bush (Ky.) 362; s. c., 2 Cr. Def. 379; *Smith v. Com.*, 1 Duv. (Ky.) 224; *Graham v. Com.*, 16 B. Mon. (Ky.) 587; s. c., 2 Cr. Def. 373; *State v. Lawrence*, 57 Me. 574; s. c., 2 Cr. Def. 386; *Com. v. Eddy*, 73 Mass. (7 Gray) 583; *Com. v. Rogers*, 48 Mass. (7 Metc.) 500; s. c., 41 Am. Dec. 458; *People v. Finley*, 38 Mich. 482; *State v. Redemeier*, 71 Mo. 173; 36 Am. Rep. 462; s. c., 8 Mo. App. 1; 2 Cr. Def. 424; *State v. Smith*, 53 Mo. 267; *State v. Hundley*, 46 Mo. 414; s. c., 2 Cr. Def. 417; *State v. Klinker*, 43 Mo. 127; s. c., 2 Cr. Def. 410; *State v. McCoy*, 34 Mo. 531; s. c., 86 Am. Dec. 121; 2 Cr. Def. 408; *Baldwin v. State*, 12 Mo. 223; s. c., 2 Cr. Def. 395; *Graves v. State*, 45 N. J. L. (16 Vr.) 347; s. c., 46 Am. Rep. 778; *State v. Spencer*, 21 N. J. L. (1 Zab.) 202; s. c., 2 Cr. Def. 335; *State v. Martin*, (N. J.) 3 Cr. L. Mag. 44; *State v. Brandon*, 8 Jones (N. C.) L. 463; *State v. Starling*, 6 Jones (N. C.) L. 366; *Loeffner v. State*, 10 Ohio St. 599; *Coyle v. Com.*, 100 Pa. St. 573; s. c., 45 Am. Rep. 397; 2 Cr. Def. 441; *Ortwein v. Com.*, 76 Pa. St. 414; s. c., 18 Am. Rep. 420; *Com. v. Lynch*, 3 Pittsb. (Pa.) 412; *State v. Coleman*, 20 S. C. 441; *State v. Stark*, 1 Strobh. (S. C.) L. 479; *Rather v. State*, (Tex.) 9 S. W. Rep. 70; *Boswell v. Com.*, 20 Gratt.

defendant is a deaf mute, the prosecution then having the burden to prove his sanity or soundness of mind.¹

7. Sufficiency and Weight.—*a. CORPUS DELICTI.*—The *corpus delicti* consists of two fundamental facts; first, the death, and second, the existence of the criminal agency as the cause thereof. The former must be shown, either by direct proof,² or by presumptive evidence of the strongest kind, which is clearly satisfactory to the jury, and convinces them beyond a reasonable doubt.³ But the latter may be established by circumstantial evidence, or by presumptive reasoning upon the facts and circumstances of the case.⁴ The general rule, however, is that the *corpus delicti*, taken as a whole, may be shown by any evidence which satisfies the jury, beyond a reasonable doubt, whether it be direct or circumstantial.⁵ But this is qualified and limited where the

(Va.) 860; U. S. v. Lawrence, 4 Cr. C. C. 514; U. S. v. McGlue, 1 Curt. C. C. 1; Attorney-General v. Parnter, 3 Bro. C. C. 441; Reg. v. Stokes, 3 Car. & K. 189; McNaghten's Case, 10 Clark & F. 200; Reg. v. Layton, 4 Cox C. C. 149, 155.

1. State v. Draper, 1 Houst. Cr. Cas. (Del.) 291.

2. See McCulloch v. State, 48 Ind. 109; People v. Deacons, 109 N. Y. 374; People v. Bennett, 49 N. Y. 137; Ruloff v. People, 18 N. Y. 179; People v. Palmer, 109 N. Y. 110; People v. Beckwith, 108 N. Y. 67; s. c., 27 N. Y. Week. Dig. 169; Walker v. State, 14 Tex. App. 609; Smith v. Com., 21 Gratt. (Va.) 809.

Corpus Delicti—New York Rule.—It seems that the provisions of the N. Y. Penal Code, section 181, as amended in 1882, requiring, upon a conviction for murder or manslaughter, direct proof of the death of the person alleged to have been killed, does not exclude evidence of points and features of resemblance between the mutilated body and the person charged to have been killed, nor does it exclude proof of circumstances tending to establish identity. People v. Beckwith, 108 N. Y. 67; s. c., 27 N. Y. Week. Dig. 169.

Same—Proof of Identity of Victim.—Under Penal Code N. Y., section 181, prohibiting a conviction "unless the death of the person alleged to have been killed, and the fact of the killing by the defendants as alleged are each established as independent facts, the former by direct proof, and the latter beyond a reasonable doubt," the accused may be convicted of murder without direct proof of the identity of the victim. People v. Palmer, 119 N. Y. 110.

Same—Finding Skeleton.—On a trial for murder, evidence was given of the finding of the skeleton of a human being of the sex of the person charged to have been murdered, and corresponding to his size. *Held*, that this was sufficient evidence of the *corpus delicti* to justify the admission of circumstantial evidence to identify the skeleton as that of the murdered party, as well as to show the cause and manner of his death. McCulloch v. State, 48 Ind. 109.

Same—Proving Disappearance.—Defendant was convicted of murdering A. It was not proved that A was dead, only that he had disappeared. A body was found in a river more than six hundred miles below the spot where the prosecution claimed that A was killed, but the body was not identified as A's. *Held*, that notwithstanding the existence of circumstantial evidence of defendant's guilt, the verdict should be set aside. Walker v. State, 14 Tex. App. 609.

3. Pitts v. State, 43 Miss. 472.

4. Pitts v. State, 43 Miss. 472.

5. People v. Alviso, 55 Cal. 230; Anderson v. State, 20 Fla. 381; State v. Keeler 28 Iowa 551; Johnson v. Com., 81 Ky. 325; State v. Williams, 7 Jones (N. C.) L. 446; s. c., 78 Am. Dec. 248; Timmerman v. Territory, 17 Pac. Rep. 625; Taylor v. State, 35 Tex. 97; U. S. v. Williams, 1 Cliff. C. C. 5. See Cavaness v. State, 43 Ark. 331; McCulloch v. State, 48 Ind. 109; Stocking v. State, 7 Ind. 326; Pitts v. State, 48 Miss. 472; Lightfoot v. State, 20 Tex. App. 77; Lovelady v. State, 17 Tex. App. 286; s. c., 14 Tex. App. 545; Robinson v. State, 16 Tex. App. 387; Spear v. State, 16 Tex. App. 98; Walker v.

rule that defendant's confession taken alone and without corroborating proof of the *corpus delicti* is not sufficient to support a conviction.¹ This general proof, however, need not necessarily be plenary,² but it is sufficient if it go to show in any substantial manner that the person charged to have been killed is dead, and that his death was caused by criminal means.³

b. VENUE.—It is sufficient if the venue be proved in any manner which satisfies the jury that the homicide was committed within the jurisdiction of the court. It has been held that it need not be proved affirmatively; but that if the witnesses describe the place sufficiently for the jury to reasonably infer that it was within the proper locality, it is sufficient.⁴ It may be established by circumstantial evidence,⁵ or by the testimony of one witness, when

State, 14 Tex. App. 609; *Smith v. Com.*, 21 Gratt. (Va.) 809. *Compare* *People v. Palmen*, 109 N. Y. 110; *People v. Beckwith*, 108 N. Y. 67; *People v. Bennett*, 49 N. Y. 137; *Ruloff v. People*, 18 N. Y. 179.

1. *Paul v. State*, 65 Ga. 152; *Daniel v. State*, 63 Ga. 339; *Holsenbake v. State*, 45 Ga. 43; *South v. People*, 98 Ill. 261; *People v. Lane*, 49 Mich. 340; *State v. Patterson*, 73 Mo. 695; *People v. Deacons*, 109 N. Y. 374; *Smith v. Com.*, 21 Gratt. (Va.) 809; *U. S. v. Williams*, 1 Cliff. C. C. 5.

2. *U. S. v. Williams*, 1 Cliff. C. C. 5.

3. See *Paul v. State*, 65 Ga. 152; *Daniel v. State*, 63 Ga. 339; *Holsenbake v. State*, 45 Ga. 83; *State v. Patterson*, 73 Mo. 695; *People v. Deacons*, 109 N. Y. 374.

Proof that the Deceased was Unlawfully Killed, is sufficient corroboration of the confession of the defendant, that he was present, aiding and abetting, to authorize his conviction. *Daniel v. State*, 63 Ga. 339.

The Finding of the Dead Body of a Person Murdered, with the unmistakable marks of a murder committed, is sufficient additional proof, to warrant the conviction of a defendant on his own confession, under N. Y. Code Cr. Proc., section 395, providing that the confession of a defendant shall not be sufficient to warrant his conviction "without additional proof that the crime charged has been committed." *People v. Deacons*, 109 N. Y. 374.

On trial of a youth for murder of a girl nine years old, proof that he confessed that he switched her near a spring for having told a lie on him; that she ran and cursed him, and that he got a rail and knocked her on the head, and she died, was confirmed by evidence

that she was found near the spring with her skull fractured, and near it certain frizzled switches and a broken rail with blood thereon. *Held*, that the verdict of guilty should not be disturbed. *Paul v. State*, 65 Ga. 152.

4. See *Andrews v. State*, 21 Fla. 598; *State v. Dent*, 1 Rich. (S. C.) L. 469. *Compare* *Franklin v. State*, 5 Baxt. (Tenn.) 613.

5. *State v. West*, 69 Mo. 401; s. c., 33 Am. Rep. 506. See *People v. Williams*, 18 Cal. 187; *Dumas v. State*, 62 Ga. 58; *Mitchum v. State*, 11 Ga. 615; *Beavers v. State*, 58 Ind. 530; *Com. v. Costley*, 118 Mass. 1; *Marion v. State*, 20 Neb. 233; s. c., 57 Am. Rep. 825. *Compare* *Franklin v. State*, 5 Baxt. (Tenn.) 613.

Evidence of the Corpus Delicti.—

Upon a trial for murder, evidence showed that the defendant, in company with the deceased, on the evening of the alleged murder, left one county, going towards an adjoining county, in which the body of the deceased was found. *Held*, that the venue of the killing was sufficiently shown to have been in the latter. *Beavers v. State*, 58 Ind. 530.

Same—Proof that the Mortal Wound Was Given after the deceased had left one point late in the afternoon, and arrived at another in the same county, eight miles distant, early in the night. *Held*, to fix the venue with sufficient certainty. *Dumas v. State*, 62 Ga. 58.

On an indictment for murder before the superior court in the county of Stewart, the proof was that the crime was committed in the house of the witness at Florence, Stewart county; and it was *held* that the proof was sufficient that the crime was committed within the jurisdiction of the court. *Mitchum v. State*, 11 Ga. 615.

not positively contradicted;¹ or by the dying declaration of deceased.²

The doctrine of reasonable doubt does not apply to proof of venue, if the evidence raises a violent presumption that the offence was committed in the county, or if the jury are reasonably satisfied that such is the case, it is sufficient.³

c. CONFESSIONS.⁴—Where the *corpus delicti* has been established by other or additional evidence, the confessions of the prisoner, if made freely or voluntarily, and not induced by fear or compulsion or promise of favor, may be alone sufficient to sustain a conviction for the homicide, when satisfactorily proved.⁵

d. ACCOMPLICE TESTIMONY.—The testimony of an accomplice may be sufficient to sustain a conviction;⁶ but it should be re-

Same—Place Where Remains Found.

—At the trial of an indictment for murder, an instruction, requested by defendant, that, in order to convict, it was not sufficient for the state to prove that the body of deceased was found in the county mentioned in the indictment as the place of the killing, but it must be proved beyond a reasonable doubt that the deceased was unlawfully killed by defendant in such county, was given, with the following addition by the court: "but the place where the remains were found, if found at all, may be taken into consideration, together with all the other evidence, in fixing the locality of the homicide, if there was a homicide." *Held*, that such addition was properly made; it was entirely competent for the jury to take into consideration all the circumstances proven as to the discovery of the body, both as to the time and place of the alleged killing. *Marion v. State*, 20 Neb. 233; s. c., 57 Am. Rep. 825.

In a trial for murder, the only proof offered that it was committed in the county laid, was the statement of the coroner who held the inquest, that the body was found in such county. *Sem-ble*, that defendant's point, that the venue was not proved, was not well taken. *People v. Williams*, 18 Cal. 187.

Proof that a body, with marks of injuries sufficient to cause death, was found in a river in the heart of a county in a condition showing that it must have been thrown there by the hand of a man, and not drifted there by the current, *held*, to warrant a finding that the homicide was committed in that county. *Com. v. Costley*, 118 Mass. 1.

1. *Speight v. State*, (Ga.) 5 S. E. Rep. 506. See *Laydon v. State*, 52 Ind. 459.

On the trial of an indictment for murder, in the Fountain circuit court, witness for the state, who testified to the whole transaction, having been present and having seen it all, concluded his evidence by saying, "In Fountain county, Indiana." *Held*, that the place of the killing was proved. *Laydon v. State*, 52 Ind. 459.

2. *Bryant v. State*, (Ga.) 4 S. E. Rep. 853.

3. *Andrews v. State*, 21 Fla. 598.

4. As to confessions, see that title, 3 Am. & Eng. Encyc. of L. 439.

5. *Mose v. State*, 36 Ala. 211; *Ruberts v. Com.*, (Ky.) 7 S. W. Rep. 401; *State v. Walker*, (Mo.) 9 S. W. Rep. 647.

Defendant Swore that he Killed the Man.—*Held*, that it having been shown outside of defendant's statements that the deceased had been killed, and defendant having admitted in open court that he killed him, it was proper to refuse to instruct the jury under Kentucky Cr. Code, § 240, that a defendant's confession, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offence was committed. *Ruberts v. Com.*, (Ky.) 7 S. W. Rep. 401.

Admissions.—There being indubitable evidence of the *corpus delicti*, and also evidence corroborative of the inculpatory admissions of defendant, it is not error to refuse to instruct that the admissions should be received with caution, and were not, unless corroborated, sufficient to warrant a conviction; the jury having been charged to weigh such admissions with caution, considering the liability of the witness to misunderstand defendant's language. *State v. Walker*, (Mo.) 9 S. W. Rep. 647.

6. See *Hudspeth v. State*, (Ark.) 9 S. W. Rep. 1; *Bailey v. State*, (Tex. App.); s. c., 9 S. W. Rep. 270.

ceived with great caution, and should be considered in the light of the circumstances under which it is given, the situation of the witness, and his temptations to swear falsely.¹

e. SELF-DEFENCE.—The question as to the sufficiency of evidence adduced to prove that the homicide was committed in self-defence, is one to be determined by the jury in each particular case. But it may be generally stated that the defendant need not show either beyond a reasonable doubt or by a preponderance of proof that he killed the deceased in self-defence; it is sufficient if the evidence to that effect raises a reasonable doubt in the minds of the jury.²

f. ALIBI.—As in cases where defendant pleads self-defence, so also where he seeks to prove an *alibi*, he need not do more than raise a reasonable doubt in the minds of the jurors whether he is the slayer,³ and evidence tending to show an *alibi* is proper to go to the jury without regard to its probable weight or sufficiency, where the evidence of the crime is circumstantial, or not clear and positive as to defendant's identity with the slayer.⁴

g. INSANITY.—The question as to the sufficiency of the proof of insanity which must be adduced, and as to the effect which it must produce on the jury in order to justify a verdict of acquittal, is not universally settled. The adjudications upon the subject may properly be divided into three classes, as follows: first, it has sometimes been maintained that the defendant has not the burden

Testimony of Accomplice—Instructions.—In a trial for murder, where there is testimony of accomplice, it is not error for the court to refuse to charge the jury that, if they believe that such witness was an accomplice in the crime charged against defendant, they could not convict upon her testimony, unless the crime and defendant's guilt were proven by other evidence. *Hudspeth v. State*, (Ark.) 9 S. W. Rep. 1.

Same—Evidence that a Conspiracy was entered into by defendant and others to kill deceased, for which they had a motive; that, according to the testimony of an accomplice, defendant procured a pistol, waylaid and shot deceased at night, and dragged his body out of the road, which was corroborated by proof of defendant's clothing, pools of blood and other facts; that defendant denied a few moments after that he heard the shots fired; that he left home the following morning for another county, is sufficient to sustain a conviction of murder in the first degree. *Bailey v. State*, (Tex.) 9 S. W. Rep. 270.

1. See *George v. State*, 39 Miss. 570; *State v. Walker*, (Mo.) 9 S. W. Rep. 647; *Williams v. State*, 15 Tex. App. 401.

Accomplices—Corroboration.—An instruction that the testimony of accomplices should be carefully scrutinized, and that unless corroborated by other witnesses, especially as to the identity of the accused as the person against whom the accomplices have testified, such testimony is insufficient to convict, is correct; as such an instruction sufficiently presents the necessity for corroboration upon the question of identity. *State v. Walker*, (Mo.) 9 S. W. Rep. 647.

2. *State v. Porter*, 34 Iowa 131; *McKenna v. State*, 61 Miss. 589. See *Com. v. Drum*, 58 Pa. St. 9.

3. *French v. State*, 12 Ind. 670; s. c., 74 Am. Dec. 229.

4. **Instruction as to Alibi.**—On a trial for murder, an instruction that if the jury did not think an alibi had been proved, "the attempt to manufacture evidence was a circumstance which always bore against the person making it, *held*, to be erroneous. Where the case rests wholly upon circumstantial evidence, the evidence of the alibi, though not clear, should be submitted to the jury as a matter of defence. *Turner v. Com.*, 86 Pa. St. 54; s. c., 27 Am. Rep. 683.

of proof, and that the presumption of sanity only arises in the absence of all evidence to the contrary; but that his only duty is to introduce evidence tending to cast uncertainty upon the question and thereby to raise in the minds of the jury a reasonable doubt as to his sanity; and that such reasonable doubt is a sufficient ground for acquittal, unless overcome by affirmative proof of his sanity adduced by the presumption.¹ Second, in other states it is the declared doctrine that insanity must be proved by the defence beyond a reasonable doubt.² Third, the more modern doctrine is that the defendant has the burden of proof, yet he may establish his insanity by a preponderance of evidence, or by any evidence which satisfies the jury that he is insane, thus regarding the same measure of proof necessary as in civil causes. This rule is undoubtedly the law in most of the states at the present time, and is supported by the great weight of authority.³

1. See *Chase v. People*, 40 Ill. 352; *Hopps v. People*, 31 Ill. 385; (overruling *Fisher v. People*, 23 Ill. 283); *Guetig v. State*, 66 Ind. 94; s. c., 32 Am. Rep. 99; *Greenley v. State*, 60 Ind. 141; *Stevens v. State*, 31 Ind. 483; *Polk v. State*, 19 Ind. 170; *State v. Mahn*, 25 Kan. 182; *State v. Crawford*, 11 Kan. 32; *State v. Reddick*, 7 Kan. 144; *Cunningham v. State*, 56 Miss. 269; s. c., 21 Am. Rep. 360; *Russell v. State*, 53 Miss. 367; *Newcomb v. State*, 37 Miss. 383; *Hawe v. State*, 11 Neb. 537; s. c., 38 Am. Rep. 375; *Wright v. People*, 4 Nev. 409; *State v. Bartlett*, 43 N. H. 224; s. c., 2 Cr. Def. 480; *State v. Jones*, 50 N. H. 369; s. c., 9 Am. Rep. 242; 2 Cr. Def. 64; *O'Connell v. People*, 87 N. Y. 377; s. c., 41 Am. Rep. 379; *Brotherton v. People*, 75 N. Y. 159; *People v. McCann*, 16 N. Y. 58; *Wagner v. People*, 4 Abb. App. Dec. (N. Y.) 509; *Dove v. State*, 3 Heisk. (Tenn.) 348; *Lawless v. State*, 4 Lea (Tenn.) 179.

In *Chase v. People*, 40 Ill. 352, the court, explaining *Hopps v. People* 31 Ill. 385, say: "What we designed to say in this case was simply this, that insanity is an ingredient in crime as essential as the overt act, and if sanity is wanting there can be no crime, and if the jury entertain a reasonable doubt on the question of insanity, the prisoner is entitled to the benefit of the doubt. We wish to be understood as saying in the case that the burden of proof is on the prosecution to prove guilt beyond a reasonable doubt, whatever the defence may be. If insanity is relied upon, and evidence given tending to establish that unfortunate condition of the mind, and a reasonable,

well formed doubt is thereby raised of the sanity of the accused, every principle of justice and humanity demand that the accused shall have the benefit of the doubt. We do not desire to be understood as holding the prosecution to the proof of sanity in any case, but we do hold, where evidence of insanity has been introduced by the accused, and a reasonable doubt of his sanity is thereby created, the accused cannot be convicted of the crime charged. We deem it necessary to say this much in explanation of the ruling in the case of *Hopps*, as some expressions used therein may have a tendency to mislead."

2. *State v. West*, 1 Houst. Cr. Cas. (Del.) 371; *State v. Pratt*, 1 Houst. Cr. Cas. (Del.) 249; s. c., 2 Cr. Def. 331; *State v. Danby*, 1 Houst. Cr. Cas. (Del.) 166; s. c., 2 Cr. Def. 327; *State v. Spencer*, 21 N. J. L. (1 Zab.) 196; s. c., 2 Cr. Def. 335; *State v. Coleman*, 20 S. C. 441. Compare *State v. Martin*, (N. J.) 3 Cr. L. Mag. 44; *Graves v. State*, 45 N. J. L. (16 Vr.) 347; s. c., 46 Am. Rep. 778.

3. See *Ford v. State*, 71 Ala. 385; *Boswell v. State*, 63 Ala. 307; s. c., 35 Am. Rep. 30; 2 Cr. Def. 352; *State v. Marler*, 2 Ala. 43; s. c., 36 Am. Dec. 98; 2 Cr. Def. 346; *Casat v. State*, 40 Ark. 511; *People v. Myers*, 20 Cal. 518; *State v. Froust*, (Iowa) 38 N. W. Rep. 405; *State v. Felter*, 32 Iowa 49; s. c., 2 Cr. Def. 371; *Kriel v. Com.*, 5 Bush (Ky.) 363; s. c., 2 Cr. Def. 379; *Graham v. Com.*, 16 B. Mon. (Ky.) 587; s. c., 2 Cr. Def. 373; *State v. Lawrence*, 57 Me. 574; s. c., 2 Cr. Def. 386; *State v. Reidmier*, 71 Mo. 173; s. c., 36 Am. Rep. 462; 8 Mo. App. 1; 2 Cr. Def. 424; *State v. Simms*, 68 Mo. 305; *State v.*

What evidence shows insanity or lack of sound mind is usually a question to be determined by the jury according to the circumstances of the particular case, and no one fact or group of facts can be, as a matter of law, conclusive proof of insanity.¹

h. DEFENDANT'S GUILT UPON THE WHOLE EVIDENCE.—(1) *Direct Evidence.*—In cases of homicide, especially those involving the life of the person charged, it is always more satisfactory if the guilt of the defendant is established by the testimony of eye-witnesses to the act or acts causing death, or to other acts or occurrences showing defendant's guilt. But direct evidence as well as circumstantial may be unsatisfactory; and it is solely and exclusively for the jury to weigh, and to determine its credibility and its sufficiency as best they may, taking into consideration anything which may aid them in arriving at a satisfactory conclusion, or supply to them the criterion or standard by which to judge.² It is not necessary, as a matter of law, that the testimony of a single

Smith, 53 Mo. 267; s. c., 2 Cr. Def. 413; State v. Hundley, 46 Mo. 414; s. c., 2 Cr. Def. 417; State v. Klinker, 43 Mo. 127; s. c., 2 Cr. Def. 410; State v. McCoy, 34 Mo. 531; s. c., 2 Cr. Def. 408; Baldwin v. State, 12 Mo. 223; s. c., 2 Cr. Def. 395; (overruling State v. Huting, 21 Mo. 464); Loeffner v. State, 10 Ohio St. 598; s. c., 2 Cr. Def. 432; Graves v. State, 45 N. J. L. (16 Vr.) 347; s. c., 46 Am. Rep. 778; Coyle v. Com., 100 Pa. St. 573; s. c., 45 Am. Rep. 397; 2 Cr. Def. 441; Meyers v. Com., 83 Pa. St. 131; s. c., 2 Cr. Def. 349; Brown v. Com., 78 Pa. St. 122; Ortwein v. Com., 76 Pa. St. 414; s. c., 2 Cr. Def. 438; Carter v. State, 12 Tex. 500; s. c., 62 Am. Dec. 539; Massengale v. State, (Tex. App.) 6 S. W. Rep. 35; Smith v. State, 19 Tex. App. 95; Jones v. State, 13 Tex. App. 1; Johnson v. State, 10 Tex. App. 571; King v. State, 9 Tex. App. 515; Webb v. State, 9 Tex. App. 490; Clarke v. State, 8 Tex. App. 350; State v. Coleman, 20 S. C. 441.

An Order of a Lunacy Commission admitting the prisoner to an insane asylum is not conclusive of his insanity on a trial for murder. Goodwin v. State, 96 Ind. 550.

Motiveless Murder.—Defendant, living on the premises of deceased and employed by him as a laborer, while sowing cotton seed, was told by deceased that he was making too many skips. In half an hour he left his work, went to his house, came back with a pistol, muttering and swearing, and shot deceased. For months the neighbors noticed a mental change in defendant, and it was rumored that he

was going crazy. Deceased had stated that he thought him crazy, and so said when he saw him with the pistol before the killing. Defendant, after the homicide, remained in the vicinity from 10 A. M., and at night went to his house and went to bed. *Held*, that from the facts that there was neither motive, threats, nor express malice, and, from all the circumstances, the defence of insanity was sustained. Massengale v. State, (Tex. App.) 6 S. W. Rep. 35.

Subject to Epileptic Fits.—Evidence that defendant had been, for some four years, subject to irregular epileptic fits of greater or less duration, *held* not sufficient evidence of insanity to relieve him from liability for homicide. State v. George, 62 Iowa 682.

1. See Goodwin v. State, 96 Ind. 550; Guetig v. State, 66 Ind. 94; s. c., 32 Am. Rep. 99; State v. George, 62 Iowa 682; Massengale v. State, (Tex. App.) 6 S. W. Rep. 35.

2. See Cross v. State, 68 Ala. 476; People v. Goslaw, 73 Cal. 323; Weeks v. State, (Ga.) 3 S. E. Rep. 323; Moon v. State, 68 Ga. 687; Mitchum v. State, 11 Ga. 615; Westbrook v. People, (Ill.) 18 N. E. Rep. 304; Grady v. People, (Ill.) 16 N. E. Rep. 654; Roberts v. Com., (Ky.) 8 S. W. Rep. 270; Pitts v. State, 43 Miss. 472; State v. Jackson, 95 Mo. 623; Territory v. Adolfson, 5 Mont. 237; State v. Jones, 97 N. C. 469; People v. Lyons, 110 N. Y. 618; s. c., 10 Cr. L. Mag. 690; People v. Cignarella, 110 N. Y. 23; People v. Wilson, 109 N. Y. 345; Alexander v. State, (Tex. App.) 7 S. W. Rep. 867; Hurd v. State, (Tex. App.) 5 S. W. Rep. 846;

eye-witness to the crime be corroborated;¹ but where the life or liberty of defendant is made to depend upon the unsupported assertion of a single person, great care should be exercised in the consideration of such evidence.²

(2) *Circumstantial Evidence*.—Except as otherwise provided in some jurisdictions as to proof of the *corpus delicti*, circumstantial evidence may constitute proof sufficient to authorize a conviction for homicide even where it involves the life of the person charged, but it should always be received and weighed with great caution, and should only be accepted as conclusive where it excludes all hypotheses inconsistent with the theory of defendant's guilt, and establishes it to a reasonable certainty.³

Gibson v. State, 23 Tex. App. 414; Holmes v. State, 11 Tex. App. 223; Kemp v. State, 11 Tex. App. 174.

1. McLain v. State, 99 Pa. St. 86.

Confession to One Person.—It appeared that defendant had lived unhappily with his wife, and had threatened her life; that he was infatuated with another woman, and after being with her until two o'clock one morning went directly home, and shortly afterwards returned in eager haste, and informed her of his wife's death. The wife had been in good health, and an autopsy pointed to death from asphyxia. A witness of unimpeached character testified that defendant confessed to him that he had suffocated his wife. *Held*, that a verdict of murder in the first degree was not against the weight of evidence. People v. Wilson, 109 N. Y. 345.

Homicide in Presence of One Person.

—On a trial for murder, one witness testified, "that prisoner stooped down, and as witness heard a rattling on the floor and did not see the knife afterwards, he supposed that prisoner picked it up. Prisoner rose with a six-barrelled pistol in his hand, presented it at the breast of deceased, not more than six inches distant, took deliberate aim, long enough to count ten or fifteen, before he fired. He fired the pistol about the right nipple. Deceased brought a groan, his face contracted, fell upon the floor, and in about five minutes expired." It was *held* that the killing was sufficiently proved. Mitchum v. State, 11 Ga. 615.

2. See Territory v. Adolfson, 5 Mont. Tr. 237.

3. Johnson v. State, 18 Tex. App. 385. See West v. State, 76 Ala. 98; Overman v. State, 49 Ark. 364; Green v. State, 38 Ark. 304; Davis v. State, 74 Ga. 869; Marshall v. State, 74 Ga.

26; Watt v. People, (Ill.) 18 N. E. Rep. 340; Swigar v. State, 109 Ill. 272; Otmer v. People, 76 Ill. 149; Schusler v. State, 29 Ind. 394; State v. Smith, 73 Iowa 32; Com. v. Robinson, 146 Mass. 571; s. c., 10 Cr. L. Mag. 544; Com. v. Webster, 59 Mass. (5 Cush.) 295; s. c., 52 Am. Dec. 711; State v. Johnson, 37 Minn. 493; Jones v. State, 57 Miss. 684; Casey v. State, 20 Neb. 138; People v. Reich, 110 N. Y. 660; People v. Beckwith, 108 N. Y. 67; Yates v. People, 32 N. Y. 509; State v. Brewer, 98 N. C. 607; State v. Harrison, 5 Jones (N. C.) L. 115; State v. Anderson, 10 Oreg. 448; Henry v. State, 11 Humph. (Tenn.) 224; Poe v. State, 10 Lea (Tenn.) 673; Rather v. State, (Tex. App.) 9 S. W. Rep. 69; Olivares v. State, 23 Tex. App. 305; Pogue v. State, 12 Tex. App. 283; Scott v. State, 23 Tex. App. 452; Lane v. State, 19 Tex. App. 54; Gomez v. State, 15 Tex. App. 327; Hogan v. State, 13 Tex. App. 319; Jackson v. State, 9 Tex. App. 114; Harrison v. State, 6 Tex. App. 42; Sutton v. Com., (Va.) 7 S. E. Rep. 323; Russell v. Com., 78 Va. 400; Hatchett v. Com., 76 Va. 1026; Dean v. Com., 32 Gratt. (Va.) 912; Miller v. Territory, (Wash. Tr.) 19 Pac. Rep. 50; Timmerman v. Territory, (Wash. Tr.) 17 Pac. Rep. 624; Leonard v. Territory, 2 Wash. Tr. 381.

Circumstantial Evidence—Instances.

—A charge that "circumstantial evidence is as good as any other kind of evidence," *held*, free from error. West v. State, 76 Ala. 98.

A and B, brothers, went hunting together. B was found dead, shot in the back of the head. It was proved that A immediately rifled B's pockets, in which was a considerable sum of money, as A knew; that A hastily possessed himself of all B's portable

It has been well said that each fact in the chain of facts from which the main fact in issue is to be inferred must be proved by

effects, which were considerable and fled the country; that prior to B's death A had no means; that A told false and contradictory stories to those who inquired about B. *Held*, that a verdict of murder in the first degree would not be set aside. *State v. Anderson*, 10 Oreg. 448.

Two boys, each with a dog and gun, went into the woods together. The elder returned alone, much agitated, and told contradictory stories. There was blood on his clothing. The body of the boy was found with the back of his head shot almost away, and under circumstances wholly precluding the theory of suicide. His dog was also found near by shot dead. *Held*, that a verdict of guilty of murder against the elder boy was justified by the evidence. *Davis v. State*, 74 Ga. 869.

Evidence that deceased was approaching defendant's cabin the last time when he was seen alive; that defendant was soon afterwards found burning meat, which he said was pork rinds; that defendant fled from his cabin; that a body cut into pieces and partially burned, an ax covered with hair the color of that of deceased, and clothes like his were found in the cabin; that defendant made voluntary expressions indicating that deceased met his death in the cabin, is sufficient to support a verdict of guilty. *People v. Beckwith*, 108 N. Y. 67.

Defendant and an associate were recognized, though disguised, lurking near, and going towards the home of deceased, avoiding the road, and inquired for deceased; defendant being armed with a rifle. They were again recognized by deceased's wife and mother hiding in the bushes near the house, and were further identified by peculiar tracks and a heel-plate on defendant's boot. A few moments after being so seen deceased was shot by two rifles from the bushes. Defendant fled to Illinois, and was there captured, and his associate's whereabouts was unknown at the time of the trial. There was evidence to impeach and contradict the state's witnesses and to show defendant's good character. *Held*, that the evidence justified a conviction of murder in the first degree. *Sutton v. Com.*, (Va.) 7 S. E. Rep. 323.

Deceased, an express messenger on a railroad car (No. 18), was murdered

somewhere between Joliet and Morris. Defendant W, was acting as baggage-man on car No. 34, and defendant S as rear brakeman. The two cars were next to the engine. Before the train started defendants were seen together in the baggage car in conversation. The doors of the cars could be opened from the inside by turning a knob, but from the outside only by a key. W stated that while making out his report he heard a step behind him, and saw a man pointing a revolver at his head, who commanded him not to move, that he then heard the breaking of glass in the transom in the roof of the car, and saw a man's hand, holding a revolver, pointing down through; that he sat still until the train reached Morris, when he discovered that both the robbers had disappeared, whereupon he gave the alarm; that he did not hear the man go in or out. The safe in the express car was found to be opened by means of a key taken from the deceased, and robbed of \$21,000. In the closet of the passenger car, where S was principally employed, was found a piece of one of the cancelled vouchers which were in the safe at the time. The defendants had no means except their wages, but soon after the robbery they changed their style of living, and indulged in many extravagances out of keeping with their visible means. To explain this they claimed to have received large sums of money from their relatives. S was shown to have paid out a considerable number of \$50 and \$100 bills, which were proved to be the identical bills stolen from the express company. It was proved, that W had cautioned S to be careful how he spent his money, as people were beginning to suspect them. *Held*, that the evidence, though entirely circumstantial, was sufficient to support a verdict finding both defendants guilty of the murder. *Watt v. People*, (Ill.) 18 N. E. Rep. 340.

In a trial for murder, it appeared that defendant and others with deceased, were seen quarreling in the street; that soon afterwards deceased fell with a gash in his neck, from which he died; that the next morning blood was found on defendant's hands and clothes. *Held*, that the evidence was sufficient to go to the jury. *State v. Johnson*, 37 Minn. 493.

On a trial for a murder committed by persons engaged at the time in robbing a store, there was evidence that one of the two defendants was seen on the night of the murder going in the direction of the store, dressed differently from what he usually dressed, and that he said he was going to see some loose women, who disappeared after the murder; that both of them were seen the next morning with a gun and saddle-bags near the house of the mother of one of them, and told witness not to tell that he had seen them; that they disappeared after the murder, and were found with some of the stolen articles in their possession. One of them did not attempt to prove his whereabouts on the night of the murder, and the other's evidence on that point was very unsatisfactory. *Held*, that upon this and other circumstantial evidence, the jury were justified in returning a verdict of guilty. *Poe v. State*, 10 Lea (Tenn.) 673.

Possession of Goods Taken at Time of Homicide.—Where murder is accompanied with robbery, possession of the fruits of the crime is of great weight in establishing proof of murder. *Williams v. Com.*, 29 Pa. St. 102; *Poe v. State*, 10 Lea (Tenn.) 673.

A Threat to Kill is Insufficient of Itself to warrant a conviction of murder, although the killing followed soon after the threat, and no other perpetrator of the crime is disclosed. *Jones v. State*, 57 Miss. 684.

Evidence that Defendant had a Motive for Killing Deceased; that a month before the killing he had threatened deceased's father; that previous to the killing he had in his possession a gun, and subsequent to the killing a pistol, which, from the character of the wounds, and the balls and shot picked up on the scene, might have been used in the killing, *held*, not to support a verdict of murder. *Hogan v. State*, 13 Tex. App. 319.

When Circumstantial Evidence Insufficient.—Defendant was indicted for poisoning Y. There was no *post mortem* examination, and no analysis of the contents of the stomach, or of the vessel which contained the liquor administered, and which was said to contain poison. There was no proof that the accused administered the liquor, or that he knew that it contained poison, nor was any motive or provocation shown. *Held*, that a verdict of guilty would be set aside, and a new

trial granted. *Hatchett v. Com.*, 76 Va. 1026.

Same—Abuse, but no Overt Acts or Threats.—The evidence showed that at the time of her death deceased was heavy with child; that her body showed marks of a severe beating; that her husband, the defendant, was jealous of her, refused to employ a physician for her, swore at her on her death-bed, and expressed suspicions of her fidelity. No testimony was produced to prove overt acts of cruelty or threats, or that the death was produced by other than natural causes. *Held*, insufficient to sustain a conviction of murder in the second degree. *Olivares v. State*, 23 Tex. App. 305.

Same—Suspicious Circumstances.—On a trial for murder, the evidence, chiefly circumstantial, showed that the two victims, being on their way to Seattle in a boat in the early morning, were shot, and their bodies sunk in the lake; that one of the bodies was robbed; that the gun-shots were heard from that direction about 7 A. M.; that their boat was found beached at a point three miles distant; it appeared that defendant left his home at 8 o'clock that morning, and arrived at Seattle shortly after 10 A. M.; that it was hardly possible for him to have committed the crime and have arrived in Seattle before 1 o'clock; that he had a black boat, and that some person was seen from a distance in a black or dark boat on that morning going from where the bodies were found towards defendant's house. It also appeared that he owned a Winchester rifle, with which the shooting might have been done. None of the stolen property was traced to defendant's possession. The only evidence as to motives was that one of the victims and defendant had been subpoenaed to testify before the grand jury in Seattle that morning, presumably concerning a charge against defendant's son, about which defendant showed great anxiety. No threats were shown. Defendant, an ignorant, illiterate man, when arrested, displayed some agitation. He was more agitated when taken by the sheriff, who maintained towards him a hostile and threatening attitude, to the scene of the murder. When taken into the presence of the dead bodies at the undertaker's, and asked by the sheriff, "How do you feel in the presence of the evidence of your hellish crime?" he looked away and breathed hard. *Held*, the evidence was insufficient to support

competent evidence, and by the same weight of evidence as if each one were the main fact in issue;¹ that the fact that the evidence is wholly circumstantial does not necessitate proof of a motive in defendant for the commission of the homicide;² and that it required that every single or separate fact or circumstance shown shall be entirely consistent with every other, if all the evidence taken together proves defendant's guilt beyond a reasonable doubt.³

i. DOCTRINE OF REASONABLE DOUBT.—Before defendant can be convicted for the commission of a homicide, the jury must be satisfied of his guilt of the crime of which they propose to convict him, beyond a reasonable doubt.⁴ The term "reasonable doubt" does not mean every vague or conjectural doubt, but it is

a verdict of guilty. *Miller v. Territory*, (Wash. Tr.) 19 Pac. Rep. 50.

1. See *Harrison v. State*, 6 Tex. App. 42.

2. *Green v. State*, 38 Ark. 304.

3. *Timmerman v. Territory*, (Wash. Tr.) 17 Pac. Rep. 624.

4. See *Gunter v. State*, (Ala.) 10 Cr. L. Mag. 428; *Lang v. State*, (Ala.) 4 So. Rep. 193; *West v. State*, 76 Ala. 98; *Ford v. State*, 71 Ala. 385; *Cross v. State*, 68 Ala. 476; *Boswell v. State*, 63 Ala. 307; s. c., 35 Am. Rep. 20; *Mose v. State*, 36 Ala. 211; *State v. Stephen*, 15 Ala. 534; *Hudspeth v. State*, (Ark.) 9 S. W. Rep. 1; *Oreman v. State*, (Ark.) 5 S. W. Rep. 588; *Green v. State*, 38 Ark. 304; *People v. Goslaw*, 73 Cal. 323; *People v. Woody*, 45 Cal. 289; *People v. Ah Fung*, 16 Cal. 137; *Territory v. Bannigan*, 1 Dak. 432; *State v. Reide*, (Del.) 15 Atl. Rep. 668; *Bond v. State*, 21 Fla. 738; *Weeks v. State*, (Ga.) 3 S. E. Rep. 323; *Rickerson v. State*, (Ga.) 1 S. E. Rep. 178; *Davis v. State*, 74 Ga. 869; *Marshall v. State*, 74 Ga. 26; *Moon v. State*, 68 Ga. 687; *Long v. State*, 38 Ga. 491; *Mitchum v. State*, 11 Ga. 615; *Watt v. People*, (Ill.) 18 N. E. Rep. 340; *Westbrook v. People*, (Ill.) 18 N. E. Rep. 304; *Grady v. People*, (Ill.) 16 N. E. Rep. 654; *Spies v. People* (Anarchists' Case), 122 Ill. 8; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829; *Ritzman v. People*, 110 Ill. 362; *Swigar v. People*, 109 Ill. 272; *Otmer v. People*, 76 Ill. 149; *Guetig v. State*, 63 Ind. 278; s. c., 32 Am. Rep. 99; *Schusler v. State*, 29 Ind. 394; *Polk v. State*, 19 Ind. 170; *French v. State*, 12 Ind. 670; s. c., 74 Am. Dec. 229; *State v. Trout*, (Iowa) 38 N. W. Rep. 405; *State v. Smith*, 73 Iowa 32; s. c., 34 N. W. Rep. 597; *State v. Clouser*, 69 Iowa 313; *State*

v. George, 62 Iowa 682; *State v. Porter*, 34 Iowa 131; *State v. Ostrander*, 18 Iowa 435; *Tweedy v. State*, 5 Iowa 433; *Craft v. State*, 3 Kan. 450; *Horne v. State*, 1 Kan. 42; *Com. v. Cozine*, (Ky.) 9 S. W. Rep. 289; *Roberts v. Com.*, (Ky.) 8 S. W. Rep. 270; *Ruberts v. Com.*, (Ky.) 7 S. W. Rep. 401; *Payne v. Com.*, 1 Met. (Ky.) 370; *Com. v. Robinson*, 146 Mass. 571; s. c., 10 Cr. L. Mag. 544; *Com. v. Webster*, 59 Mass. (5 Cush.) 295; s. c., 52 Am. Dec. 711; *State v. Johnson*, 37 Minn. 493; *McKenna v. State*, 61 Miss. 589; *Hawthorne v. State*, 58 Miss. 778; *Jones v. State*, 57 Miss. 684; *Kendrick v. State*, 55 Miss. 436; *Pitts v. State*, 43 Miss. 472; *George v. State*, 39 Miss. 570; *Riggs v. State*, 30 Miss. 635; *State v. Walker*, (Mo.) 9 S. W. Rep. 647; *State v. Jackson*, (Mo.) 9 S. W. Rep. 624; *State v. Anderson*, 86 Mo. 309; *State v. Simms*, 68 Mo. 305; *State v. Schoenwald*, 31 Mo. 147; *State v. Nueslein*, 25 Mo. 111; *Territory v. Clayton*, (Mont. Tr.) 19 Pac. Rep. 293; *Territory v. Adolfson*, 5 Mont. Tr. 237; *Territory v. Tunnel*, 4 Mont. Tr. 148; *Territory v. Edmonson*, 4 Mont. Tr. 141; *Casey v. State*, 20 Neb. 138; *Bradshaw v. State*, 17 Neb. 147; *State v. Brewer*, 98 N. C. 607; s. c., 3 S. E. Rep. 819; *State v. Jones*, 97 N. C. 469; *State v. McCluer*, 5 Nev. 132; *State v. Harrison*, 5 Jones (N. C.) L. 115; *People v. Reich*, 110 N. Y. 660; *People v. Lyons*, 110 N. Y. 618; s. c., 10 Cr. L. Mag. 690; *People v. Cignarale*, 110 N. Y. 23; *People v. Wilson*, 100 N. Y. 345; *People v. Beckwith*, 108 N. Y. 67; *Brotherton v. People*, 75 N. Y. 159; *Gordon v. People*, 33 N. Y. 501; *Yates v. People*, 32 N. Y. 509; *Stephens v. People*, 4 Park. Cr. Cas. (N. Y.) 396; *State v. Ander-*

a substantial doubt—a reasonable hypothesis—rising from the evidence, or a lack of evidence, inconsistent with the theory of defendant's guilt.¹ It should be accurately defined to the jury in each case in language not to be misunderstood, which conveys that idea; and a charge that the jury "should be convinced as jurors when they would be convinced as men, and should doubt as jurors when they would doubt as men," has been held to be a correct exposition of the doctrine of reasonable doubt as applied to a criminal prosecution.²

son, 10 Oreg. 448; *Tiffney v. Com.*, 121 Pa. St. 165; *McMeen v. Com.*, 114 Pa. St. 300; *McLain v. Com.*, 99 Pa. St. 86; *Meyers v. Com.*, 83 Pa. St. 131; *Ortwein v. Com.*, 76 Pa. St. 414; s. c., 18 Am. Rep. 420; *Com. v. Drum*, 58 Pa. St. 9; *Warren v. Com.*, 37 Pa. St. 45; *Kilpatrick v. Com.*, 31 Pa. St. 198; *Williams v. Com.*, 29 Pa. St. 102; *Com. v. Harman*, 4 Pa. St. 269; *Henry v. State*, 11 Humph. (Tenn.) 224; *Poe v. State*, 10 Lea (Tenn.) 673; *Alexander v. State*, (Tex. App.) 7 S. W. Rep. 867; *Bailey v. State*, (Tex. App.) 9 S. W. Rep. 270; *Rather v. State*, (Tex. App.) 9 S. W. Rep. 69; *Massengale v. State*, (Tex. App.) 6 S. W. Rep. 35; *Hard v. State*, 24 Tex. App. 103; s. c., 5 S. W. Rep. 846; *Scott v. State*, 23 Tex. App. 452; *Gibson v. State*, 23 Tex. App. 414; *Olivares v. State*, 23 Tex. App. 305; *Rowlett v. State*, 23 Tex. App. 191; *Kunde v. State*, 22 Tex. App. 65; *Smith v. State*, 19 Tex. App. 95; *Lane v. State*, 19 Tex. App. 54; *Johnson v. State*, 18 Tex. App. 576; *Williams v. State*, 15 Tex. App. 401; *Gomez v. State*, 15 Tex. App. 327; *Hogan v. State*, 13 Tex. App. 319; *Scott v. State*, 12 Tex. App. 594; *Pogne v. State*, 12 Tex. App. 283; *Holmes v. State*, 11 Tex. App. 223; *Kemp v. State*, 11 Tex. App. 174; *King v. State*, 9 Tex. App. 515; *Webb v. State*, 9 Tex. App. 490; *Jackson v. State*, 9 Tex. App. 114; *Harrison v. State*, 6 Tex. App. 42; *Browne v. State*, 4 Tex. App. 275; *Sutton v. Com.*, (Va.) 7 S. E. Rep. 323; *Russell v. Com.*, 78 Va. 400; *Hatchett v. Com.*, 76 Va. 1026; *Dean v. Com.*, 32 Gratt. (Va.) 912; *Miller v. Territory*, (Wash. Tr.) 19 Pac. Rep. 50; *Timmerman v. Territory*, (Wash. Tr.) 17 Pac. Rep. 624; *Leonard v. Territory*, 2 Wash. Tr. 381; *Territory v. Manton*, (Mont. Tr.) 14 Pac. Rep. 637.

1. See *Lang v. State*, (Ala.) 4 So. Rep. 193; *State v. Stephen*, 15 Ala. 534; *Territory v. Bannigan*, 1 Dak. 432; *Long v. State*, 38 Ga. 491; *Spies v. People* (Anarchists' Case), 122 Ill. 8;

s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 827; *Schusler v. State*, 29 Ind. 394; *Horn v. State*, 1 Kan. 42; *Com. v. Webster*, 59 Mass. (5 Cush.) 295; s. c., 52 Am. Dec. 711; *Kendrick v. State*, 55 Miss. 436; *State v. Walker*, (Mo.) 9 S. W. Rep. 647; *State v. Anderson*, 86 Mo. 309; *State v. Schoenwald*, 31 Mo. 147; *State v. Neuslein*, 25 Mo. 111; *Territory v. Manton*, (Mont. Tr.) 14 Pac. Rep. 637; *Bradshaw v. State*, 17 Neb. 147; *State v. McCluer*, 5 Nev. 132; *Brotherton v. People*, 75 N. Y. 159; *McMeen v. Com.*, 114 Pa. St. 300; *Com. v. Drum*, 58 Pa. St. 9; *Warren v. Com.*, 37 Pa. St. 45; *Kilpatrick v. Com.*, 31 Pa. St. 198; *Com. v. Harman*, 4 Pa. St. 269.

2. See *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829; *McMeen v. Com.*, 114 Pa. St. 300.

Reasonable Doubt.—Instruction—In a capital case, the trial court gave the rule as to a reasonable doubt, as affecting the finding of the jury, as follows: "The court instructs the jury, as matter of law, that in considering the case the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be reasonable, and it arises from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of 'not guilty.' If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt." The rule has thus formulated, has repeatedly received the approval of this court, and is correct. *Spies v. People* (Anarchists' Case), 122 Ill. 8; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

XXIII. ARGUMENT OF COUNSEL.—1. Prosecuting.—The province of counsel in argument is to state to the jury the case and the facts pertaining thereto, and to sum up before them the evidence; and where the prosecuting counsel exceed this, go beyond proof relating to the case, and the hypothesis upon which the prosecution is based, in order to create a prejudice in the jury against the defendant, and the court makes no attempt to counteract any effect which such action may have, the defendant does not receive an impartial trial, which is guaranteed to him by constitutional provision.

In a prosecution for homicide, the opening statement of the case by the counsel for the prosecution is one requiring great latitude; and it is not a matter which can be assigned as error that a hypothesis was stated to the jury by the prosecuting attorney which the evidence did not afterwards strictly prove.¹ But the argument upon the evidence should always be confined strictly to the proof of defendant's guilt, and the circumstances tending thereto; the criterion as to the reversal for erroneous remarks of prosecuting counsel being, however, the question whether such remarks or statements probably had the effect of working to the prejudice of defendant with the jury.² But objection must be

Instructions in a murder trial that the jury need not be satisfied beyond a reasonable doubt "of each link in the chain of circumstances relied on to establish defendant's guilt," but that it was sufficient if, taking the testimony altogether, the jury was satisfied beyond a reasonable doubt that the state had proven "each material fact charged, and that defendant is guilty." *Held*, good. *Bradshaw v. State*, 17 Neb. 147.

On an indictment for murder, an instruction that "to prove beyond a reasonable doubt that the defendant is guilty does not mean that the state must make the proof by an eye-witness, or to a positive, absolute, mathematical certainty. This latter measure of proof is not required in any case. If, from all the evidence, the jury believe that it is possible, or that it may be, or perhaps, the defendant is not guilty, this degree of uncertainty does not amount to a reasonable doubt, and does not entitle the defendant to an acquittal. All that is required is that the jury should, from all the evidence, believe beyond a reasonable doubt that the defendant is guilty; and if they so believe, . . . they must find the defendant guilty, although they may also believe, from the evidence, that it may be that he is not guilty, or that it is possible that he is not guilty," is not error. *Lang v. State*, (Ala.) 4 So. Rep. 193.

On a trial for murder, an instruction: "In determining the question of doubt, you will act as a prudent, careful business man would act in determining an important matter pertaining to his own affairs." *Held*, to be erroneous. There must be in the juror's mind an abiding conviction to a moral certainty of the truth of the charge against the accused; such conviction as to the juror would venture to act upon in matters of the highest concern to himself. *Territory v. Bannigan*, 1 Dak. 432.

1. An Opening Statement by the State's Attorney, in a trial for murder, that defendant had a difficulty with A B, in the evening preceding the homicide, and that A B procured a warrant for his arrest, and that defendant then obtained a revolver with which he shot the sheriff when seeking to make the arrest. *Held*, properly made as tending to disprove the theory of self-defence, even though the attorney was unable to find evidence to support all his statements. *State v. Meshek*, 61 Iowa 316.

2. See *Cross v. State*, 68 Ala. 476; *People v. Ah Fook*, 64 Cal. 380; *Petite v. People*, 8 Colo. 518; *Blackman v. State*, (Ga.) 10 Cr. L. Mag. 71; *Earl v. People*, 99 Ill. 123; *Bulliner v. People*, 95 Ill. 394; *Epps v. State*, 102 Ind. 539; *Ferguson v. State*, 49 Ind. 33; *Johnson v. State*, 63 Miss. 313; *Cavanah v.*

made at the time, as it comes too late after verdict.¹

2. Defending.—While it is always within the discretion and power of the court to limit the time of argument reasonably, yet it is the substantial right of the defendant to have his case fairly and fully argued, especially if the charge involves his life; and where it clearly appears that his counsel were not allowed time sufficient for argument, he is entitled to a new trial,² the

State, 56 Miss. 298; *State v. Walker*, (Mo.) 9 S. W. Rep. 647; *State v. Banks*, 10 Mo. App. 111; *Simmerman v. State*, 16 Neb. 615; *State v. Matthews*, 80 N. C. 417; *State v. Smith*, 75 N. C. 306; *Com. v. Smith*, 10 Phila. (Pa.) 189; *Cartwright v. State*, 16 Tex. App. 473; s. c., 49 Am. Rep. 826; *Puryear v. Com.*, (Va.) 9 Cr. L. Mag. 788; *Price v. Com.*, 77 Va. 393.

Comment on Failure to Call Witnesses.

—Upon an indictment for murder, the defendant, before the jury was impaneled, made a motion for a continuance on the ground of the absence of witnesses, and setting forth, in his motion, what he expected to prove by them. The witnesses were sent for, but were not called up to testify. In his argument to the jury, the attorney for the state, against the objection of defendant's counsel, commented upon the failure of the defendant to prove what he said he could prove by the witnesses, and insisted that his failure was evidence of guilt. *Held*, reversible error. *Blackman v. State*, (Ga.) 10 Cr. L. Mag. 71.

Misstatement of Facts.—In arguing a criminal case, *held*, that counsel had no right to state as facts what he alleged had occurred in the case of another homicide similar to the one on trial. *Cross v. State*, 68 Ala. 476.

What Cause for Reversal.—On a trial for murder, where the defence was insanity, a remark of the district attorney to the jury, "You can make no mistake in convicting the defendant. If he were insane, the governor, the court and I will secure a commission to inquire into the fact, and will see that no injustice be done him," *held*, to be ground for a new trial. That the remark prejudiced the jury might be presumed from the fact that, although there were fifteen witnesses on the question of insanity, the jury, after consulting only half an hour, returned a verdict of guilty. *Com. v. Smith*, 10 Phila. (Pa.) 189.

Same—Comments on Plaudits of Audience.—On a murder trial, at the end of

the opening address of the prosecuting attorney the audience applauded. In his closing argument he alluded to this, and approved it. The court did not check nor reprimand the audience nor the counsel, nor caution the jury. This, it seems, was error. *Cartwright v. State*, 16 Tex. App. 473; s. c., 49 Am. Rep. 826.

Same—Commenting on Defendant's Failure to Testify.—A conviction will not necessarily be reversed for improper attempt on the part of the prosecuting attorney to comment on the fact that defendant did not testify, the court at once interfering and duly warning the jury. *Petite v. People*, 8 Colo. 518.

Same—Accounts of Conviction of Innocent Persons on Circumstantial Evidence.—Where counsel, on a trial for murder, read from the cases where convictions of innocent persons have been had on circumstantial evidence, the court may properly caution the jury against attaching too much importance in such cases. *People v. Ah Fook*, 64 Cal. 380.

"Billy the Kid" a "Jesse James Sort of Cow Boy."—Evidence that defendant, under indictment for murder, was a herder on the plains, that he carried two revolvers and a knife, of which he made a display, and that his companions had four revolvers, *held* to warrant the district attorney in his argument to the jury in describing him as "Billy the Kid" or "Jesse James sort of a cow boy." *Simmerman v. State*, 16 Neb. 615.

1. See *Earll v. People*, 99 Ill. 123; *Bulliner v. People*, 95 Ill. 394; *Puryear v. Com.*, (Va.) 9 Cr. L. Mag. 788.

2. *People v. Keenan*, 13 Cal. 581. See *Kizer v. State*, 12 Lea (Tenn.) 564.

Limiting Time for Argument.—Upon a trial for murder, the prisoner's counsel, three in number, were limited to seventy minutes for argument, which time they divided equally between them. *Held*, that while the action of the court in thus limiting them to so short a time, over their objection, was open to criticism, yet it was apparent that

usual order of argument requires that counsel for the defendant shall sum up the evidence in his behalf before the closing argument for the prosecution, and the fact that the defence is insanity, and that, therefore, defendant has the burden to prove it, does not so change the proper order of argument as to allow his counsel to open and close.¹

Where the order of argument is properly changed, defendant cannot be heard for the first time to complain in the appellate court.² The court has control over defendant's counsel and their argument, as well as over counsel for the prosecution; and where they unduly press upon the jury the fact of defendant's punishment, if he is convicted, it is not error for the court to check such remarks by counsel.³

XXIV. INSTRUCTIONS.—1. What Questions Must be Submitted by the Instructions.—*a. GENERALLY.*—On the trial of an indictment for felonious homicide, it is the duty of the court to state to the jury the law defining the offence with which defendant is charged, and, if the proof raises any doubt as to the degree of the homicide, the law defining the different grades of homicide, not higher than the grade which the indictment charges.⁴ No instruction should be given upon the degree of homicide which lacks all proof of its commission.⁵

b. DEGREE OF MURDER.—Where the indictment charges murder in the first degree, but the evidence leaves a doubt as to the degree, the court should instruct upon the law of both degrees of murder; but where the evidence shows clearly and unequivocally that the homicide was not less than murder in the first degree, there is no occasion to instruct the jury upon the law of any lesser grade of homicide.⁶ But where there is no evidence

the evidence sustained the verdict, and that no injustice had been done, and, as the exception was general, a reversal should not be ordered. *Kizer v. State*, 12 Lea (Tenn.) 564.

1. *Loeffner v. State*, 10 Ohio St. 598.

2. *People v. Ah Hop*, 1 Idaho 698.

3. *State v. Dodson*, 16 S. C. 453.

4. *State v. Stephens*, 15 Ala. 534; *Washington v. State*, 36 Ga. 222; *Crawford v. State*, 12 Ga. 142; *Fitzgerald v. People*, 37 N. Y. 413; *Nelson v. State*, 2 Swan. (Tenn.) 257; *Lindsay v. State*, 36 Tex. 337.

Charging Erroneously or Insufficiently.—While it is true generally, that a failure of the circuit court to charge fully, when there is no essential point omitted, or wrongfully charged, is not error, unless it should appear that the court was asked for further instructions; still, on the trial of a capital offence, it is error if the court (although expounding the law correctly, so far as the charge goes), omit to instruct the

jury fully and explicitly on the legal effect of all the circumstances developed on the trial, which would tend to determine the character or degree of the prisoner's guilt. *Nelson v. State*, 2 Swan. (Tenn.) 237.

5. *Washington v. State*, 36 Ga. 222; *Crawford v. State*, 12 Ga. 142; *State v. Stoeckli*, 71 Mo. 559; *State v. Kilgore*, 70 Mo. 546; *State v. Edwards*, 70 Mo. 312; *Lindsay v. State*, 36 Tex. 337; *Daniels v. State*, 24 Tex. 389.

6. See *State v. Johnson*, 8 Iowa 525; s. c., 74 Am. Dec. 321; *State v. Wilson*, 88 Mo. 13; *State v. Ward*, 74 Mo. 253; *State v. Kotovsky*, 74 Mo. 247; *State v. Ellis*, 74 Mo. 207; *State v. Erb*, 74 Mo. 199; *State v. Talbott*, 73 Mo. 347; *State v. Wieners*, 66 Mo. 13; *State v. Phillips*, 24 Mo. 475; *O'Connell v. State*, 18 Tex. 343; *May v. State*, 22 Tex. App. 595; *Washington v. State*, 1 Tex. App. 647; *Holden v. State*, 1 Tex. App. 225.

On a trial for murder, it being clearly proven that the defendant killed de-

whatever which, if believed, will reduce the crime to murder in the second degree, even though it be given by the defendant himself, he is entitled to an instruction upon the law of murder in the second degree.¹

Where, however, instructions are given upon the law of murder in the second degree, when unwarranted by the evidence, it will not be reversible error in the absence of any showing that the verdict of guilty of murder in the first degree is unjust to defendant;² nor will such a conviction be reversed because such unnecessary instructions were erroneous, the verdict showing them to have been immaterial.³

Where defendant has been convicted of murder in the second degree, and has obtained a new trial, it is unnecessary for the court to instruct upon the degrees of malice, or upon the law of premeditation and deliberation, as such conviction of murder in the second degree works an acquittal of murder in the first degree; and a statement by him to the jury to that effect is proper.⁴

c. MANSLAUGHTER.—If, on a trial for murder there is no evidence upon which the jury can find that the killing was done in the sudden heat of passion, or under other circumstances reducing the crime to manslaughter, it is not error for the court to fail or refuse to instruct the jury upon the law applicable to a reduction of the homicide from the grade of murder to that of manslaughter;⁵ but the defendant is entitled to have the law of manslaughter given to the jury, if there is no evidence whatever to which it is applicable, no matter how weak or insufficient it may appear to the court.⁶ But the law of involuntary man-

ceased intentionally, that there was no excuse or justification for the killing, that the provocation given by the deceased was slight, and that deceased apologized to defendant for it. *Held*, that it was not a case requiring instructions to be given to the jury, defining murder in the second degree; and there being no complaints against the instructions in regard to murder in the first degree, given by the trial court, the judgment of conviction was affirmed. *State v. Wieners*, 66 Mo. 13.

1. *State v. Banks*, 73 Mo. 592.

2. *State v. Talbott*, 73 Mo. 347. Compare *State v. Phillips*, 24 Mo. 475.

3. *State v. Ward*, 74 Mo. 253; *State v. Kotovsky*, 74 Mo. 247; *State v. Ellis*, 74 Mo. 207; *State v. Erb*, 74 Mo. 199.

4. *Pharr v. State*, 10 Tex. App. 485.

5. *People v. Estrado*, 49 Cal. 171; *Dozier v. State*, 26 Ga. 156; *Teal v. State*, 22 Ga. 75; s. c., 68 Am. Dec. 482; *State v. Rose*, 92 Mo. 201; *State v. Downs*, 91 Mo. 19; *Lum v. State*, 11 Tex. App. 483; *Hill v. State*, 11 Tex. App. 456.

The deceased and defendant's son had an altercation, and defendant, without warning, stepped up behind deceased and struck him a blow which killed him. *Held*, that defendant was not entitled to an instruction upon the law of manslaughter in the first degree. *State v. Down*, 91 Mo. 19.

As the jury, in trying an indictment for murder, have the power to find the prisoner guilty of manslaughter, it was pertinent and right for the judge to instruct the jury in the law both of murder and manslaughter, notwithstanding his counsel chose to assert that the only issue for the jury to try was the sanity of the accused. *State v. Patton*, 12 La. An. 288.

6. *Payne v. Com.*, 1 Met. (Ky.) 370; *McLaurin v. State*, 64 Miss. 529; *Potter v. State*, 85 Tenn. 88; *Liskoski v. State*, 23 Tex. App. 165; *Roberts v. State*, 23 Tex. App. 170; *McLaughlin v. State*, 10 Tex. App. 340. See *U. S. v. Armstrong*, 2 Curt. C. C. 446.

A woman with whom defendant's wife was on bad terms, while passing defendant's house, was attacked by his

slaughter need not be given where the indictment charges only murder, as a conviction for involuntary manslaughter cannot usually be had, except under an indictment strictly charging the offence.¹

d. EXCUSE OR JUSTIFICATION.—Where defendant pleads the necessity of self-defence, or other legal excuse for the homicide, he is entitled to have the jury instructed upon the law relating thereto;² but where there is no evidence whatever tending to show that the killing was done in self-defence or in the reasonable belief of imminent danger to the defendant from deceased, or under other circumstances excusing it, it is proper for the court to ignore the question of self-defence in charging the jury.³

e. COMPETENCY AND WEIGHT OF EVIDENCE.—On the trial of an indictment for homicide, where any part of the testimony which has been adduced has an artificial importance given to it

wife, the latter using only her hands; the other struck defendant's wife with an axe handle, by which she was considerably cut, whereupon defendant, who had taken no part in the struggle, seeing his wife hurt and bleeding, shot and killed the other woman as she was moving off. *Held*, that a charge to the jury as to the law of murder only, and a refusal to charge as to the law of manslaughter, was erroneous. *McLaurin v. State*, 64 Miss. 529.

1. *McWhirt's Case*, 3 Gratt. (Va.) 544.

2. *Hinch v. State*, 25 Ga. 699; *Steinmeyer v. People*, 95 Ill. 383; *State v. Sneed*, 91 Mo. 552; *Potter v. State*, 85 Tenn. 88; *McConnell v. State*, 22 Tex. App. 354; s. c., 58 Am. Rep. 647; *Elliston v. State*, 10 Tex. App. 361; *McLaughlin v. State*, 10 Tex. App. 340; *Warren v. State*, 9 Tex. App. 619; s. c., 35 Am. Rep. 745. See *People v. Walter*, 1 Idaho 386; *May v. State*, 23 Tex. App. 146.

On the trial of an indictment for murder, there was proof that deceased was a quarrelsome, overbearing and dangerous man, and had made repeated threats against the life of defendant, some of which had been and some had not been communicated to him. The court omitted to instruct the jury that they might look at the threats to show the state of mind of defendant, and illustrate his conduct and motive in connection with the other evidence, and to show the *animus* of deceased and his motives; and defendant did not ask for such an instruction. *Held*, that the finding of the jury of murder in the first degree could not negative the ex-

istence of a defence which the jury were not properly instructed to consider; nor would the court, in a case involving the life of a citizen, or his hopeless imprisonment, stand on any nice technicality of requiring defendant to have demanded an instruction, essential to a fair trial, which the law is supposed to guarantee to him without a demand; and that the omission was error warranting a reversal. *Potter v. State*, 85 Tenn. 88.

3. *Taylor v. State*, 48 Ala. 180; *Varnell v. State*, (Tex. App.) 9 S. W. Rep. 65; *Allen v. State*, (Tex. App.) 6 S. W. Rep. 187. See *Epps v. State*, 19 Ga. 102; *Jarrell v. State*, 58 Ind. 293; *State v. Sneed*, 91 Mo. 552; *Honeycutt v. State*, 8 Baxt. (Tenn.) 371.

The evidence showed that defendant and deceased had had a controversy; that deceased had abandoned it, and defendant had renewed it, in order to have a pretext for killing deceased, and during the renewed controversy had killed deceased. *Held*, that there was no issue of fact as to defendant's intent in such renewal, and that it was not necessary for the court to instruct the jury on that point. *Allen v. State*, (Tex. App.) 6 S. W. Rep. 187.

Trial—Instructions.—Where, on a trial for murder, the evidence tended to show that the deceased sought the defendant after an act of carnal intercourse between the defendant and the deceased's minor daughter had been consummated with the daughter's consent, and she had gone away, it was error to charge the jury with respect to the father's right to interfere to prevent the seduction of his daughter and de-

by the law or a presumptive weight which is the duty of the court to instruct the jury on such an explanation to the general rule,¹ the defendant is always entitled to have the jury clearly instructed as to the doctrine of reasonable doubt; and where the testimony is entirely circumstantial, the court should state to the jury the rules which regulate the application of circumstantial evidence in cases of homicide.² But that is not necessary where there is any direct proof of defendant's guilt.³ Where testimony is admitted upon the representation of counsel, that it will subsequently be connected with additional evidence so as to render it material, and the promise is not fulfilled, the court should conclusively direct the jury to exclude such testimony entirely from their consideration.⁴

f. VERDICT.—It is not essential to the sufficiency of the charge that it should instruct the jury as to the forms of verdicts which may be rendered by them, although it is entirely proper to do so; but when such instructions are given, they should embrace every verdict which might be rendered in the case, so as to avoid conveying to the minds of the jury any impression as to the opinion of the court as to which of every verdict might or should be rendered.⁵

g. PUNISHMENT.—Where the jury must or may fix the punishment, they should be instructed as to the proper punishment for all grades of homicide for any of which they have the right to convict defendant, and as to the limits of such punishment.⁶

h. REPETITION.—The meaning of a charge is not to be determined by selecting and disconnecting particular sentences, and considering them without reference to the context, but all its parts must be considered in connection with each other. Therefore, where the court has once instructed the jury as to the law relating to a particular phase of the crime charged correctly and to the point, it is not bound to repeat such instructions expressly in connection with other ingredients of the crime.⁷

2. Sufficiency and Correctness of Instructions, as to Form.—No rule can be laid down which prescribes the forms in which each instruction upon trials of indictments for homicide must or may be given, but this depends entirely upon the circumstances of each particular case, to be determined in the discretion of the court; it may be generally stated, however, that the language of the instruc-

defendant's culpability for the killing under such circumstances. *Varnell v. State*, (Tex.) 9 S. W. Rep. 65.

1. *Brown v. State*, 23 Tex. 195.

2. *People v. Lachanias*, 32 Cal. 433.

3. *McDaniel v. State*, 16 Miss. (8 Smed. & M.) 401; s. c., 47 Am. Dec. 93.

4. *State v. McDonnell*, 32 Vt. 491.

5. *Williams v. State*, (Tex. App.) 7 S. W. Rep. 333.

6. In Texas, since the adoption of the

new constitution, it is the duty of the district judge, on the trial of an indictment for murder, to instruct the jury that they have the power to commute the death penalty to imprisonment at hard labor for life; and if this instruction is omitted, and the accused convicted of murder in the first degree, the case will be reversed and remanded. *Marshall v. State*, 33 Tex. 664.

7. *Stanton v. State*, 13 Ark. 317; *Jordan v. State*, 10 Tex. 479.

tions, and the form and connection in which they are given should not be such as to mislead the jury, but should be clear and unequivocal, and incapable of any misinterpretation.¹

1. See *Brown v. State*, (Ala.) 3 So. Rep. 857; *Amos v. State*, (Ala.) 3 So. Rep. 749; *Williams v. State*, 81 Ala. 1; *Fallen v. State*, (Ala.) 3 So. Rep. 525; *Gunter v. State*, (Ala.) 10 Cr. L. Mag. 428; *Hampton v. State*, 45 Ala. 82; *Dill v. State*, 25 Ala. 15; *Felix v. State*, 18 Ala. 720; *Pierson v. State*, 12 Ala. 149; *Howard v. State*, 34 Ark. 433; *Atkins v. State*, 16 Ark. 568; *People v. Williams*, (Cal.) 17 Pac. Rep. 211; *People v. Giancoli*, 74 Cal. 642; *People v. Gonzales*, 71 Cal. 569; *People v. Welch*, 49 Cal. 177; *People v. Best*, 39 Cal. 690; *People v. Moore*, 8 Cal. 90; *People v. Quincy*, 8 Cal. 89; *Redus v. People*, 10 Colo. 208; *Blakeman v. State*, (Ga.) 10 Cr. L. Mag. 71; *Edwards v. State*, 53 Ga. 428; *Pressley v. State*, 19 Ga. 192; *Anderson v. State*, 14 Ga. 709; *Holder v. State*, 5 Ga. 441; *Monroe v. State*, 5 Ga. 85; *Crews v. People*, 120 Ill. 317; s. c., 11 N. E. Rep. 404; *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829; *Gainey v. People*, 97 Ill. 270; s. c., 37 Am. Rep. 109; *Alexander v. People*, 96 Ill. 96; *Barnett v. People*, 54 Ill. 325; *Maher v. People*, 24 Ill. 241; *Mayfield v. State*, 110 Ind. 591; *Wade v. State*, 71 Ind. 335; *Jackman v. State*, 71 Ind. 149; *Snyder v. State*, 59 Ind. 105; *Kingin v. State*, 45 Ind. 519; *Bland v. State*, 2 Ind. 608; *State v. Donnelly*, 69 Iowa 705; s. c., 58 Am. Rep. 234; *State v. Mahan*, 68 Iowa 304; *State v. McCormick*, 27 Iowa 402; *State v. Johnson*, 8 Iowa 525; s. c. 74, Am. Dec. 321; *State v. Gillick*, 7 Iowa 287; *State v. Baldwin*, 36 Kan. 1; *Radford v. Com.*, (Ky.) 5 S. W. Rep. 343; *Coffman v. Com.*, 10 Bush (Ky.) 495; *Williams v. Com.*, 9 Bush (Ky.) 274; *Smith v. Com.*, 1 Duv. (Ky.) 224; *Jane v. Com.*, 2 Met. (Ky.) 30; *State v. Ricks*, 32 La. An. 1098; *Nye v. People*, 35 Mich. 16; *Burden v. People*, 26 Mich. 162; *Maher v. People*, 10 Mich. 212; *Glenn v. State*, 64 Miss. 724; *Wesley v. State*, 37 Miss. 327; s. c., 75 Am. Dec. 62; *Mask v. State*, 36 Miss. 77; *Boles v. States*, 17 Miss. (9 Smed. & M.) 284; *McDaniel v. State*, 16 Miss. (8 Smed & M.) 401; *State v. Walker*, (Mo.) 9 S. W. 646; *State v. Leabo*, (Mo.) 5 S. W. Rep. 491; *State v. Brooks*, 94 Mo. 121; *State v. Hayes*, 89 Mo. 262; *State v. Ellis*, 74 Mo. 207; *State v. Edwards*, 71 Mo. 312; *State v. Dearing*, 65 Mo. 530; *State v. Byrne*, 24 Mo. 151; *State v. Dillihunt*, 18 Mo. 331; *Schlenker v. State*, 9 Neb. 300; *State v. St. Clair*, 16 Nev. 207; *State v. Frazer*, 14 Nev. 210; *State v. Hutchinson*, 7 Nev. 53; *State v. Floyd*, 6 Jones (N. C.) L. 392; *State v. Simmons*, 6 Jones (N. C.) L. 21; *State v. Harrison*, 5 Jones (N. C.) L. 115; *State v. Owen*, Phill. (N. C.) L. 425; *Smith v. State*, 41 N. J. L. (12 Vr.) 370; *McNevin v. People*, 61 Barb. (N. Y.) 307; *Pfomer v. People*, 4 Park. Cr. Cas. (N. Y.) 558; *Stephens v. People*, 4 Park. Cr. Cas. (N. Y.) 396; *People v. Quin*, 1 Park. Cr. Cas. (N. Y.) 340; *Beaudien v. State*, 8 Ohio St. 634; *Robbins v. State*, 8 Ohio St. 131; *Stewart v. State*, 1 Ohio St. 66; *Lane v. Com.*, 59 Pa. St. 371; *Kilpatrick v. Com.*, 31 Pa. St. 198; *Small v. Com.*, 91 Pa. St. 304; *State v. Jacobs*, (S. C.) 4 S. E. Rep. 799; *State v. Coleman*, 20 S. C. 441; *State v. Stark*, 1 Strobb. (S. C.) L. 479; *Rea v. State*, 8 Lea (Tenn.) 356; *Anderson v. State*, 31 Tex. 440; *Monroe v. State*, 23 Tex. 210; s. c., 76 Am. Dec. 58; *Brown v. State*, 23 Tex. 195; *Darron v. State*, 23 Tex. App. 462; s. c., 5 S. W. Rep. 237; *McCullough v. State*, 23 Tex. App. 620; *Hill v. State*, 11 Tex. App. 456; *Holmes v. State*, 11 Tex. App. 223; *Greta v. State*, 9 Tex. App. 429; *Harrison v. State*, 9 Tex. App. 407; *Murray v. State*, 1 Tex. App. 417; *Dickerson v. State*, 48 Wis. 288; *Roman v. State*, 41 Wis. 312.

On a capital trial, the instruction to the jury that they "have no right to hold the law to be otherwise in any particular than as given to them by the court," is not erroneous. *Robbins v. State*, 8 Ohio St. 131.

A charge by the court, in making the distinction between murder in the first and second degree, that "if you believed the defendant killed the deceased in a sudden and unexpected fight without previous malice, and with no time for deliberation, and no previously formed design, then he will be guilty of murder in the second degree," is not such a charge as is calculated to mislead the jury, and preclude them from finding a verdict of manslaughter. *Anderson v. State*, 31 Tex. 440.

An instruction that the jury should find the accused "guilty of murder in

the first degree, or not guilty, according as they should find the fact," even if understood as requiring them to acquit him entirely in case they should not find him guilty of murder in the first degree, *held*, to contain no error injurious to the defendant. *Dickerson v. State*, 48 Wis. 288.

Homicide—Murder—Definition.—It is not error, in an instruction defining murder in the first degree, to omit the word "feloniously," as it is used only in classifying offences, and is not a distinct element of the crime. *State v. Walker*, (Mo.) 9 S. W. Rep. 646.

In a prosecution for murder in the first degree, the court charged that, "no matter what the provocation; no matter what the heat of passion; no matter if there were any previous assaults; no matter what the other surrounding circumstances might have been; unless the act was justifiable, if there was a premeditated design to produce death, it is murder in the first degree." *Held*, no error, it being clear from the whole charge that, by the provocation and heat of passion here spoken of, were meant such as are not incompatible with the formation in the mind of the accused of a deliberate premeditated design to kill the deceased. *Roman v. State*, 41 Wis. 312.

An instruction that, "if homicide be committed by a deadly weapon in the previous possession of the slayer, the law implies malice in a perpetrator," given without qualification, was *held* wrong and misleading. *Smith v. Com.*, 1 Duv. (Ky.) 224.

Where, on a trial for murder, the court, in relation to the dying declarations of the deceased, instructed the jury as follows: "If you receive them as true, it will be your duty to find the defendant guilty of murder in the first degree, because they show that it was done, either in the perpetration of, or attempt to perpetrate a robbery;" and where the court, in response to an interrogatory of the jury, further *held*: "That if you should believe that the deceased was mistaken as to the object the defendant had in killing (*i. e.*, for his money), and that all the other declarations were true, and are satisfied, from the circumstances detailed by the testimony, that the murder was willful, deliberate, and committed with malice aforethought, the verdict should be for murder in the first degree. You can find a verdict of guilty of murder in the second degree, if the murder was willful,

and with malice aforethought, though not deliberate and premeditated, provided you are not satisfied that it was committed in the perpetration, or attempt to perpetrate a robbery. In inquiring into what was said by the deceased, on the subject of defendant's object in inflicting the wound, you may inquire whether he meant to say that a robbery had been committed, or whether he referred to the intention of defendant in making the assault." *Held*, that taking the instructions together, the first was not objectionable, or at least not so much so as to alone justify a reversal of the cause. *State v. Johnson*, 8 Iowa 525; s. c., 74 Am. Dec. 321.

An instruction which declares that if the jury find that defendant killed his wife "by choking and strangling her, by fixing, fastening, etc., his hand about her neck and throat, and then by drowning her, so choked and strangled, into the well," etc., they should return a verdict of guilty, is not to be construed as a direction to find him guilty if they find that he "first choked his wife to death, and then drowned her in a well;" but means that if they find she was killed by all the means so employed conjointly, and by none of them separately, they should return a verdict of guilty. *State v. Leabo*, (Mo.) 5 West. Rep. 491.

"That the killing will be manslaughter, if the reason of the prisoner was temporarily dethroned by passion," is a figure of speech which ought not to be used by a judge in his charge to the jury, on a trial for murder, as they may infer therefrom that no sudden heat, short of the dethronement of reason, will mitigate a killing to manslaughter; hence it is error so to charge. *Bland v. State*, 2 Ind. 608.

On a trial for murder, the court charged, "it is the duty of the person assaulted to retire to what is termed the wall or ditch, before he is justified in repelling an assault by taking the life of his assailant. But cases frequently arise where the assault is made with a dangerous or deadly weapon and so fiercely as not to allow the party assaulted to retire without manifest danger to his life, or great bodily injury; in such cases he is not required to retreat." *Held*, that the instruction was not objectionable as holding by implication that defendant was only excused from retreating where it would be manifestly dangerous to attempt it. *State v. Donnelly*, 69 Iowa 705.

3. Written Instructions.—It is sometimes provided by statute that the instructions of the court in cases of homicide shall be in writing. Such a provision must be interpreted as referring to the charge of the court to the jury upon the law of the case, and not a mere direction given to them, incidentally or otherwise, as to a

So also, an instruction, that "the necessity for the killing must be apparent, actual, imminent, absolute, and unavoidable," is contradictory and misleading. *People v. Gonzales*, 71 Cal. 569.

On a trial for manslaughter, the court instructed the jury that if they believed that defendant shot and killed the deceased, he, the said defendant, not being himself the attacking party in said encounter, yet had reasonable grounds to believe and did believe his life was then in danger, then said defendant had the right to use such means, etc. *Held*, that the instruction in regard to defendant not being the attacking party was misleading, in view of the fact that the jury may have thought that the mere taking of the gun along by the accused, which the evidence tended to show was for the purpose of protecting himself, amounted to an attack upon the deceased. *Radford v. Com.*, (Ky.) 5 S. W. Rep. 343.

The expression, by the court, of an opinion upon the weight of evidence, in charging the jury, is not error, when the jury are also told that they are the judges of all questions of fact, which are to be determined by them without reference to any opinion expressed by the court. *Stephens v. People*, 4 Park. Cr. Cas. (N. Y.) 396.

On trial of indictment for murder, and for being an accessory thereto, the court instructed the jury: "By his testimony he charges the murder upon the wife of the victim. In so doing, has he kept back and concealed what would, if divulged, implicate himself in the commission of the deed, or show that he aided and assisted the woman in its commission? Has he told the whole truth in respect to the death of deceased? Has he satisfied you that the woman, alone and unaided, perpetrated the crime? If you are satisfied that he has not told the whole truth in respect to the death of the deceased; that he has kept back and concealed important facts and circumstances connected with such death; if, from the nature of things, you are satisfied, from the testimony that you regard as

reliable, that something must have been done in taking the life of deceased other than what he has stated; what does such testimony justify you in believing has been suppressed by the defendant? And does what has been suppressed implicate him as aiding and assisting in the commission of the deed, and how? These and like questions are important for your consideration in determining whether the defendant be or be not guilty." *Held*, not liable to the objection that it left the jury to find defendant guilty upon conjecture, or otherwise than upon the evidence. *Dickerson v. State*, 48 Wis. 288.

Form of Verdict.—On Trial for Murder—Direction in Respect Thereto.—On the trial of several persons upon the charge of murder, the trial court instructed the jury as to the form of their verdict, as follows: "If all the defendants are found guilty, the form of the verdict will be, 'We, the jury, find the defendants guilty of murder, in manner and form as charged in the indictment,' and fix the penalty." "If all are found not guilty, the form of the verdict will be, 'We, the jury, find the defendants not guilty.'" And correspondingly, in case part were found guilty and part not guilty. The verdict was, guilty of murder. It was objected by the defendants, that under this instruction, the jury were obliged to find the defendants guilty or not guilty of murder, whereas the jury were entitled to find that the offence was a lower grade of homicide than murder, if the evidence so warranted. But the objection was not well taken. If the defendants desired to have the jury differently instructed, they should have prepared an instruction accordingly. *Spies v. People* (Anarchists' Case), 122 Ill. 1; s. c., 3 Am. St. Rep. 320; 9 Cr. L. Mag. 829.

A charge that, in the event of finding from the evidence that the defendant was guilty of murder in the second degree, the jury assesses his punishment at confinement in the penitentiary for any length of time, "not less than five" (omitting "years"), *Held*, not fatally defective. *Hill v. State*, 11 Tex. App. 456.

former procedure.¹ Where such a statutory provision exists, it will always be presumed, in favor of the regularity of the proceedings, that it was complied with in an absence of a showing to the contrary, and the record need not expressly show that such was the case.²

XXV. DISAGREEMENT AND RE-TRIAL.—The discharging of the jury because of inability to agree upon a verdict, in the trial of an indictment for homicide, is a matter almost exclusively within the discretion of the court, which will not be disturbed, except where gross abuse is clearly shown, even in a capital case; and all presumptions are in favor of the correctness of the action of the court in discharging a jury because of disagreement.³

Where the jury in a case of homicide has disagreed, and has been discharged, it is usual to continue the case until the next term of the court; but this is within the discretion of the trial court, and it is no error, even in a capital case, to proceed to a second trial before another jury at the same term of the court.⁴

XXVI. VERDICT.—1. **Time and Manner of Rendition.**—There is no prescribed time when a verdict in a homicide case must be rendered, except that it must be received at same time during the term at which the trial takes place,⁵ in open court.⁶ Unlike other proceedings, the verdict may be received and the jury discharged on Sunday; and a judgment of conviction rendered on a regular court day will not be invalidated because the verdict is found and reported on Sunday.⁷

2. **Form.**—a. **SPECIFYING THE DEGREE OF GUILT.**—On the trial of an indictment for murder in the first degree, a verdict of guilty must specify the degree of which defendant is convicted; a statement that defendant is found guilty in manner and form as charged in the indictment is not sufficient,⁸ even though the

1. A jury, in a murder case, returned a general verdict of guilty, as charged in the indictment; whereupon the court directed them orally to return and "to find" in what degree. *Held*, that this was not a change which was required to be in writing. *People v. Bonney*, 19 Cal. 426.

2. *People v. Chung*, 17 Cal. 320.

3. See *State v. Dunn*, 80 Mo. 681.

4. *State v. Allen*, 47 Conn. 121.

5. Where, in a criminal case, a judge adjourned the court at 6 P. M. until noon of the next day, which was in the next term, placing no reason for such adjournment upon the record, it was *held* that he had no right to so adjourn under the statute; therefore that the order was not a good adjournment to the next day, but only operated as an adjournment *sine die*; therefore that the verdict received on the next day from the jury out when the court adjourned, was not received during the

term and was a nullity. *Morgan v. State*, 12 Ind. 448.

6. Although the statute requires that a verdict shall be rendered in open court, it will not be set aside because received after adjournment for the night, the judge, officers of the court, defendant and his counsel being present, and defendant by his counsel having demanded the polling of the jury. *State v. McKinney*, 31 Kan. 570.

7. *Meece. Com.*, 78 Ky. 586.

8. *Dover v. State*, 75 Ala. 40; *Storey v. State*, 71 Ala. 329; *Kendall v. State*, 65 Ala. 492; *Murphy v. State*, 45 Ala. 32; *Johnson v. State*, 17 Ala. 618; *Cobia v. State*, 16 Ala. 781; *Ford v. State*, 34 Ark. 649; *Neville v. State*, 26 Ark. 614; *Trammell v. State*, 26 Ark. 534; *Allen v. State*, 26 Ark. 333; *Thompson v. State*, 26 Ark. 323; *People v. Campbell*, 40 Cal. 129; *People v. Marquis*, 15 Cal. 38; *State v. Dowd*, 19 Conn. 388; *State v. Moran*, 7 Iowa

offence is charged to have been committed by poisoning.¹

b. ASSESSING THE PUNISHMENT.—Where the law prescribes that the jury, where they return a verdict of conviction of any grade of homicide, shall assess the punishment therefor in the verdict, it is imperative that the verdict shall, clearly and specifically, and without implication or inference, specify the punishment assessed by the jury.²

c. SPECIFICALLY ACQUITTING OF HIGHER OR LOWER DEGREE.—Upon the trial of an indictment for any grade of homicide a verdict convicting the defendant of a lower grade may be sufficient without specifically acquitting of the higher degree; for a verdict of guilty of any degree or grade of homicide is always equivalent of an express acquittal of all higher grades or degrees of that offence.³ But where the verdict does specify an acquittal of the higher grade, and together with a conviction of a lower one, it will not be bad on that account, if its terms, con-

236; *State v. Huber*, 8 Kan. 447; *Ford v. State*, 12 Md. 514; *Tully v. People*, 6 Mich. 273; *State v. Upton*, 20 Mo. 397; *Parrish v. State*, 18 Neb. 405; *State v. Rover*, 10 Nev. 388; s. c., 21 Am. Rep. 745; *Parks v. State*, 3 Ohio St. 101; *Dick v. State*, 3 Ohio St. 89; *McPherson v. State*, Yerg. (Tenn.) 279; *Slaughter v. State*, 24 Tex. 410; *Armstead v. State*, 22 Tex. App. 51; *Dubose v. State*, 13 Tex. App. 418; *Krebs v. State*, 3 Tex. App. 348; *Colbath v. State*, 2 Tex. App. 391. See *Dover v. State*, 75 Ala. 40; *McGuffey v. State*, 17 Ga. 497; *State v. Potter*, 16 Kan. 80; *Com. v. Herty*, 109 Mass. 348; *State v. Ryan*, 13 Minn. 370. Compare *People v. March*, 6 Cal. 543; *Revel v. State*, 26 Ga. 275; *Kennedy v. State*, 6 Ind. 485; *State v. Weese*, 53 Iowa 92; *Bilansky v. State*, 3 Minn. 427; *Territory v. Yarberry*, 2 New Mex. 319; *Territory v. Romine*, 2 New Mex. 114; *People v. Rugg*, 98 N. Y. 537; *Buster v. State*, 42 Tex. 315; *Leschi v. Territory*, 1 Wash. Tr. 23.

Where a jury, in a case of murder in the second degree, return a verdict as follows: "We, the jury, find the defendant guilty as charged," it is not error for the court, after being informed by the jury that they intended to find the defendant guilty of murder in the second degree, to allow the verdict, with the consent of the jury, to be amended so as to read as follows: "We, the jury, find the defendant guilty of murder in the second degree, as charged in the information." *State v. Potter*, 16 Kan. 80.

1. *Kendall v. State*, 65 Ala. 492.

2. See *Veatch v. State*, 60 Ind. 291; *State v. Foster*, 36 La. An. 857; *State v. Ross*, 32 La. An. 854; *Walton v. State*, 57 Miss. 533; *Doran v. State*, 7 Tex. App. 385.

In a murder case, a verdict, "Guilty of capital punishment," cannot serve as a foundation for the sentence of death; the meaning (whether guilty with capital punishment or without) is ambiguous. *State v. Foster*, 36 La. An. 857.

Under Mississippi acts, 1875, p. 79, a jury in the trial of an indictment for a capital crime must be informed that if they find the defendant guilty, and do not declare in their verdict whether his punishment shall be death or imprisonment for life, the court will pronounce the sentence of death or their verdict will be set aside. *Walton v. State*, 57 Miss. 533.

Iowa code (McLain's Code, 1886, p. 972), providing that the jury on a trial under an indictment for murder in the first degree, must designate, in a verdict of guilty, whether the accused shall be punished by death or imprisonment for life at hard labor, is not unconstitutional and void as trenching upon the judicial powers, which, by Iowa Constitution, Art. 5, §§ 1, 5, is vested in the district and other courts. *State v. Hockett*, 70 Iowa 442; s. c., 9 Cr. L. Mag. 208.

3. See *Weighorst v. State*, 7 Md. 442; *State v. Lessing*, 16 Minn. 75; *Brooks v. State*, 3 Humph. (Tenn.) 25. Compare *State v. Flannigan*, 6 Md. 167; *Casey v. State*, 20 Neb. 138.

sidered altogether, conclusively import a conviction for such lower offence.¹

d. NAMING THE DEFENDANT.—Where the indictment is against only one person, a verdict finding the defendant guilty without naming him is usually good.²

e. SPECIFYING THE COUNT SUSTAINED.—While a verdict of guilty rendered upon the trial of an indictment which contains several counts should specify the count upon which it is rendered where the homicide is alleged to have been committed in different ways or under different circumstances, yet where all the counts are the same as to the manner of death, and, to all of the circumstances surrounding it, except as to the weapon or instrument used, the verdict need not specify upon which count the defendant is found guilty.³

f. RECOMMENDATION OF MERCY.—While it is always proper for the jury convicting a person of any high grade of homicide to incorporate in their verdict a recommendation that the mercy of the court be extended to the prisoner, where the court has a discretion in imposing the punishment, yet such a request or recommendation for mercy toward the convict is always addressed solely to the discretion of the court; and it is, therefore, not a necessary part of the record, and the court may order the verdict recorded without it;⁴ and it may be disregarded in assigning the punishment or pronouncing the sentence.⁵

g. ERRORS IN SPELLING.—It is a sound rule that the sufficiency of a verdict depends to a large degree upon its intelligibility and the clearness with which it shows the intention of the jury, and their decision convey their mind to the court; and errors in spelling which render it unintelligible, or its meaning doubtful, will be sufficient to invalidate it,⁶ but mere misspelled words which render its meaning none the less clear or certain, should not be allowed to vitiate it.⁷

1. On the trial of an information for murder in the second degree, the verdict was, "We, the jury, find the defendant not guilty in manner and form as charged in the information, but do find him guilty of manslaughter in the second degree." *Held*, that all the parts of the verdict should be considered in determining its effect, and that, so considered, it was evident that the jury only intended to acquit of the major crime in terms charged, to wit, that of murder in the second degree, and did not intend to acquit of the lesser offences, the different degrees of manslaughter included therein. *State v. Bowen*, 16 Kan. 475.

2. *Martin v. State*, 25 Ga. 494. See *State v. Conley*, 39 Me. 78; *State v. Yancey*, 3 Brev. (S. C.) L. 142. Compare *People v. Boggs*, 20 Cal. 432; *State v. Bradley*, 9 Rich. (S. C.) L. 168.

3. *Jackson v. State*, 74 Ala. 26; *Kilgore v. State*, 74 Ala. 1; *Brown v. State*, 105 Ind. 385; *Donnelly v. State*, 26 N. J. L. (2 Dutch.) 463, 601.

4. *People v. Lea*, 17 Cal. 76.

5. See *Hackett v. People*, 8 Colo. 390; *Walston v. State*, 54 Ga. 242; *Eason v. State*, 6 Baxt. (Tenn.) 431.

6. A verdict in a murder case, finding defendant guilty of murder in the "first" degree, *held*, insufficient and illegal. *Wooldridge v. State*, 13 Tex. App. 443; s. c., 44 Am. Rep. 708.

7. *State v. Ross*, 32 La. An. 854; *Walker v. State*, 13 Tex. App. 618; s. c., 44 Am. Rep. 716, note; *Krebs v. State*, 3 Tex. App. 348.

A verdict, "wee the jurors finde the defendant gilty of mrder in the first degree, and assess his confinement in the penitentiary for life," *held* sufficiently certain, though the "u" was omitted

3. Polling the Jury.—Where, on the trial of an indictment for homicide, a verdict is announced, either the prosecution or the defence may require the jury to be polled. Where this is done, it is the duty of each juror to announce his individual decision upon the question of defendant's guilt, and if it be that he is guilty, the degree of which he decides him to be guilty.¹

XXVII SENTENCE.—The proceedings to be had upon pronouncing sentence of punishment, whether capital or otherwise, against the person convicted of homicide are substantially the same as like proceedings upon conviction for other felonies. And before the sentence is pronounced he should be inquired of, if he has anything to say why judgment should not be pronounced against him for the offence of which he has been tried and convicted,² and it will be presumed, in the absence of a showing to the contrary, that this is done;³ but where it is omitted, such error will not be ground for reversing the conviction and granting a new trial, but merely for remitting the case for a new sentence.⁴

But it has been held that such an omission in pronouncing the sentence for manslaughter is of no consequence.⁵

If, after conviction, it is claimed that the prisoner is insane, the sentence must be suspended until after the question can be investigated as prescribed by law.⁶

XXVIII. NEW TRIAL.—1. **Grounds for New Trial.**—The grounds for a new trial after a conviction for homicide are, generally

from "murder" and "punishment at" before "confinement." *Walker v. State*, 13 Tex. App. 618; s. c., 44 Am. Rep. 716, note.

"We the jurors find the defendant guilty, and sess his punishment deth," however obnoxious in spelling and style, is an intelligible verdict in a murder case; but it will not support a judgment, inasmuch as it fails to show of what degree of murder the defendant is found guilty. *Krebs v. State*, 3 Tex. App. 343.

Where the law did not require that verdict in a capital case to be in writing, a verdict written "gulty without capitel parnish," but distinctly read by the clerk, "guilty without capital punishment," held to be valid. *State v. Ross*, 32 La. An. 854.

1. See *Williams v. State*, 60 Md. 402; *State v. Ostrander*, 30 Mo. 13; *Rothbauer v. State*, 22 Wis. 468.

If, when the jury is polled in a trial for murder, a juror says he thinks the prisoner is only guilty of manslaughter, but assents to a verdict for the sake of an agreement, a verdict of guilty is not a proper verdict, and a judgment entered thereon against the prisoner's objection will be reversed. *Rathbauer v. State*, 22 Wis. 468.

A verdict of guilty of murder in the second degree, having been rendered upon an indictment for murder in the first degree, and it afterwards appearing that one of the jurors assented to it as a compromise, and he refusing in open court to assent to it, according to its legal effect, as a verdict of not guilty in the first degree, the court held that there was no verdict, and that there was a mistrial. This decision was overruled on appeal. *State v. Ostrander*, 30 Mo. 13.

2. *Sarah v. State*, 28 Ga. 576; *State v. Jennings*, 24 Kan. 642; *State v. Askins*, 33 La. An. 1253; *State v. Shields*, 33 La. An. 991; *Territory v. Webb*, 2 New Mex. 147; *McCue v. Com.*, 78 Pa. St. 185; *Hamilton v. Com.*, 16 Pa. St. 129; *State v. Jefcoat*, 20 S. C. 383; *State v. Trezevant*, 20 S. C. 363; s. c., 47 Am. Rep. 840.

3. *Territory v. Webb*, 2 New Mex. 147.

4. *State v. Jennings*, 24 Kan. 642; *McCue v. Com.*, 78 Pa. St. 185; *State v. Jefcoat*, 20 S. C. 383; *State v. Trezevant*, 20 S. C. 363; s. c., 47 Am. Rep. 840. See *Sarah v. State*, 28 Ga. 576.

5. *State v. Askins*, 33 La. An. 1253; *State v. Shields*, 33 La. An. 991.

6. *State v. Vann*, 84 N. C. 722.

stated, the same as in prosecutions for other felonies, although where the punishment will be death the courts are sometimes inclined to be more lenient in the granting of subsequent trials for alleged errors. Surprise by unexpected testimony is usually no ground for a new trial.¹ Newly discovered evidence may be a ground for new trial;² but not where it could have been discovered with reasonable diligence during the trial,³ nor where it is merely cumulative,⁴ nor where it consists of affidavits to declarations of witnesses that are inconsistent with their testimony.⁵

1. The rule that surprise by unexpected testimony is no ground for a new trial, but may entitle to a postponement, applied on a trial for murder, where a medical expert witness for the defence testified contrary to expectation, and no postponement was asked nor effort made to supply the proof of insanity, etc., by other witnesses. *Webb v. State*, 9 Tex. App. 490. See *Burton v. State*, 9 Tex. App. 605.

2. *People v. Fong Ah Sing*, 70 Cal. 8; *Hamlin v. State*, 48 Conn. 92; *Fletcher v. People*, 117 Ill. 184; *Keenan v. People*, 104 Ill. 385; *State v. Redemeier*, 8 Mo. App. 1; *Territory v. Clayton*, (Mont. Tr.) 19 Pac. Rep. 293; *Casey v. State*, 20 Neb. 138; *People v. Hovey*, 30 Hun (N. Y.) 354; *Leighton v. People*, 10 Abb. (N. Y.) N. C. 261; *Strickland v. State*, 13 Tex. App. 364.

Newly discovered evidence of dying declarations rebutting those of the State in a trial for murder, and of facts showing an adequate motive for an assault by deceased on defendant. *Held*, sufficient ground for a new trial. *Strickland v. State*, 13 Tex. App. 364.

After a conviction for murder defendant discovered that one of the state's witnesses, in expectation of death, had made a statement more favorable than his testimony was to defendant. *Held*, ground for a new trial. *Fletcher v. People*, 117 Ill. 184.

Defendant testified that on the night when the murder, with which he was charged, was committed, he was in a certain freight car, many miles away. He accurately described the contents of the car, and there was some other evidence tending to corroborate his story. Government witnesses testified that his story could not be true, because the car, that night, was sealed, that there was no appearance of the seals having been tampered with, and that the car could not have been entered without the seals being so disturbed that it

would have been discovered. Defendant was found guilty. Upon a motion for a new trial, he produced the affidavits of witnesses who testified that they had recently experimented with similar seals, and had ascertained that a car so sealed could be entered so as to leave no trace. One of these witnesses had sworn otherwise upon the trial. *Held*, that defendant was entitled to a new trial. *Keenan v. People*, 104 Ill. 385.

3. See *Territory v. Clayton*, (Mont. Tr.) 19 Pac. Rep. 93; *People v. Hovey*, 30 Hun (N. Y.) 354.

New Trial—Newly Discovered Evidence.—A new trial will not be granted on the ground of newly discovered evidence which consisted in threats made by deceased against defendant, where the witness relied upon testified for the prosecution, and in the cross-examination alluded to the conversation set out in defendant's affidavits for new trial; and also where other witnesses on the trial testified to threats made by deceased against defendant. *Territory v. Clayton*, (Mont. Tr.) 19 Pac. Rep. 293.

After a conviction of murder, defendant moved for a new trial on the ground that, since the previous trial, he had learned that at the time of the homicide, and for a week afterwards, he was insane from the effects of the excessive use of intoxicating liquors. *Held*, that this could not be deemed newly discovered evidence such as might not, with the exercise of reasonable diligence, have been discovered before the trial. *People v. Hovey*, 30 Hun (N. Y.) 354.

4. *People v. Fong Ah Sing*, 70 Cal. 8; *State v. Redemeier*, 8 Mo. App. 1. See *Casey v. State*, 20 Neb. 138.

Evidence of distinct and independent facts of a different character, though tending to establish the same ground of defence, is not cumulative. *Casey v. State*, 20 Neb. 138.

5. *Leighton v. People*, 10 Abb. (N. Y.) N. C. 261.

Nor will a new trial be granted for newly discovered evidence where it is clear that on the whole case its result would necessarily be the same, notwithstanding such evidence.¹ In a capital case the fact that a prejudicial error was not excepted to will not prevent the court from granting a new trial because of its commission.²

2. Proceedings on Motion.—The motion for a new trial should usually be made at the same term at which the trial took place, but this is within the discretion of the court;³ and it is the right of the defendant that it shall be heard by the same judge or judges who conducted the trial.⁴ The court has no right to overrule the motion as of course, but should hear all the grounds urged in its support.⁵ The application must show all the grounds upon which a new trial is claimed; and if it claims on the ground of newly discovered evidence, it must state that the evidence was unknown to defendant before or during the trial, and could not have been discovered or procured by the exercise of reasonable diligence.⁶

XXIX. APPEAL AND ERROR.—1. When Allowed.—An appeal or a writ of error in a prosecution for homicide, as in other felony cases, must be obtained or allowed in the manner⁷ and within

1. Two convicts, A and B, planned an escape from prison, by the connivance of one of the guards, but both armed themselves with pistols intending to kill the night watchman, if necessary, and in the encounter which ensued, he was shot by one of them. Upon the trial, the evidence showed that A fired the fatal shot, and he was found guilty of murder in the first degree. *Held*, that he was not entitled to a new trial on the ground that newly discovered evidence showed that the shot was fired by B, as both being equally guilty, the result of a new trial would be the same, notwithstanding the newly discovered evidence. *Hamlin v. State*, 48 Conn. 92.

2. *Schelenker v. State*, 9 Neb. 300.

3. After conviction for murder, defendant moved at the same term for a new trial on the ground of the evidence being insufficient to support the verdict. The motion was overruled. At a subsequent term, a new trial was moved for, on the ground of newly discovered evidence. *Held*, that the circuit court had power to grant a new trial, though the power should be exercised with great caution. *State v. David*, 14 S. C. 428.

4. See *People v. Hobson*, 17 Cal. 424; *Ohms v. State*, 49 Wis. 415.

Where, after conviction, in a trial for murder, the motion for a new trial is

passed upon by a court composed of different members from those before whom the trial was had, and the prisoner makes no objection on this ground at the time of hearing the motion, he will be *held* to have waived his right of objection. *People v. Hobson*, 17 Cal. 424.

5. After a verdict of guilty of murder in the second degree, the court, *pro forma*, overruled a motion for a new trial. *Held*, that the supreme court would order a new trial for this alone; that the trial judge had no right to thus refuse to perform his duty, and to impose it on a court less able to perform it. *State v. Bridges*, 29 Kan. 138.

6. See *Williams v. State*, 7 Tex. App. 163.

7. A writ of error to review in the court of appeals a judgment rendered in the supreme court, on an indictment for a capital offence, cannot be issued unless allowed by a judge of the court of appeals, or justice of the supreme court, or a county judge, and such writ of error will not stay or delay the execution of such judgment, or of the sentence thereon, unless it be expressly directed in the allowance that the writ shall operate as a stay of proceedings. *Stout v. People*, 4 Park. Cr. Cas. (N. Y.) 132.

Such writ ought not to be allowed and the proceedings stayed, unless it is

the time¹ prescribed by law; but it can only be taken from a judgment of the trial court.²

2. Record and Case in Appellate Court.—As in appeals in other cases, the record upon appeal from a judgment of conviction of homicide should show the whole course of the proceedings against the defendant, from the indictment to the overruling of the motion for a new trial; and the presence of each requisite to a proper trial should be affirmatively shown. The record should be signed by the judge, and certified to the appellate court as the true record of the proceedings in the case.³

3. What Questions will be Considered.—*a. ERRORS NOT EXCEPTED TO BELOW.*—While it is the general rule in appeals from convictions from homicide as well as in all other cases, that the appellate court will not consider errors which were not made the subject of exception in the trial court,⁴ yet it is sometimes

probable an error has been committed, or unless real doubt may well be entertained as to the correctness of the decisions sought to be reviewed. *Stout v. People*, 4 Park. Cr. Cas. (N. Y.) 132.

1. Where one sentenced to death made his escape before the return-day for filing the transcript of appeal, and was captured long after the judicial day had elapsed, *held*, that the court could not allow an appeal. *State v. Butler*, 35 La. An. 392.

2. A verdict of guilty of murder and a warrant of execution do not constitute a judgment reviewable by writ of error. *Regan v. Territory*, 1 Wash. Tr. 31.

3. For requisites of the record in cases of homicide, see *Russell v. State*, 33 Ala. 366; *People v. Murback*, 64 Cal. 369; *People v. Kahl*, 18 Cal. 432; *Blackman v. State*, (Ga.) 10 Cr. L. Mag. 71; *People v. Waters*, 1 Idaho N. S. 560; *Devine v. People*, 100 Ill. 290; *State v. Meshek*, 61 Iowa 316; *Ford v. State*, 12 Md. 514; *Territory v. Clayton*, (Mont. Tr.) 19 Pac. Rep. 293; *Stephens v. People*, 4 Park. Cr. Cas. (N. Y.) 396; *State v. Christmas*, 4 Dev. & B. (N. C.) 410; *Taylor v. Com.*, 44 Pa. St. 131; *Jewell v. Com.*, 22 Pa. St. 94; *O'Connell v. State*, 18 Tex. 343; *Steagald v. State*, 22 Tex. App. 464; s. c., 9 Cr. L. Mag. 515; *Babb v. State*, 8 Tex. App. 173; *Lytte v. Territory*, 1 Wash. Tr. 435; *Shapoonmash v. U. S.*, 1 Wash. Tr. 188.

After a defendant was found guilty of murder in the second degree, his counsel abandoned him, and left the court without preparing a statement of the facts. Defendant appealed and employed another counsel; but they, not

having been present at his trial, could not prepare a statement. The prosecuting attorney refused to prepare one, and the judge on the last day of the term certified his inability to make one without the assistance of counsel. *Held*, that the judge should, under these circumstances, have exercised the power granted him by Tex. Rev. Code, arts. 1378, 1379, to authorize, by order in term time, the preparation of the statement of facts within ten days after the close of the term, and should have required the prosecuting attorney and the original counsel for the defendant, under penalty for contempt, to prepare and submit their respective statements within that period. *Babb v. State*, 8 Tex. App. 173.

The district judge should always be ready to relieve parties convicted of murder of any omission of counsel in preparing papers for the appellate court, where no fault is imputable to the prisoner, and he applies immediately upon discovery of the neglect or omission; though it should first be shown that the appeal is based upon reasonable grounds, and is not intended merely for delay. *People v. Kahl*, 18 Cal. 432.

Appeal.—After a bill of exceptions in a capital case had been settled, the judge in vacation in another county, after notice to defendant's counsel, but in his absence amended the bill, *held*, that the judge exceeded his powers, and that the amended bill should be stricken from the files. *Devine v. People*, 100 Ill. 290.

4. See *Potsdamer v. State*, 17 Fla. 895; *Millinix v. State*, 10 Ind. 5; *State v. Moran*, 7 Iowa 236; *Gavigan v.*

the rule that in a capital case an error which may have been prejudicial to defendant, may be taken on appeal, although no exception was made to it in the lower court.¹

b. ERRONEOUS ADMISSION OR REJECTION OF EVIDENCE.—On an appeal in cases of homicide, especially capital cases, it will be presumed that the erroneous admission of evidence against the accused, and from his objection,² or the erroneous rejection of evidence in his favor, or of a competent witness called by him,³ was prejudicial to him; and, therefore, a judgment will be reversed, and a new trial granted, upon due exception to such errors.

c. SUFFICIENCY AND WEIGHT OF EVIDENCE.—While the courts of appeal usually have the power to review the evidence upon which a conviction of homicide was had in the case under their consideration, yet only where the verdict appears to them to be manifestly against the weight of evidence, should they reverse the judgment and grant a new trial upon that ground.⁴ But where errors of law assumed to be injurious to the prisoner, have been committed, the mere fact that the verdict and judgment appear to be according to the merits, should not prevent a reversal and the granting of a new trial.⁵

4. Harmless Errors.—It is a general rule that in appeals from convictions of homicide, as well as other offences, the conviction will not be set aside and a new trial granted merely because of immaterial or harmless errors, which is strictly shown could not have prejudiced the defendant in any way.⁶

State, 55 Miss. 533; *Gardner v. State*, 11 Tex. App. 265.

1. See *State v. Ricks*, 32 La. An. 1098; *People v. Lyons*, 110 N. Y. 618; s. c., 10 Cr. L. Mag. 690.

In a capital case, the charge of the jury being in writing and embodied in the record, and involving a question of law, can be revised by the supreme court on an assignment of errors, although no bill of exceptions was taken to the same. *State v. Ricks*, 32 La. An. 1098.

Under laws New York, 1887, ch. 493, § 528, providing that "when a judgment is of death, the court of appeals may order a new trial if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial, whether any exceptions shall have been taken or not in the court below," a defendant cannot claim, as matter of right, the benefit of errors occurring on the trial, and not excepted to, but can only ask the court to determine upon the whole case whether or not justice requires a new trial, or whether the verdict is against law or evidence. *People v.*

Lyons, 110 N. Y. 618; s. c., 10 Cr. L. Mag. 690.

2. *Preston v. State*, 4 Tex. App. 186.

3. *Stoaks v. State*, 4 Baxt. (Tenn.) 47.

4. *Lewis v. Com.*, 81 Va. 416. See *People v. Lewis*, 36 Cal. 531; *Mitchell v. State*, 8 Yerg. (Tenn.) 514; *Giles v. State*, 23 Tex. App. 281; *Vaiden v. Com.*, 12 Gratt. (Va.) 717. Compare *Falk v. People*, 42 Ill. 331; *Hudson v. State*, 107 Ind. 372; *Holmes v. State*, 20 Tex. App. 110; *Bright v. State*, 10 Tex. App. 68.

A verdict of murder in the second degree should be set aside when the defence of insanity, although almost conclusively established, was disregarded by the jury. *Holmes v. State*, 20 Tex. App. 110.

5. *People v. Williams*, 18 Cal. 187.

6. See *People v. Daniels*, 70 Cal. 521; *People v. Bennett*, 65 Cal. 267; *People v. Wyman*, 15 Cal. 70; *Brown v. State*, 28 Ga. 199; *State v. Baldwin*, (Kan.) 9 Cr. L. Mag. 50; *State v. Burns*, 30 La. An. pt. I, 679; *Ogle v. State*, 33 Miss. 383; *State v. Payton*, 90 Mo. 220; *State v. Blunt*, 91 Mo. 503;

XXX. PUNISHMENT.—The punishment for all grades of homicide is prescribed exclusively by statute in all states for murder in the first degree, which is usually death by hanging by the neck;¹ but it is sometimes provided that the jury may commute this penalty to imprisonment for life,² or that the court may do so where, in opinion of the presiding judge, the evidence upon which the conviction is based is wholly circumstantial.³

The punishment prescribed for murder in the second degree is

Territory v. Clayton, (Mont. Tr.) 19 Pac. Rep. 293; *People v. Carpenter*, 102 N. Y. 238; *People v. Otto*, 101 N. Y. 690; *State v. Neville*, 6 Jones (N. C.) L. 423; *Mimms v. State*, 16 Ohio St. 221; *Erby v. State*, (Tex. App.) 7 S. W. Rep. 705; *Logan v. State*, 17 Tex. App. 50; *Graves v. State*, 14 Tex. App. 113.

In a prosecution for murder, the admission of evidence tending to show that defendant was a person of immoral character is without prejudice, if defendant testified substantially to the same effect. *People v. Daniels*, 70 Cal. 521.

A conviction of murder will not be set aside because a state's witness was allowed to say that another witness, while not sick in bed, was not able to attend the trial, it being apparent that no harm could have resulted to defendant from the statement, immaterial though it may have been. *Logan v. State*, 17 Tex. App. 50.

1. See *People v. Brick*, 68 Cal. 190; *People v. Majors*, 65 Cal. 138; *People v. Welch*, 49 Cal. 177; *Marshall v. State*, 74 Ga. 26; *Merritt v. State*, 52 Ga. 82; *Peri v. People*, 65 Ill. 17; *Mingia v. People*, 54 Ill. 274; *State v. Wilson*, (La.) 1 So. Rep. 418; *Com. v. Gardner*, 77 Mass. (11 Gray) 438; *Green v. State*, 55 Miss. 454; *Ratzky v. People*, 29 N. Y. 124; *State v. Kitchem*, 2 Hill (S. C.) L. 612; *Cockrum v. State*, 24 Tex. 394; *Wall v. State*, 18 Tex. 682; *Boyd v. State*, 7 Coldw. (Tenn.) 69; *Simms v. State*, 8 Tex. App. 230; *Myers v. State*, 8 Tex. App. 321; *Hunt v. State*, 7 Tex. App. 212.

But in Utah the defendant is given his choice as to which of several methods of executing the death penalty upon him shall be employed. And in New York the legislature has provided that capital punishment shall be by electricity. See N. Y. Acts 1888.

2. *People v. Brick*, 68 Cal. 190; *People v. Welch*, 49 Cal. 177; *Mingia v. People*, 54 Ill. 274.

Punishment.—If a jury agree that the

defendant is guilty of murder in the first degree, but cannot agree that punishment shall be imprisonment for life, or do not declare in their verdict that such shall be the punishment, it is the duty of the court to pronounce punishment of death. *People v. Welch*, 49 Cal. 177.

Upon the trial of an indictment for murder, the court instructed the jury that if the evidence showed defendant to be guilty of murder in the first degree, but did not show some extenuating fact or circumstance, it was their duty to find a simple verdict of guilty of murder in the first degree, and leave with the law the responsibility of fixing the punishment. *Held*, that the instruction was proper, as the discretion given the jury by the Penal Code of California, in a criminal case for murder, is not an arbitrary one, but is limited to determining which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed. *People v. Brick*, 68 Cal. 190.

3. See *Marshall v. State*, 74 Ga. 26; *Merritt v. State*, 52 Ga. 82.

The circumstantial testimony which, under the laws of Georgia, authorize the commutation of the punishment for the offence of murder from death to imprisonment in the penitentiary for life, is that which only tends to establish the issue by proof of various facts, sustaining, by their consistency, the hypothesis claimed. *Merritt v. State*, 52 Ga. 82.

Defendant having been found guilty of murder, and the jury not having recommended a lower punishment, he was sentenced to death, the judge, in passing sentence, remarking that not being of opinion that the conviction was founded solely on circumstantial evidence he did not feel justified in imposing a sentence of imprisonment for life as he would like to do. *Held*, that defendant had no ground of exception. *Marshall v. State*, 74 Ga. 26.

HOMOLOGATE—HOMOLOGATION—HONOR.

usually a term of imprisonment, at hard labor, in close confinement in a state prison or penitentiary, for a term of years.¹

Manslaughter is a felony, and the punishment therefor is usually by confinement in a state prison or penitentiary; but the term is usually much shorter than the imprisonment for murder,² and the confinement is not solitary, as sometimes prescribed for murder.³

HOMOLOGATE.—To approve; to confirm.⁴

HOMOLOGATION.—Estoppel *in pais*.⁵

HONOR.—(See **BILLS AND NOTES; DISHONOR.**) A term used in respect to commercial paper; to accept and pay when due, as to honor a bill.⁶ Especially used in the phrase

1. See *Warren v. State*, 4 Coldw. (Tenn.) 130; *Wilson v. State*, 14 Tex. App. 524; *Hunter v. State*, 8 Tex. App. 75; *Johnson v. State*, 5 Tex. App. 423.

A conviction of murder in the second degree and an assessment of punishment at thirteen years in the penitentiary, arrived at by averaging the several assessments of the jurors, who, before making them, agreed to be bound by the result, *held*, to be invalid. *Hunter v. State*, 8 Tex. App. 75.

The rule that the appellate court will not interfere with a penalty assessed by the jury within the statutory limit, merely on the ground that it is excessive, applied to an assessment at twenty-seven years in the penitentiary for murder in the second degree. *Johnson v. State*, 5 Tex. App. 423.

2. See *Gunter v. State*, (Ala.) 10 Cr. L. Mag. 428; *Brown v. State*, 34 Ark. 232; *State v. Daley*, 29 Conn. 272; *Hoss v. State*, 18 Ind. 349; *State v. Fields*, 70 Iowa 196; *State v. Fitzsimons*, 63 Iowa 356; *Conner v. Com.*, 13 Bush (Ky.) 714; *State v. Small*, 29 Minn. 216; *State v. Henderson*, 2 Dev. & B. (N. C.) L. 543; *State v. Kearney*, 1 Hawks (N. C.) L. 53; *White v. Com.*, 1 Serg. & R. (Pa.) 139; *Allan v. State*, Mart. & Yerg. (Tenn.) 294; *Keene v. State*, 3 Chand. (Wis.) 109.

Punishment.—In Kentucky, the punishment of involuntary manslaughter is not declared by the statute; that offence, is, therefore, to be punished by fine and imprisonment, which is the common-law punishment for offences for which no punishment is provided by the statute. *Conner v. Com.*, 13 Bush (Ky.) 714.

Under Alabama Code 1876, sections 4303, 4450, a verdict of the jury assessing the punishment on conviction of manslaughter at "thirty months' hard labor," authorizes a sentence of im-

prisonment in the penitentiary for thirty months. The words "hard labor" are not necessarily to be construed to import hard labor for the county, and not for the state. *Gunter v. State*, (Ala.) 10 Cr. L. Mag. 428.

On the trial of an indictment for murder, the court charged the jury, without objection from the defendant, to find him guilty of manslaughter, if they believed that he killed the deceased, and assess his punishment in the penitentiary for a period of not less than two or more than seven years. This was the punishment prescribed for voluntary manslaughter. The evidence would have warranted a verdict of guilty of either voluntary or involuntary manslaughter. The jury found defendant guilty of manslaughter, and fixed his punishment at imprisonment for two years. *Held*, in the absence of any showing that the court instructed the jury as to what punishment was prescribed for involuntary manslaughter, that the judgment should be modified, so as to reduce the imprisonment to one year, which was the punishment prescribed for involuntary manslaughter. *Brown v. State*, 34 Ark. 232.

3. *White v. Com.*, 1 Serg. & R. (Pa.) 139.

4. Used in the civil law of a confirmation of proceeding by a court of justice. *Viale's Syndics v. Gardenier*, 9 Mart. (La.) 324; *Burr. Law Dict.*; *Repalje & L. Law Dict.*

5. *Burkinshaw v. Nicholls*, L. R. 3 App. Ca. 1026; *Repalje & L. Law Dict.*

6. Thus where a consignee purchased bills and advised the consignor of their remittance, requesting him that he would "please to give them credit in exchange when the bills were duly honored," and the bills were in due

HONORARIUM—HONORARY—HORSE RAILWAYS.

"Acceptance for honor." ¹

HONORARIUM.—See ATTORNEY AND CLIENT.

HONORARY.—Without profit, fee or reward, and in consideration of the honor conferred by holding a position of responsibility and trust. ²

HOOK. ³

HORSEMANSHIP. ⁴

HORSE RAILWAYS.—See STREET RAILWAYS.

course accepted, but were not paid at maturity, it was *held* that the consignee, by his mode of treating the remitted bills, had made them his own, and judgment was for the consignor, PARK, J., saying: "The solicitor-general argues that the phrase 'duly honored' means accepted; whether it does so or not has been left to the jury, and they have found that it meant due payment; which is the opinion that I should myself have formed." *Lucas v. Growing*, 7 Taunt. 164.

1. **Acceptance for Honor.**—One who is not a party to a bill as drawer, drawee, or payee may make himself liable upon it, as a guarantor or as a surety, or may accept it "for the honor" of another party, and become an acceptor *supra protest*. 1 Rand. Com. Paper, § 4.

An agreement on the part of a stranger to pay the bill at maturity, if the drawee does not, is called an *acceptance for honor*, or an acceptance *supra protest*. 1 Randolph on Commercial Paper, § 5. See, also, II Rand. Com. Paper, § 594.

There is a peculiar kind of payment sometimes made after protest, and which is called accordingly payment *supra protest*. It is a general principle of the common law that a stranger cannot voluntarily, and without the request of another, pay his debt and acquire a right to reimbursement. But an exception is made in respect to bills of exchange, and for the benefit of trade, which is not extended even to negotiable notes. When the bill has been protested for non-payment, and not before, a stranger may pay it *for the honor* of the drawer, or acceptor (if it has been accepted), or of any indorser, or he may pay it *for the honor* of all the parties—*for honor* generally, as such a payment is termed. And such payment does not, like a simple payment of the original drawee, operate as a satisfaction of the bill, but itself transfers the holder's rights to the party paying, unless the party paying limits and nar-

rows them. If the payment is made *for the honor* of a particular indorser, the party paying may sue such indorser, and all parties prior to him whom he could have resorted to, but not subsequent indorsers, for it stands like a payment made at the request of the indorser, for whose honor it is made, and the payor *supra protest* narrows and limits his rights to recover against them only. But if he pays *for honor* of the bill generally, it is the same as payment *for the honor* of the last indorsee, and he may recover against all parties to the bill, declaring specially upon the bill, according to the custom of merchants, or generally upon a count for money paid for defendant's use. *Daniel Neg. Instr.* 1, § 1254, etc.; and cases there cited.

2. "If a recompense was to be received or a payment made, either by salary or otherwise, the office would not be honorary alone, but one of emolument also." It was resolved by a board of health that on and after June 1, 1871, "the office of engineer of this board be honorary, and that no salary be attached to that office or paid to that officer after that date." This resolution was communicated to the incumbent of the office, who had been in receipt of an annual salary. He acknowledged the receipt of the communication and expressed his gratification at being retained as "honorary engineer." It was *held* that he could not recover for his services after June 1, 1871. *Haswell v. Mayor, etc.*, of New York, 81 N. Y. 255.

3. "Hook" does not commonly or ordinarily mean "steal." The words "you hooked my geese" are not actionable. *Hays v. Mitchell*, 7 Blackf. (Ind.) 117.

4. An exhibition of feats of horses is not an exhibition of feats of horsemanship, which has reference to the riders. A corporation which maintains a driving and race-track is not liable to a tax for conducting a public exhibition of feats of horsemanship. *U. S. v. The Buffalo Park*, 16 Blatchf. (C. C.) 189.

HORSES.—(See AGISTER, ANIMALS, AUCTIONS AND AUCTIONEERS, BAILMENT, CATTLE, CARRIERS OF LIVESTOCK, GAMING, INN-KEEPER, LIVERY-STABLE KEEPER, NEGLIGENCE, SALE, WAGER.)

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1. **Definition.**—A hoofed quadruped of the *genus equus* (*E. caballus*), having one toe to each foot, a mane and a long flowing tail. It is supposed to be originally a native of Central Asia.¹ The term horse embraces generally all the classes and sexes.²

1. Webster's Dict.

2. Taylor v. State, 44 Ga. 264. *Ib.*

In an indictment for horse stealing, the animal, whether horse, mare, gelding, colt or filly, may be described as a horse, although the statute mentions the particular species and gender. *R. v. Aldridge*, 4 Cox C. C. 143.

Includes Mares.—The word "horses" may fairly be construed to include mares, as *nomen generalissimum*. *State v. Dunnivant*, 3 Brev. (S. Car.) 9; *Ware v. Juda*, 2 C. & P. 351. And proof of stealing a mare will sustain indictment for stealing a horse. *Baldwin v. People*, 1 Scram. Ill. 304. And geldings; *State v. Ingram*, 16 Kan. 14.

Embraces Mules and Asses.—Mules and asses are embraced in the terms "cattle and horses," as used in a statute requiring railroad companies to maintain fences. *Toledo, etc., R. Co. v. Cole*, 50 Ill. 185; *Ohio, etc., R. Co. v. Brubaker*, 47 Ill. 462.

Where the defendant claimed a gray mare under a bill of sale executed in February, "conveying one gray horse, also one black horse and one gray mare," and the plaintiff claimed the same mare under a bill of sale executed in May following, conveying "two horses, one a bay and the other a gray mare," and the mare was thereupon delivered to plaintiff, *held*, that the plaintiff was entitled to recover. *Miller v. Hahn*, 84 N. Car. 226. "The bill of sale to the plaintiff undertakes to convey 'two horses (one a bay and the other a gray mare)' . . . The intention evidently was (and such we think to be the legal effect of the de-

scriptive words employed) to sell the horses, one of which is a bay mare and the other a gray mare, the added description of color and sex limiting and defining the more general preceding term 'horses.' We are equally clear that the description in the defendant's bill of sale, 'one gray horse, also one black horse and one gray mare,' does not include a black or bay mare, nor can it be aided by the testimony of the defendant that the word horse is used to embrace both sexes. *Per SMITH, C. J.*, in *Miller v. Hahn*, 84 N. Car. 226.

When "Colt" is not Included in "Stallion."—A statute prohibiting stallions from running at large was not intended to apply to colts until they were of such age as to be troublesome to mares or dangerous to be at large. *Aylesworth v. Chicago, etc., R. Co.*, 30 Iowa 459.

When Includes Gelding.—Where the defendant is indicted for the killing or larceny of a "horse," and the proof shows the animal was a gelding, the evidence sustains the indictment. *Fein v. Territory*, 1 Wyoming Ter. 376; *Owens v. State*, 38 Tex. 555; *Reg. v. Aldridge*, 4 Cox C. C. 143; *Gravely v. Ford*, 2 Lord Raym. 1209; *People v. Butler*, 2 Utah 504; *Trevino v. State*, 1 Tex. App. 72.

Not Include Gelding.—Where a statute uses the word "horse," not in a generic sense, but in one of specific signification, an indictment for stealing a horse is not sustained by proof that accused stole a gelding. *Jordt v. State*, 38 Tex. 571; *Persons v. State*, 3 Tex.

2. Right to Increase of Horses.—A colt born of a mare which is held under mortgage belongs to the holder of the legal title, the mortgagee.¹

3. Auctions, Repositories and Sale-Stables.—An auctioneer is the agent of the vendor until a sale is effected. He then becomes the agent of the vendee for particular purposes. When he signs the particulars or memorandum of the sale, he signs for the vendor, and entries made by him in his books at the time of the sale bind both parties.²

App. 240; *Lunsford v. State*, 1 Tex. App. 448; *Banks v. Freedman*, 28 Tex. 644; *Valesco v. State*, 9 Tex. App. 76; *State v. Buckles*, 26 Kan. 237; *Hooker v. State*, Ohio Cond. Rep. 819; 6 *Wheeler C. L.* 38.

And proof that in the common understanding of the community the term horse includes gelding will not cure a variance between the proof and indictment. *Turley v. State*, 3 Humph. (Tenn.) 323.

Includes Ridgling.—But a "ridgling" is not a gelding, but a horse. *Brisco v. State*, 4 Tex. App. 219.

What Horses are Exempt.—The exemption of a horse from execution, under the *Texas* exemption act, includes everything absolutely essential to its beneficial enjoyment, as bridle, saddle and martingale. *Cobbs v. Coleman*, 14 Tex. 594; *Dearborn v. Phillips*, 21 Tex. 449.

The statute includes geldings, mares and mules. *Allison v. Brookshire*, 38 Tex. 199. And asses; *Richardson v. Duncan*, 2 Heisk. (Tenn.) 220.

Farm and Work Horse.—And it is not necessary to aver it to be a *farm horse*. 1 *Swan*. (Tenn.) 25.

Nor to prove the horse had been broke to gear or used in harness. *Noland v. Wickham*, 9 Ala. 169. And a stallion will be exempt as a work horse if one of the purposes for which he is kept is the use of the family in the performance of the ordinary services of a work horse, though sometimes used for other purposes. *Allman v. Gann*, 29 Ala. 240. And a colt is exempt where the debtor owns neither horses nor oxen of the statutory value. *Kennedy v. Bradbury*, 55 Me. 107. And in *Kentucky* a mare and her colt are exempt where the execution defendant is a housekeeper with a family and owns no other work beast. *Winfrey v. Zimmerman*, 8 Bush (Ky.) 587.

It has been held that a horse standing at a farrier's to be shod is exempt from

distress on the ground of public utility. *Francis v. Wyatt*, 3 Burr. 1502.

What Horses Not Exempt.—A stallion not used as a work horse on a farm, but kept for service of mares, is not exempt from execution. *Robert v. Adams*, 38 Cal. 383.

1. A colt born of a mare which is held under mortgage belongs to the holder of the legal title—the mortgagee. *Kellogg v. Lovely*, 46 Mich. 131; *Forman v. Proctor*, 9 B. Mon. (Ky.) 124. But to entitle a chattel mortgagee to the colt he must show that it was conceived prior to the date of his mortgage. *Thorpe v. Cowles*, 55 Iowa 408.

2. Oliphant on Horses 39; *Hanover on Horses* 37; *Story on Sales* 61; *Benjamin on Sales* 202; *Williams v. Millington*, 1 H. Black. 81; *Emerson v. Halis*, 2 Taunt. 38; *Mens v. Carr*, 48 Eng. L. & Eq. 358; *Eden v. Blake*, 13 M. & W. 619; *Wright v. Dannah*, 2 Camp. 203; *Farebrother v. Simmonds*, 5 B. & A. 333; *Sharman v. Brandt*, L. R., 6 Q. B. 720; *Horton v. McCarty*, 53 Me. 394; *Smith v. Arnold*, 5 Mason (U. S.) 414.

But sales made by an auctioneer not at auction are governed by the rules of ordinary sales. *Marsh v. Jelf*, 3 F. & F. 234; *Mens v. Carr*, 26 L. J. Ex. 39.

Implied Authority to Sell.—When a horse is sent to a common repository or stable for the sale of horses, an authority to sell is implied, although no authority was ever given in fact, and the owner will be bound by a sale to a *bona fide* purchaser although made without his express consent. *Pickering v. Bush*, 15 East 38; *Horton v. McCarty*, 53 Me. 394; *Pugh v. Cheseldine*, 11 Ohio 109; *Chitty on Contracts* 195.

Auctioneer's Liability for Negligence.—An auctioneer is liable for negligence in the care of property intrusted to him for unskilful management of the sale and for conversion, where by an unauthorized sale he deprives the owner

4. Soundness.—A horse is defined to be "sound" when he is free from hereditary disease, is in the possession of his natural and constitutional health, and as much of his bodily perfection as is consistent with his natural formation.¹

of his property. *Parker v. Farebrother*, 2 Weekly Rep. C. B. 370; *Torrance v. Bolton*, L. R. 8 Ch. App. 118; *Hiorst v. Bott*, L. R. 9 Ex. 86, 89; 43 L. J. Ex. 81; 30 L. T., N. S. 25; 22 W. R. 414.

In *Cochrane v. Rymill* (40 L. T. N. S. 744; 27 W. R. 776), an auctioneer was held liable for an unauthorized sale under the following circumstances: Plaintiff, by agreement, let some cabs on hire to one Peggs, who took them to defendant, an auctioneer, and obtained an advance upon them. Defendant, by P's instructions, and without any notice of plaintiff's property therein, subsequently sold them at auction, and having recouped himself for his advances, commissions, etc., handed over the balance to P. Held, that plaintiff was entitled to recover damages from defendant for a conversion of the goods, *BRAMWELL, L. J.*, in his opinion saying: "It no doubt is a very hard case for the defendant, who has acted innocently throughout in the matter; but setting aside the hardship of the case, the law applicable is quite clear. Here is Peggs, a man who is not the true owner of these goods, but appearing to act as such, but who has no power whatever to sell, takes them to defendant and gets a loan from him on them. The defendant keeps them and finally sells them in such a way as to pass the property in them to the buyers, and if that is not a conversion then I think there can be no such thing. Supposing a man were to come into an auction yard holding a horse by the bridle and to say: 'I want to sell my horse; if you will find a purchaser I will pay commission.' And the auctioneer says: 'Here is a man who wants to sell a horse, will anyone buy him?' If he then and there finds him a purchaser, and the seller himself hand over the horse, there could be no act on the part of the auctioneer that could render him liable to an action of conversion. But, looking at this case, there is a clear dealing with the property, an exercising dominion over the chattel, and a delivery of it by the defendant to another person to do what he likes with it." But where the plaintiffs were holders of a bill of sale of certain horses and harness, and the grantor took them to de-

fendant's repository, and he knowing nothing of the bill of sale sold them at auction, it was held he was not liable for a conversion. *National Mercantile Bank v. Rymill*, 44 L. T., N. S. 767. See AUCTIONS AND AUCTIONEERS, pages 977, 980.

1. *Oliphant Law of Horses* 71; *Kiddell v. Burnard*, 9 M. & W. 668; *Coates v. Stephens*, 2 M. & Rob. 157; *Elton v. Brogden*, 4 Camp. 281; *Elton v. Jordan*, 1 Stark. 127; *Bolden v. Brogden*, 2 M. & Rob. 113; *Garment v. Barrs*, 2 Esp. 673; *Joliff v. Bendell*, R. & M. 136; *Watson v. Denton*, 7 Car. & P. 85; *Holiday v. Morgan*, 28 L. J. Q. B. 9; *Kounzag v. White*, 10 Ala. 255; *Tatum v. Mohr*, 21 Ark. 349; *Thompson v. Bertrand*, 23 Ark. 730; *Burton v. Young*, 5 Harr. (Del.) 233; *Hook v. Stovall*, 21 Ga. 69; *Merrick v. Bradley*, 19 Md. 50; *Roberts v. Jenkins*, 21 N. H. 116.

CHIEF JUSTICE BEST, in *Best v. Osborne* (R. & M. 290), held that "sound" meant "perfect." "The word *sound* means what it expresses, namely, that the animal is *sound* and free from disease at the time he is warranted." *PER PARKE, B.*, in *Kiddell v. Burnard*, 9 M. & W. 670. "The word 'sound' means *sound*; and the only qualification of which it is susceptible arises from the purpose for which the warranty is given. If, for instance, a horse is purchased to be used in a given way, the word 'sound' means that the animal is useful for that purpose; and 'unsound' means that he at the time is affected with something which will have the effect of impeding that use." *PER ALDERSON, B.*, in *Kiddell v. Burnard*, 9 M. & W. 670.

LORD ELLENBOROUGH said: "A warranty of soundness is broken if the animal at the time of the sale had any infirmity upon him which rendered him less fit for present service. It is not necessary that the disorder should be permanent or incurable." *Elton v. Brogden*, 4 Camp. 281. "If a horse be afflicted with an infirmity which renders him less fit for immediate use than he otherwise would be, and less able to perform the proper and ordinary labor of a horse, it would seem but reasonable it should be regarded as un-

5. Vice.—A vice is a bad habit, and a habit to constitute a vice must either be shown by the temper of the horse so as to make him dangerous or diminish his natural usefulness, or it must be a habit decidedly injurious to his health.¹

6. Diseases Constituting Unsoundness or Vice.—Various diseases of horses which do or do not constitute unsoundness or vice are specified in alphabetical order in the notes.²

soundness." Per *Wood, J.*, in *Roberts v. Jenkins*, 21 N. H. 116; *Elton v. Jordan*, 1 Stark. N. P. 127; *Coates v. Stephens*, 2 M. & Rob. 137.

The rule as to unsoundness is that if, at the time of the sale, the horse has any disease which actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal; or, if the horse has, either from disease or accident, undergone any alteration of structure, that either does at the time or in its ordinary effects will, diminish the natural usefulness of the horse, such horse is unsound. *Parke, B.*, *Kiddell v. Burnard*, 9 M. & W. 670.

1. *Oliphant on Horses* 74; *Schollfield v. Robb*, 2 M. & Rob. 210.

The soundness or unsoundness of a horse is a question peculiarly fit for the consideration of a jury, and the court will not set aside a verdict on account of there being a preponderance of evidence the other way. *Lewis v. Peake*, 7 Taunt. 153; s. c., 2 Marsh. 43. The jury should consider whether the effect said to proceed from the alleged unsoundness is such an effect as, in the eye of the law, renders a horse unsound. It is also a question for them whether a horse warranted sound was, at the time of delivery, rendered unfit for immediate use to an ordinary person, on account of some disease. *Oliphant on Horses* 74; *Ainsley v. Brown*, New-castle Spring Assises 1845; *Whitney v. Taylor*, 54 Barb. (N. Y.) 536; *Ellis v. Loftus Iron Co.*, 31 L. T. Rep. 483; 1 So. Law Rev. (N. S.) 186. In the case of vice, the jury should consider whether the effect alleged to proceed from a certain habit is such an effect as the law holds to be a vice in a horse. *Oliphant on Horses*.

2. **Asthma.**—As there is a chronic disease present, beside an assumed predisposition to injury of the lungs, horses affected by asthma are regarded as *unsound*. *Hanover on Horses*.

Abrasions.—Very slight abrasions, though hardly perceptible and requiring but little care, are an *unsoundness* until perfectly healed. *Hanover on Horses*.

Backing and Glibbing—Balky Horse.—This is usually the result of bad breaking; when the habit has become fixed it is impossible to cure the horse of it. It is a vice. The fact that a horse on trial three or four days after purchase proved to be "balky," is evidence that he was "balky" at the time of purchase. *Finley v. Quirk*, 9 Minn. 194.

Bitting, when dangerous, is a vice. *Oliphant on Horses* 75.

Blindness constitutes *unsoundness*.

Cataract has been held to be *unsoundness*. *Higgs v. Theale*, before C. B. Pollock, Guildhall, Feb. 18, 1850.

Cloudiness of the Eye or Opacity of the Lens.—It must be shown that there was or *must have been* inflammation before time of sale to constitute breach of warranty. *Briggs v. Baker*, *Oliphant on Horses* 76.

Blood and Bog Spavin usually produce lameness, and constitute *unsoundness*.

Bone Spavin.—Bone spavin in the hock is *unsoundness* in a horse, and therefore is a breach of warranty of soundness, whether it produces lameness at the time of warranty or not, and though it may not produce lameness for years after. *Watson v. Denton*, 7 C. & P. 85.

Saddle-back, Cradle-back, Hollow-back, Low-back, denote a horse who has his back lower than in ordinary cases. Such a horse, when not so low in the bend of the back as to disable him to carry a fair amount of weight, is sound; when not so able to carry is sound as a harness horse, but as a saddle horse is *unsound*.

Roach or High-back is the reverse of low-back. When it occurs to a moderate extent only, it does not impede his work and the horse is sound; when the back is weakened he is *unsound*. When it is a positive disfigurement it is held to be a blemish.

Broken-backed, or horses *chinked in the chine*, are unsound.

Broken Knees do not constitute unsoundness, unless they interfere with the action of the joint. Oliphant on Horses 78.

Broken Wind constitutes unsoundness.

Bronchitis constitutes unsoundness.

Bleeding.—Mischievous and unexpected results following from an operation, until the orifice made by the lancet or fleam is completely healed, render a horse unsound. Hanover on Horses.

Blemishes, scars from wounds or sores, and all unsightly enlargements, whether the effects of blows, works or sprains, are blemishes. They may or may not impair a horse's value.

Bald Places, when unsightly, are *blemishes*.

Bastard Strangles or *Vices* render a horse unsound.

Bandages and **Bar-Shoes**.—If these are required to enable the horse to perform his work he is unsound.

Bearing Rein.—A sore, no matter how slight, if the result of the bearing rein, renders a horse unsound.

Bent Before.—When the fore legs of a horse are bent forward at the knee he is *unsound*, but when the deviation is slight, and he can do his proper work without inconvenience, he is sound. Hanover.

Canker and **Capped Hocks** constitute unsoundness.

Chest-founder and **Anticor** constitute *unsoundness*.

Where, in an action on a warranty of a horse, the plaintiff obtained a verdict on the ground that the horse was *chest-foundered*, the court would not grant a new trial on the grounds that there was no known disease to constitute such an unsoundness, or that the defendant was taken by surprise, although the plaintiff, on application, had refused to inform him of the cause or nature of the unsoundness. Atterbury v. Fairmanner, 8 Moore 32.

Chinked in the Chine.—See **BROKEN-BACKED** (*supra*).

Clicking.—See **OVERREACH** (*infra*).

Contraction.—Contraction of the hoof, where produced by inflammation, or accompanied by disease in the foot, or any alteration in its natural structure, though it may not cause lameness at the time of sale, yet if lameness be afterwards produced by it, is an unsoundness. Greenway v. Marshall Exr., sitting Dec. 9, 1845; Oliphant on Horses 81.

Corns, as they seldom can be permanently cured, constitute unsoundness.

Coughs and **Colds**.—In *Bolden v. Brogden* (2 M. & Rob. 114), LORD COLERIDGE held that "A mere slight cold no more constituted unsoundness in a horse than it did in a human creature," but in *Coates v. Stephens*, (2 M. & Rob. 157) the rule is laid down that a cough at the time of the sale of a horse warranted sound, is an unsoundness, and breach of the warranty, though it be afterwards cured without any permanent injury to the horse. Says LORD ELLENBOROUGH: "While a horse has a cough I say he is unsound, although that may be either temporary, or the cough may prove mortal." *Elton v. Brogden*, 4 Camp. 281; *Elton v. Jordan*, 1 Stark. 102.

No distinction can be drawn from the slightness of the disease or the facility of the cure. Of course, if the disease is slight, the unsoundness is proportionally so, and so also ought to be the damages. *Kiddell v. Burnard*, 9 M. & W. 670, 671.

Crib-biting.—Where it has not yet produced disease or alteration of structure, crib-biting is not an unsoundness, but a vice, under a warranty that a horse is "sound and free from this." *Scholifield v. Robb*, 2 M. & R. 210. It is a mere accident arising from bad management in the training of a horse, and is no more connected with unsoundness than starting and shying. Its existence in a horse will not entitle a purchaser, who bought under a general warranty, to maintain an action for the breach of it on this fault alone. *Broennenburgh v. Haycock*, Holt 630. (In this case the horse was only proved to be an *incipient* crib-biter.) But cribbing affecting the health and condition of a horse so as to render him less able to perform service and of less value, is unsoundness. *Washburn v. Cuddihy*, 8 Gray (Mass.) 430. See *Walker v. Hoisington*, 43 Vt. 608; *Dean v. Morley*, 33 Iowa 120.

Curb—Curby Hocks.—A horse with a curb is unsound, but a horse with *curby hocks* is not unsound. *Brown v. Elkington* 8 M. & W. 132; *Dickenson v. Follett*, 1 M. & Rob. 299.

Cutting arises from badness of structure, and being neither a disease nor a bad habit, cannot be pronounced a breach of warranty of *soundness* and *freedom from vice*. A horse cannot "be considered unsound in law merely from badness of shape. As long as he

was uninjured, he must be considered sound. When the injury is produced by the badness of his action, that injury constitutes the unsoundness." Per **ALDERSON, J.**, *Dickenson v. Follett*, 1 M. & Rob. 300.

Dishing.—The movements of horses which turn out their forefeet when in action. A horse having this habit may still be considered sound. *Hanover*.

Dropsy.—Dropsy of either the skin or heart constitutes unsoundness. See *Eaves v. Dixon*, 2 Taunt. 343.

Enlargements.—Enlarged glands or enlarged hocks render a horse unsound.

False Quarter, Fever or Inflammation in the Feet or Acute Founder, Farcy or Water Farcy, render a horse unsound.

Gibbing.—See **BACKING** (*supra*).

Glanders is the most formidable of all the diseases to which a horse is subject. It is described by writers fifteen hundred years ago; and it was then, and is now, not only a loathsome, but an incurable disease. The disease is infectious to beasts (*Baird v. Graham*, 14 Court of Sess. Cases (Sco.) 615). Also to man. *Oliphant Law of Horses* 89. It constitutes probably the worst kind of *unsoundness*. The moment that symptoms of glanders appear in a horse—indications of the incipency of the disease—that is, if he really have the seeds of it in him, he is unsound, although it may be some time before the disease becomes fully developed in its most offensive conditions, and it is the future history of the case which is to show whether it was the glanders or not. *Woodbury v. Robbins*, 10 Cush. (Mass.) 520. In *Regina v. Henson*, 1 Dears. C. C. 24, to bring a horse infected with the glanders into a public place to the danger of infecting the queen's subjects, is *held* to be a misdemeanor at common law.

Glaucoma is a dimness or obscurity of sight from an opacity of vitreous humor, and prevents a horse from appreciating objects, and is therefore an unsoundness. *Settle v. Garner*, Westminster, Feb. 10, 1857; *Oliphant* 90.

Grease, Grogginess, Grunting and Gutta-Serena each constitutes unsoundness.

Hereditary Diseases.—It would be no doubt a matter of great difficulty to maintain an action on a breach of warranty of soundness on the sale of a horse, on the ground of *hereditary disease* alone, but it is presumed to be just possible that if some general de-

cay of the system or such like, developing itself after sale, could be proved to be hereditary, the purchaser might have his action. *Oliphant* 92. An analogous case is found in that of *goggles* in sheep. *Jollif v. Beadell R. & M.* 136.

Kloking is a *vice* in the temper of the animal. *Schollifield v. Robb*, 2 M. & R. 210.

Harness, Quiet in.—All that "warranted quiet in harness" engages, is that the horse has been used sufficiently to prove that any coachman of tolerable ability may drive him without accident. *Hanover on Horses* 77. "If the horse was purchased to be used in harness, if the vendor said it was all right, and it was actually ungovernable in harness, though a good saddle-horse, that would be a breach of warranty." Per **PAINÉ, J.**, *Smith v. Justice*, 13 Wis. 602. See *Woodruff v. Weeks*, 28 Conn. 328.

Heels, Humors.—A horse with fleshy or cracked heels, or with humors, is unsound.

Kidney-dropping.—A kidney-dropper is worthless and unsound. *Eastman's Case*, Lambeth Police Court, Nov. 11, 1853. *Oliphant* 92.

Lameness, either temporary or permanent, is an unsoundness. *Coates v. Stephens*, 2 M. & Rob. 137; *Kiddell v. Burnard*, 8 M. & W. 670; *Elton v. Brogden*, 4 Camp. 281; *Elton v. Jordan*, 1 Stark. N. P. 127; *Garment v. Rogerson*, 2 Esp. 673.

Laminitis is such an alteration in structure as is an unsoundness. *Hall v. Rogerson*, *Oliphant Law of Horses* 468; *Smart v. Allison*, *Oliphant Law of Horses* 474.

Lampas is unsoundness only so long as it interferes with the usefulness of the animal.

Liver.—A diseased liver is an unsoundness.

Lungs.—All diseases of the lungs constitute unsoundness. *Buckingham v. Rogers*, *Oliphant Law of Horses* 479; *Hyde v. Davis*, *Oliphant Law of Horses* 477.

Legs.—Swollen legs, when proceeding from dropsy, farcy, or if of long standing, render a horse unsound. Milder forms arising from fatigue, or want of medicine, render him unsound, until cured. *Hanover Law of Horses*.

Mallenders and Sallenders, and Mange constitute unsoundness.

Navicular Joint Disease is unsoundness. *Bywater v. Richardson*, 1 A. & E. 508; *Matthews v. Parker*, *Oliphant* 471.

Nerved Horse.—A horse upon which the operation of *nerving* has been performed, is unsound. *Best v. Osborne*, R. & M. 290.

Nasal Gleet is an unsoundness.

Not Lying Down.—A horse which will seldom or never lie down in the stable has a bad habit; when decidedly injurious to his health and tending to impair his health, has a *vice*. *Olipphant Law of Horses* 96.

Ossification of the Cartilages is an unsoundness. *Simpson v. Potts*, *Olipphant* 467.

Overreaching arises from the bad formation of the horse, and is neither an unsoundness nor a *vice*. *Brown v. Elkington*, 8 M. & W. 132; *Dickenson v. Follet*, 1 M. & Rob. 299.

Poll-evil, Pummee Soles and Parotid Gland ulcerated, each is an unsoundness.

Pigeon Toed.—If the defect *impede* the horse in his labor he is unsound, but not otherwise.

Paralysis.—A horse liable to paralysis is unsound.

Quidding, so long as sore throat lasts, is unsoundness.

Quittor.—A horse with quittor is unsound.

Rat-tails, only in bad cases, could be considered unsoundness.

Rearing is a *vice*.

Rheumatism.—While subject to the return at intervals, or when it is a determined complaint of the horse, the animal is unsound; when the malady has not become a constitutional complaint, and it may be considered a permanent cure has been effected, the horse is sound. *Hanover*. In questions of unsoundness, where the disease is chronic, like rheumatism, it is not necessary to show that the symptoms existed at the time of the sale, for subsequent incidents and appearances may show that the disease existed before the sale, although the symptoms had not then been observed. *Crouch v. Culbreath*, 11 Rich. (S. Car.) L. 9.

Roaring, Rumbling.—Roaring is an unsoundness. *Onslow v. Eames*, 2 Stark. 72; *Bassett v. Collins*, 2 Camp. 522; *Quintard v. Newton*, 5 Robt. (N. Y.) 72. Rumbling is not.

Running Away or Bolting.—Such habits in a horse are vices. If caused by tendency of blood to the head, or defective vision, the horse is unsound. *Hanover*.

Rolling, when inveterate, is a *vice*.

Saddle-galls produce little tumors

called *wartles*, which, when ulcerated, are known as *siffasts*. These, if in such a situation as to prevent the putting on of saddle or harness, constitute unsoundness. *Kiddell v. Burnard*, 9 M. & W. 670. In this case *PARKER, B.* says: "If the disease were not of a nature to impede the natural usefulness of the animal for the purpose for which he is used, as, for instance, if a horse had a slight *pimple* on his skin, it would not amount to an unsoundness; but even if such a thing as a *pimple* were on some part of the body where it might have that effect, for instance, on a part which would prevent the putting a saddle or bridle on the animal, it would be different."

Sallenders and Scab constitute unsoundness.

Sand-crack is an unsoundness; but, as in the case of a *curb*, if a horse without any indication of having previously had the disease, throw out a *sand-crack* immediately after the sale, it is *no breach* of a warranty of soundness. *Olipphant*.

Shying, when confirmed, the result of playfulness, cowardice, etc., is a *vice*; when the result of defective sight, an unsoundness. *Holiday v. Morgan*, 28 L. J., Q. B. 9.

Sprain is an unsoundness.

Speedy-cut is a result of defective shape, and if the horse is sound at time of sale, lameness produced by it immediately afterwards is not a breach of warranty of soundness.

Splint.—It depends upon the situation of the bony tumor on the inside of the shank-bone, whether a splint is to be considered an unsoundness. *Olipphant*. If a splint exist at the time of sale, which is the cause of future lameness, it constitutes a breach of warranty of soundness. *Margetson v. Wright*, 1 M. & Sc. 622; *Smith v. O'Brien*, 11 L. T., N. S. 346.

Thickening of the Back Sinews is unsoundness.

A Star-gazer and Ewe-necked horse, being defects in its formation, are neither unsoundness nor *vice*.

String-halt.—There is a difference of opinion whether *string-halt* constitutes unsoundness. In *Thompson v. Patterson*, *Olipphant on Horses* 105, it was so held.

Thick Urine, when it proceeds from inflammation, is an unsoundness.

Thinness of Sole.—In *Bailey v. Forrest*, 2 C. & K. 131, the jury held it no breach of warranty of soundness, under

7. Sale of Horses.—Where there is no warranty, the rule *caveat emptor* applies, and except there be deceit either of fraudulent concealment or fraudulent misrepresentation, no action lies by the vendee against the vendor upon the sale of a horse.¹

(a) **Warranty.**—A general or express warrant is an unconditional undertaking that the horse really is what the warrantor professes it to be.²

this instruction: "The mere fact of the horse in question being thin-soled at the time of sale is not sufficient to constitute a breach of the warranty of soundness . . . unless you are of opinion that the peculiar formation had produced, at the time of sale, actual lameness."

Thoroughpin, when so large as to render it likely that lameness will ensue, constitutes unsoundness.

Thrush is an unsoundness.

Tripping is not a vice.

Vicious to Clean or Shoe.—When a horse is so restive as to be *dangerous* to clean or shoe he possesses a vice.

Wartles.—See SADDLE-GALLS.

Warts, unless they impede some natural function, are not unsoundness. *Kiddell v. Burnard*, 9 M. & W. 670.

Washby.—A horse laboring under this malady is unsound.

Weak-foot.—When it is the result of disease, is such an alteration of structure as constitutes unsoundness.

Weaving is a vice.

Wheeling and Whistling are unsoundness. *Onslow v. Eames*, 2 Stark. N. P. 72.

Wind-galls do not constitute unsoundness unless they cause lameness.

Wind sucking is a vice.

Wolf's Tooth, until removed, is an unsoundness.

Yellows, otherwise jaundice, is unsoundness. See *Olipphant on Horses*.

Diseased Horses.—See DISEASED ANIMALS, vol. 1, p. 585.

1. *Hill v. Bulls*, 2 H. & N. 304; *Osbourne v. Hart*, 23 L. T. N. S. 851; *Jones v. Bright*, 5 Bing. 553; *Parkinson v. Lee*, 2 East 323.

2. *Olipphant on Horses*.

Of Title.—In England the general rule is said to be that there is no implied warrant of title, and in the absence of fraud or express warranty, or an equivalent to it by declaration or conduct, a vendor is not liable for defect of title. *Morley v. Attenborough*, 18 L. J. Ex. 148; *Ormrod v. Huth*, 14 M. & W. 661. But the exceptions well-nigh eat up the rule. *Sims v.*

Marryat, 17 Q. B. 281; *Eicholz v. Bannister*, 11 Jur. N. S. 15.

In the United States there is always an implied contract that the vendor has the right to dispose of the article which he sells. *Whitney v. Heywood*, 2 Cush. (Mass.) 82; *Shattuck v. Green*, 104 Mass. 42; *Sargent v. Currier*, 49 N. H. 310; *Sherman v. Champlain Trans. Co.*, 13 Vt. 162; *Clayton v. Scott*, 43 Vt. 553; *Rew v. Barker*, 3 Cow. (N. Y.) 272; *Burt v. Dewey*, 40 N. Y. 283; *Sweetman v. Prince*, 62 Barb. (N. Y.) 256; *Storm v. Smith*, 43 Miss. 497; *Jones v. Edwards*, 1 Neb. 170; *Gross v. Kierski*, 41 Cal. 111; *Miller v. Van Tassel*, 24 Cal. 458; *Thurston v. Spratt*, 52 Me. 202; *Richardson v. Tipton*, 2 Bush (Ky.) 202; *Plummer v. Newdigate*, 2 Duv. (Ky.) 3; *Williamson v. Sammons*, 34 Ala. 691.

General and Express Warranty.—A general warranty is an unconditional undertaking that a horse *really* is what the warrantor *professes* it to be. *Olipphant*.

No particular form of words is necessary to constitute a warranty. See *Salmon v. Ward*, 2 C. & P. 211; *Jones v. Bright*, 3 M. & P. 173; *Randall v. Newson*, L. R., 2 Q. B. D. 102; *Wood v. Smith*, 4 C. & P. 45; *Paisly v. Freeman*, 3 T. R. 57; *Jones v. Bright*, 5 Bing. 553; *Carr v. Coleman*, 3 M. & R. 2; *Wood v. Smith*, 5 Mood. & Ry. 74; *Budd v. Fairman*, 1 M. & S. 74; *Watson v. Rowe*, 16 Vt. 525; *Richardson v. Mason*, 53 Barb. (N. Y.) 601; *Quintard v. Newton*, 5 Robt. (N. Y.) 84; *Brown v. Bigelow*, 4 Gray (Mass.) 353; *Marsh v. Webber*, 13 Minn. 109; *Randall v. Thornton*, 43 Me. 226; *Wheeler v. Reed*, 36 Ill. 81; *Colthard v. Puncheon*, 2 Dowl. & Ry. 10; *Woodruff v. Weeks*, 28 Conn. 328; *Lamme v. Gregg*, 1 Metc. (Ky.) 444; *Willard v. Stevens*, 4 Fost. (N. H.) 271; *Perrine v. Serrell*, 1 Vroom (N. J.) 454; *Hersom v. Henderson*, 1 Fost. (N. H.) 224; *Filkins v. Wyland*, 24 N. Y. 338.

Qualified Warranty.—A warranty may be qualified; as if the vendor say, "I never warrant, but he is sound as

8. Hiring Horses.—(a) Hirer's Liability.—When a horse is let out for hire for the purpose of performing a particular journey, the person letting warrants it fit and competent for such journey.¹

far as I know," an action for breach can be maintained if it can be proved that the seller *knew* the horse was unsound. *Wood v. Smith*, 4 C. & P. 45; *Pinder v. Button*, 7 L. T., N. S. 269.

Limited Warranty.—It may be limited as to time, *e.g.*, "After twenty-four hours I do not warrant." *Bywater v. Richardson*, 1 A. & E. 508; *Best v. Osbourne*, 2 C. & P. 74; *Hinchcliffe v. Barwick*, L. R. 5 Ex. Div. 177; *Chapman v. Guyther*, L. R. 1 Q. B. 463.

Special Warranty.—Seller may except some defect of which he knows, or may expressly state in what particulars only he warrants. *Jones v. Conley*, 4 B. & C. 445; *Hemming v. Parry*, 6 C. & P. 580.

In general, same rules apply to warranty and breach thereof, of horses, as to other chattels. See WARRANTY.

Patent Defects.—A general warranty does not cover *patent defects* in a horse; being such, they are obvious to the buyer, and require no skill to discover. 2 Bla. Com. 165; *Bagley v. Merrell*, Cro. Eliz. 389; *Liddard v. Kain*, 2 Bing. 183; *Southerne v. Howe*, 2 Rob. 5; *Holyday v. Morgan*, 28 L. J., Q. B. 9; *Margetson v. Wright*, 5 M. & P. 610; *Fisher v. Pollard*, 2 Head (Tenn.) 314; *Brown v. Bigelow*, 10 Allen (Mass.) 242; *Birdseye v. Frost*, 34 Barb. (N. Y.) 367; *Hill v. North*, 34 Vt. 604.

Suspected Defect.—But if the purchaser suspect a defect and wishes to examine and try the horse, but the seller objects and says he will warrant him, he is liable for the defect. *Smith v. O'Brien*, 11 L. T., N. S. 346; *Dornington v. Edwards*, 2 Rob. 188.

Purchase Without Inspection.—And where there is no opportunity of inspecting, *caveat emptor* does not apply. Year Book, 13 Hen. 4, p. 1; *Gardiner v. Gray*, 4 Camp. 145; *Jones v. Just*, L. R., 3 Q. B. 197.

Pedigree.—If a man, not knowing the age of a horse, but having a written pedigree which he received with him, sell as a horse of the age stated in the pedigree, at the same time stating he knows nothing of him but what he learned from the pedigree, he is not liable to an action when it appears that the pedigree is false. *Dunlop v. Waugh*, Peake N. P. C. 167.

1. *Chew v. Jones*, 10 L. T. 231; *Hy-*

man v. Nye, L. R., 6 Q. B. 685. The rule is the same if a particular horse be selected, as it is to be presumed all are fit for their work. *Chew v. Jones*, 10 L. T. 231. But if a horse be hired for one purpose and is used for another, and when thus used is injured, the hirer is liable for such injury. *Gapp v. Giandounti*; *Olipphant* 247, note 2. The hirer is answerable only for ordinary neglect. *Jones on Bailment* 25. The degree of care is that which a prudent man would exercise over his own horse under the same circumstances. *Cooper v. Burton*, 3 Camp. 5; *Sullivan v. Scripture*, 3 Allen (Mass.) 564; *Maynard v. Buck*, 100 Mass. 40. In action on contract the hirer may plead his infancy in bar to an action for injuries occasioned by him to a horse. *Jennings v. Randle*, 8 D. & R. 335. But where a tort, separate and independent from the contract, can be shown, he is liable. *Walley Holt*, 35 L. T., N. S. 631.

A hirer is liable if he keep the horse hired after the stipulated time, or use it differently, from his agreement.

Lucas v. Trumbull, 15 Gray (Mass.) 306; *Moore v. Larry*, 15 Gray (Mass.) 451; *Eastman v. Sanborn*, 3 Allen (Mass.) 594; *Banfield v. Whipple*, 10 Allen (Mass.) 27; *Ruggles v. Fay*, 31 Mich. 141; *Graves v. Moses*, 13 Minn. 335; *Harrington v. Snyder*, 3 Barb. (N. Y.) 380; *Collins v. Bennett*, 46 N. Y. 490; *Wentworth v. McDuffie*, 48 N. H. 402; *Cross v. Brown*, 41 N. H. 281; *Thompson v. Harlow*, 31 Ga. 348; *Murphy v. Kaufman*, 20 La. Ann. 559; *O'Brien v. Bound*, 2 Speers (S. Car.) 495; *Davis v. Garrett*, 6 Bing. 716; *Cooper v. Burton*, 3 Camp. 5.

When the horse falls lame the hirer may abandon it and notify owner, whose duty it is to send for it. *Chew v. Jones*, 10 L. T. Ex. 231.

When a horse is exhausted and has refused his food, the hirer is liable for injury sustained if he drive him further. *Bray v. Mayne*, 1 Gow. 1; *Edwards v. Carr*, 13 Gray (Mass.) 234; or if, by improperly feeding and watering him he make him sick. *Eastman v. Sanborn*, 3 Allen (Mass.) 594.

If a hired horse be taken sick on the journey agreed upon without fault of the hirer, its cure is at the expense of the owner. *Olipphant on Horses* 249.

(b) *Owner's Liability*.—The owner of a horse is liable for any accident which may befall it when used with reasonable care by the hirer.¹

9. *Borrowing Horses*.—The correlative duties and liabilities of the borrower and lender of horses cannot be explained in a few words, and are set forth in detail in the notes.²

If the hirer prescribe for it he is answerable for improper treatment, but not if he call in a farrier. *Dean v. Keats*, 3 Camp. 4. Where a horse is let on hire to be kept for a certain period, the hirer must pay for the shoeing during that time, but otherwise if a person lets his coach and horses to another for a journey to be driven by his servants. *Pothier* 107, 129; *Story on Bailments* 258. The owner can recover the full value of a horse sold by a hirer from the purchaser. *Shelly v. Ford*, 1 C. B. 672.

If, through the hirer's negligence, a horse be stolen, he is liable, but it would seem he would not be liable if he were robbed of it by highwaymen, unless his imprudence gave occasion for the robbery. *Oliphant on Horses* 250.

1. *Arbon v. Fussell*, 3 F. & F. 152; *Holmes v. Onion*, 2 C. B., N. S. 790; and see *Sutton v. Temple*, 12 M. & W. 60; *Lygo v. Newbold*, 23 L. J. Ex. 108. The owner is liable for damage inflicted through the negligent use of carriage or horses he has let for hire when driven by his servants. *Samuel v. Wright*, 5 Esp. 263; *Smith v. Lawrence*, 2 M. & R. 1; *Dean v. Branthwaite*, 5 Esp. 35; *Quarman v. Bennett*, 6 M. & W. 499; *Reading v. Menham*, 1 M. & Rob. 234; and see *Laugher v. Pointer*, 5 B. & C. 558. But the hirer is liable when the damage is occasioned by the negligence of himself or his servant; two hirers are jointly liable; but if one do not hire, but is a mere passenger, he is not liable. *Quarman v. Bennett*, 6 M. & W. 499; *Chandler v. Broughton*, 1 Cr. & M. 229; *M'Laughlin v. Prior*, 1 C. & Marsh 354; *Gregory v. Piper*, 9 B. & C. 591. But the hirer may render himself liable by agreement. *Jeffrey v. Walton*, 1 Stark. N. P. C. 267.

2. "The duties of the borrower and lender are in some degree correlative. The lender must be taken to lend for the purpose of a beneficial use by the borrower; the borrower therefore is not responsible for reasonable wear and tear; but he is for negligence, for misuse, for gross want of skill in the

use, above all for anything that may be defined as legal fraud. So, on the other hand, as the lender lends for beneficial use, he must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured. . . . Would it not be monstrous to hold that if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one ignorant of its bad qualities and conceal them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible.

. . . By the necessarily implied purpose of the loan a duty is contracted towards the borrower not to conceal from him these defects known to the lender, which may make the loan perilous or unprofitable to him." Per COLERIDGE, J., in *Blackmore v. Bristol & Exeter R. Co.*, 27 L. J., Q. B. 167; *McCarthy v. Taney*, 3 L. T., N. S. 785.

If a person borrows a horse, to be used without making compensation therefor, he is bound to a greater degree of care and diligence in its care than if it were hired. He must use extraordinary care, and is responsible for slight neglect. *Bennett v. O'Brien*, 37 Ill. 250; *Howard v. Babcock*, 21 Ill. 259; *Wilcox v. Hogan*, 5 Ind. 546; *Phillips v. Condon*, 14 Ill. 84; *Wood v. McClure*, 7 Ind. 156; *Kennedy v. Ashcraft*, 4 Bush (Ky.) 530; *Carpenter v. Branch*, 13 Vt. 161. See *Fortune v. Harris*, 6 Jones L. (N.C.) 532; *Maxwell v. Houston*, 67 N. Car. 305; *Chamberlin v. Cobb*, 32 Iowa 161; *Hunt v. Wyman*, 100 Mass. 198.

Where a person rides a horse *gratuitously* at the owner's request, he is bound to use such skill and management as he really possesses, and if he is careless or negligent he is liable, for injury done, to the owner. *Wilson v. Brett*, 11 M. & W. 113. See, also, *Grill v. General Iron Screw Colliery Co.*, L. R., 1 C. P. 612; *Beal v. South Devonshire R. Co.*, 5 H. & N. 881; *Austin v. Manchester R. Co.*, 10 C. B. 454; *Gibbin v. McMullen*, L. R., 2 P. C. 317;

10. Lien on Horses.—Various classes of persons dealing with or in horses, such, for example, as auctioneers, farriers, horse-breakers, vendors, etc., may acquire a lien upon them, and the circumstances under which such lien exists are specified in the notes.¹

Coggs v. Bernard, 2 Ld. Raym. 909; 1 Smith's Lead. Cas. (12 Am. ed.) 96.

But a more extensive use may be implied from other circumstances, as where a horse is for sale and is loaned to the proposed purchaser for the purpose of trying it, he is entitled to put a competent person on the horse to try it, and is not limited to merely trying it himself. *Lord Camogo v. Scurr*, 9 C. & P. 383.

In cases of mere gratuitous loan the use is to be deemed strictly a personal favor, and confined to the borrower. The borrower cannot allow a servant to ride the horse (*Bringlor v. Morrice*, 1 Mod. R. 210), though he might be justified in returning him to the owner by a servant. *Scranton v. Baxter*, 4 Sandf. (N. Y.) 9.

If the borrower use the horse not warranted by the terms of the loan, he is responsible. *Coggs v. Bernard*, 2 Ld. Raym. 915; 1 Sm. Lead. Cas. (12 Am. ed.) 96. Thus if a man should lend another a horse to go westward, or for a month; if the bailee go northward, or keep the horse above a month, if any accident happens to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable. *Coggs v. Bernard*, 2 Ld. Raym. 909; 1 Sm. Lead. Cas. (12 Am. ed.) 96; *Wheelock v. Wheelwright*, 5 Mass. 104.

When the borrower promises to redeliver the horse on request and the horse die before the request, the return having been rendered impossible by act of God, the borrower is discharged. *Williams v. Hill*, Palm. 548; cited in *Powell v. Salisbury*, 2 G. & J. 394.

A party who borrows a horse is bound to keep it, unless an agreement is made to the contrary. *Handford v. Palmer*, 2 B. & Bing. 359.

If the borrower of a horse will imprudently ride by a ruinous house in manifest danger of falling, and part of it actually fall on the horse's head and kill him, the lender is entitled to the price of him; but if the house were in good condition and fell by the violence of a sudden hurricane, the bailee shall be discharged. *Jones on Bailments* *68.

The borrower of a horse and carriage is liable for any injury occasioned

by his negligent driving. *Wheatley v. Patrick*, 2 M. & W. 650.

When there has been a misuse of the thing lent, as by its destruction or otherwise, there is an end of the bailment, and an action of trover is maintainable for the conversion. *Oliphant on Horses* 262; *Bryant v. Wardell*, 2 Ex. 482.

Carrying Horses.—See CARRIERS OF STOCK.

1. Seller's Lien for Price.—In *Stackfield v. Hind* (Oliphant 31), *MARTIN, B., held*, where two horses were sold and were to be kept by a third party until a cheque given in payment was cashed, that, as the cheque was dishonored, the vendor had not given up possession.

The seller's right in respect of the price is not a mere lien, which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a condition precedent on the buyer's part, and until he makes such payment or tender he has no right to the possession. *Bloxam v. Sanders*, 4 B. & C. 941.

No conditional or temporary arrangement by which the buyer gets possession of the horse will forfeit the seller's lien. *Oliphant on Horses* 31; *Story on Sales* 236; *Benjamin on Sales* 667; *Reeves v. Capper*, 5 Bing. N. C. 136.

Exchange.—In the case of an exchange of two horses for one, a delivery of one of the two would not preclude the owner's lien on the other till the delivery of the one horse for which the two were to be exchanged. *Hanson v. Meyer*, 6 East 621.

Auctioneer's Lien on Price.—An auctioneer has a lien on the price of a horse when paid for his commissions and charges, and may bring an action in his own name therefor. *Robinson v. Rutter*, 24 L. J., Q. B. 250.

Lien of Keeper of Repository.—Where the rules of a repository provide that in certain cases of dispute the horse shall be tried by an impartial person, and the expense of trial in case the horse does not answer his warranty is to fall on the seller, the keeper of the repository has a specific lien on the

11. Gifts of Horses.—In order to transfer a horse by gift, he must be actually delivered to the donee.¹

12. Sunday Dealing.—The effect of the Sunday laws upon transactions relating to horses has been considered in several cases.²

horse until such expense is paid. *Hardingham v. Allen*, 5 C. B. 797.

Inn Keeper's Lien.—See **INN KEEPER.**

Farrier's Lien.—A farrier has a lien upon a horse for his charges. *Lane v. Cotton*, 1 Salk. 18; *Scarfe v. Morgan*, 4 M. & W. 280. But only for work done at the particular time. The lien does not extend to any previous account. *Rushforth v. Hadfield*, 7 East 229.

Horse Breaker's Lien.—The horse breaker, by whose skill the horse is rendered manageable, has a lien upon him in respect of his charges, and such lien being consistent with the principles of natural equity, is favored by the law, which, in such case, is construed liberally. *Oliphant on Horses* 233; *Scarfe v. Morgan*, 4 M. & W. 283.

Trainer's Lien.—A livery stable keeper or trainer of horses has a lien for the keep and exercise of a horse sent to him for the purpose of being trained. *Bevan v. Water*, 3 C. & P. 520; *Jacobs v. Latour*, 2 M. & P. 201; *Jackson v. Cummins*, 5 M. & W. 350. And the lien extends to the labor and skill employed on a *race horse* by a trainer; but if, by usage or contract, the owner send the horse to run at any race he chooses and select the jockey, the trainer has no continuing right of possession, and consequently no lien. *Forth v. Simpson*, 13 Ad. & E., N. S. 681.

Stallion Master's Lien.—A stallion is entitled to a specific lien on the mare for the charge for covering her. *Scarfe v. Morgan*, 4 M. & W. 270.

Livery Stable Keeper's Lien.—A livery stable keeper cannot detain a horse for his *keep*, as an inn keeper may, because he is not bound to take it. *Oliphant on Horses* 238; *Barnard v. How*, 1 C. & P. 366; *Yorke v. Greenough*, 2 Ld. Raym. 867; *Francis v. Wyatt*, 3 Burr. 1498; *Parson v. Gingell*, 4 M. G. & S. 558. But he may have by special agreement, as where a mare having been placed with a livery stable keeper who advanced money to the owner, and it was agreed that she should remain as a security for the repayment of the sum advanced and for the expenses of her keep. *Held*, that the livery stable keeper had a lien on the mare. *Donaty v. Crowther*, 11 Moore 479; *Hick-*

man v. Thomas, 16 Ala. 666. And where he has such an agreement, if the owner of the horses in the possession of the livery stable keeper fraudulently take them out of his possession, he may, without force, retake the horses, and the lien will revive. *Wallace v. Woodgate*, R. & M. 193.

Agister's Lien.—An agister has no lien on horses taken to pasture on a contract at so much per head per week. *Chapman v. Allen*, Cro. Cas. 271; *Richards v. Symonds*, 8 Q. B. 93; *Jackson v. Cummings*, 5 M. & W. 342; *Bevan v. Waters*, 3 C. & P. 520; *Scarfe v. Morgan*, 4 M. & W. 283; *Judson v. Ethridge*, 1 Car. & M. 743. But where there is an agreement to that effect he has a lien. *Richards v. Symons*, 8 Q. B. 90.

1. Where the plaintiff claimed colts under a verbal gift from his father, twelve months before his death, which remained in the father's possession until his death, it was *held*, that the property in them did not pass to the plaintiff. *Irons v. Smallpiece*, 2 Barn. & Ald. 551. See **GIFTS.**

A, having a horse to sell agreed to let B have him for thirty guineas if he liked him, and that he should take him a month on trial. B took him, and at the end of a fortnight told A he liked the horse but not the price. A desired him, if he did not like the price, to return the horse. B, however, kept the horse ten days more and then returned him. A refused to receive him, and brought an action for the price. *Held*, he could not maintain it. *Ellis v. Mortimer*, 4 B. & P. 257.

2. In England, a *horse-dealer* cannot maintain an action upon a contract for the sale of a horse made by him on Sunday. He is within the statute that the tradesman, artificer, workman, etc., shall not exercise his calling upon the Lord's day, and that those so doing shall forfeit the goods sold, etc. *Fennell v. Ridler*, 5 B. & C. 406. But where neither of the parties are horse-dealers, a sale of a horse on Sunday is good. *Drury v. De la Fontaine*, 1 Taunt. 131; approved in 3 B. & C. 232. See *Smith v. Sparrow*, 4 Bing. 88.

A party cannot sue on a breach of warranty if he take it on Sunday from a

HOSPITAL.—(See BOARD OF HEALTH, HEALTH, NEGLIGENCE, NUISANCE, PHYSICIAN AND SURGEON, QUARANTINE.) A building in which the sick or infirm are received and treated; a public or private institution founded for the reception and cure, or for the refuge of persons diseased in body or mind, or disabled, and in which they are treated either at their own expense or more often by charity in whole or in part.¹

person he *knows* to be a horse-dealer; but if an innocent party brings an action for a breach of warranty given him by a horse-dealer on Sunday, the defendant cannot set up this breach of the law as a defence. *Williams v. Paul*, 6 Bing. 653. And it seems an action for negligence resulting in the wrongful injury of a horse may be prosecuted against a bailee for hire, although the contract of hiring was made on Sunday. *Harrison v. Marshall*, 4 E. D. Smith (N. Y.) 271. See SUNDAY LAWS.

Frightening Horse by Steam Whistle.—The frightening of horses by the use of steam whistles is or is not negligence, according to circumstances. *Phila. etc., R. Co., v. Stinger*, 78 Pa. St. 219; *Knight v. Goodyear Co.*, 38 Conn. 438.

Injuries to Horses.—See INJURIES TO ANIMALS, vol. i, p. 574.

Cruelty to Horses.—See CRUELTY TO ANIMALS, vol. i, p. 575.

Trespassing by Horses.—See TRESPASSING ANIMALS, vol. i, p. 576.

Vicious Horses.—See VICIOUS ANIMALS, vol. i, p. 581.

Stray and Runaway Horses.—See STRAY AND RUNAWAY HORSES AND CATTLE, vol. i, p. 587.

1. Webster's Dict. ●

By the word hospital is understood rather an institution for the relief of the sick or aged than for the maintenance and education of children. *Colchester v. Kewney*, L. R., 1 Exch. 377.

A municipal corporation is included in the words of a statute enabling "all and every person and persons" to found hospitals for the poor and to incorporate them. *Corporation of Newcastle v. Attorney-General*, 12 C. & F. 402.

Establishment of a Hospital.—The city of Richmond purchased land outside of its corporate limits and in an adjoining county, to use as the site of a smallpox hospital, in lawful pursuance of a general statute authorizing the establishment of hospitals. Before the city could use the property for which it was purchased, the legislature enacted

an amendment to the law providing that cities locating hospitals outside their corporate limits must first obtain the consent of the county court and board of supervisors. *Held*, that the purchase of the land by the city was such an establishment of the hospital on the site in question, that the city could use the property for such purpose, without hindrance, notwithstanding the enactment of the amendment. *Richmond v. Supervisors*, (Va.) 18 Am. & Eng. Corp. Cas. 520. "A municipal government establishes a hospital by purchasing a place specially for that purpose; a city council, designating and directing the purchase of a place for a hospital, and by appropriating the money of the city to pay for it, and by the payment of the money and the reception of a deed for the property or place purchased." *Richmond v. Supervisors*, (Va.) 18 Am. & Eng. Corp. Cas. 523, 524. See *Seagrave's Appeal*, now (1889) pending in Pennsylvania Supreme Court; *Sutton's Case*, 10 Co. 23a; *Wragg v. Penn.*, 94 Ill. 19; *Foster v. Boston Park Comrs.*, 133 Mass. 335—establishment of highway by order laying it out.

When a Foundation for a Hospital Presumed.—A freehold building, called Boughley Hospital, was divided into several rooms, each of the annual value of £4. Each room was separately inhabited by a bedesman, appointed under certain ordinances purporting to have been made A. D. 1597 (before Stat. 39 Eliz., ch. 5), but of which only a printed copy existed. No deed, or charter, or letters patent relating to the hospital could be found; neither was there any common seal nor any enrollment under the Stat. 39 Eliz., ch. 5. The ordinances referred to certain feoffees and their heirs, but none were known to exist. No person admitted as a bedesman had ever been known to be removed during his life, but a power of a motion was contained in the ordinances by which the hospital was governed for certain infirmities and vices specified therein. *Held*, that a legal foundation for the

hospital might be presumed not necessarily investing the bedesmen with corporate character, and that they were entitled to an equitable estate of freehold in their respective rooms. *Simpson v. Wilkinson*, 1 Lutch App. Cas. 168.

Right of Presentation to Living.—When a hospital for the relief of poor, needy and impotent people is duly incorporated, and consists of a master and twelve poor brethren, and the advowson of a living is conveyed to them, to hold to the use of the master and brethren and their successors forever, the right to nominate to the living belongs to the majority of the entire body of master and brethren, and the master's concurrence in the act of the majority is not necessary. *Reg v. Kendall*, 4 P. & D. 603; 1 Q. B. 366.

Right to Remove Physician.—In an action brought by the plaintiff, a doctor, who had been appointed by the committee of a hospital, pursuant to the charity deed by which the hospital had been founded, to be its resident medical superintendent, to obtain a declaration that he was entitled to hold and execute such office during his good behavior, the court was moved that an injunction might be granted to him restraining defendants from disturbing him in his office, from ejecting him from his residence in the hospital, from suspending the work of the hospital, and from otherwise interfering with his tenure and execution of his office. It appeared, by the rules made in pursuance of the trust deed under which the hospital was constituted, power was given for the committee to remove the resident medical superintendent by written notice of three months, on proof to them of certain acts, none of which, it was suggested, the plaintiff had committed; but, as the committee had come to the conclusion that the funds of the hospital were not sufficient to support a resident medical superintendent, they had given the plaintiff three months' notice to leave, after he had spent £400 on his residence in the hospital. The defendant, however, took the preliminary objection that the plaintiff, before commencing his action, had not obtained the sanction of the charity commissioners, which was required by the charitable trusts act, 1853. *Held*, that the objection was fatal to the plaintiff's case, as he was not claiming adversely to the trust, but under it, and that the motion must be

refused. *Benthall v. Kilmorey*, 49 L. T., N. S. 127; affirmed 25 L. R. Ch. Div. 139. See *Brittain v. Overton*, 25 L. R. Ch. Div. 41.

Liability of Subscribers and Supporters.—The subscribers who attend a committee for managing the concerns of a hospital are liable to the creditors of the hospital; the proper question for the consideration of a jury is whether the defendant has so acted as to induce the plaintiff to believe he was to look to the defendant and other members of the committee for payment. *Burl v. Smith*, 5 M. & P. 735; 7 Bing. 705.

If a builder does work at an intended hospital on the order of the physician and surgeon, they being announced to deliver lectures there, and being members of the provisional committee, such builder is not bound to look solely to the funds of the hospital for payment, but may sue the persons who gave the orders, unless he was distinctly informed that the dealing was to be on the terms of looking for payment to the funds of the hospital only. *Pink v. Scudamon*, 5 C. & P. 71.

Exemption from Taxation.—As to what property is exempt from taxation under statute exempting from State, county or municipal taxation, "hospitals or asylums . . . so far as used for the benefit of the indigent and afflicted, and the ground which the buildings used as such hospitals . . . actually cover, and the equipments owned by such corporations and institutions," see *Appeal Tax Court v. St. Peter's Beadency et al.*, 50 Md. 321.

As to exemption under acts of parliament, see *Colchester v. Kewney*, 1 L. R. Exch. 368; 2 L. R., Exch. 204; *Rabbits v. Cox*, 26 L. J., Q. B. Div. 498; 25 W. R. 594; *Cox v. Rabbits*, 3 L. R., App. Cas. 493; *Wilson v. Fassen*, 48 J. P. 361.

Torts of Hospitals.—"It is universally conceded that infancy, insanity, infirmity and helpless poverty have a claim upon the protecting care of the State. Corporate trustees, instituted for the purpose of extending such care, on a principle of charity, and administering funds contributed for that object from the public treasury or by private bounty, without the expectation or right on their part to receive compensation for their own benefit, having no capital stock and no provision for making dividends or profits, are public servants; having exercised due care in the selection of their agents, they are

not liable as a corporation for the negligence of such agents in the line of their employment, resulting in an injury to another. Their funds are not to be diminished by such casualties, it is *held*, unless a contrary legislative intention can be gathered from the statute. The rule will not apply, of course, to a private corporation exercising a public function or engaged in a work of charity, if its operations are carried on for the private gain of its members. It is not the object alone of a corporation which makes it charitable, within the meaning of the rule; it is the mode in which that object is sought to be obtained, as well as the purpose for which it is pursued." 1 Shear. & Redf. on Negligence, § 331. See *Patrol v. Boyd*, 22 W. N. (Pa.) 248.

In *Massachusetts*, it has been *held* that a corporation established for the maintenance of a public charitable hospital, which has exercised due care in the selection of its agents, is not liable for injury to a patient caused by their negligence, nor for the unauthorized assumption of one of the hospital attendants to act as a surgeon. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432.

In this case the court says: "Where actions have been brought against commissioners of public works serving gratuitously, for negligence in carrying on the work by which injury has occurred, it has been *held* they were not liable if proper care had been used by them in selecting those who were actually to perform the work. *Holliday v. St. Leonards*, 11 C. B. (N. S.) 192. The liability of the defendant corporation can extend no further than this: if there has been no neglect on the part of those who administer the trust and control its management, and if due care has been used by them in the selection of their inferior agents, even if injury has occurred by the negligence of such agents, it cannot be made responsible. The funds intrusted to it are not to be diminished by such casualties if those immediately controlling them have done their whole duty in reference to those who have sought to obtain the benefit of them. There was no attempt to show that the trustees had in, any respect, failed in the performance of their duty. If they had made suitable regulations, had selected proper persons to fill the positions of surgeons, then, whether those persons neglected to perform their duty, or

whether another person, as the house pupil, not selected for the office of surgeon, assumed, without authority, to act as such, and injury has thus resulted, the plaintiff has no remedy against the corporation."

In *Rhode Island*, however, it was *held* that a hospital (a public charity), in the absence of legislative provision granting exemption from liability, was not exempt from liability for injuries caused by the unskillfulness and negligence of a surgical interne, a house officer of the hospital, or for reasons of public policy; that if an incompetent interne was appointed by the negligence of the managers of the hospital, the hospital was responsible for the results of such negligence and the incompetency of the interne; that, although the attendant physicians and surgeons could not be considered the servants of the hospital, yet the hospital was responsible for the exercise of reasonable care in selecting them; that when the hospital rules required the interne to summon an attendant surgeon, the interne was the agent of the hospital for this purpose, and the hospital was liable for his omission or negligence. *Glavin v. Rhode Island Hospital*, 12 R. I. 411.

"The cases are strikingly similar. In both, the defendant, in its corporate capacity, exercised a public charity. In both, the surgeons acted gratuitously. In both, the resources of the defendant came from endowments and contributions. In both, the plaintiff was not benefited by the charity conferred. In both, the plaintiff paid nothing for the surgical and medical attendance rendered. In both, the plaintiff desired a regular visiting surgeon in the first instance. In one case, the plaintiff when received was treated by the house pupil, in the other by the hospital interne." See 20 Am. Law Rev. 641, *et seq.*

See *Boyd v. Ins. Patrol*, 113 Pa. St. Rep. 269; s. c., 22 Weekly Notes Cases, (Pa.) 248; *Richmond v. Long*, 17 Gratt. (Va.) 375.

Negligence of Superintendent.—No action can be maintained against the trustees of a hospital, incorporated by statute (if the trustees are regarded as trustees of a public charity), by a person who has entered the hospital building on business, for personal injuries occasioned by reason of the unsafe condition of the covering of stairs over which he is passing in leaving the build-

Relations of Municipal Corporations to Hospitals.—The provision of hospitals for the indigent sick is within the police power of cities.¹

ing, although such condition is caused by the negligence of the superintendent of the hospital. *Benton v. Trustees, etc.*, 140 Mass. 13; 12 Am. & Eng. Corp. Cases 625.

Liability for Damages for Refusal to Admit Qualified Applicant.—Where the trustees of a hospital founded and erected for the education and maintenance, relief, bringing up and education of fatherless boys, refused to admit the plaintiff, who possessed the requisite qualifications, it was *held* that an action for damages therefor against the trustees would not lie. *Fooffees of Heriot's Hospital v. Ross*, 12 Cl. & Fin. 507. LORD CAMPBELL said: "It seems to have been thought that if charity trustees are guilty of a breach of trust, the persons damnified thereby have a right to be indemnified out of the trust funds. That is contrary to all reason and justice and common sense. Such a perversion of the intention of the donor would lead to most inconvenient consequences. The trustees would in that case be indemnified against the consequences of their own misconduct, and the real object of the charity would be defeated. . . . Damages are to be paid from the pocket of the wrong-doer, not from a trust fund."

Nuisance.—A hospital for the reception and treatment of patients with contagious diseases may be a public nuisance, and indictable as such. *Wood on Nuisances*, § 67.

In *Baines v. Baker* (Ambler 158) an injunction to restrain the erection of a building very near the houses of tenants of the plaintiff in *Coldbath Fields*, to be used as a hospital for the reception of persons ill of the smallpox, and also for the reception of persons to be inoculated there, was refused. The LORD CHANCELLOR said it was "a charity like to prove of great advantage to mankind; such an hospital must not be far from town, because those that are attacked with that disorder in a natural way may not be in a condition to be carried far." In 3 Atk. 750, LORD HARDWICKE says "that the fears of mankind, though they may be reasonable ones, will not create a nuisance." "Notwithstanding these authorities, I do not think a court of chancery would now hesitate a moment in granting an injunction to stay the erection of a

hospital . . . in the neighborhood of a town, and near to dwelling houses, and on the ground of the reasonable fears and apprehensions such erections usually excite." Per WILLIAMSON, Ch., in *Wolcott v. Melick*, 3 Stockt. (N. J.) 209.

Where the appellants, a body duly constituted under the Metropolitan Poor Act 1867, pursuant to an order of the local government board, and under the powers given them by that act, built a hospital which they used for the reception of persons suffering from smallpox and other infectious diseases, the respondents, who were the owners and occupiers of land adjacent to the hospital, brought an action against the appellants, alleging that the hospital was so conducted as to be a nuisance to them, and the jury found that it was so in fact. *Held*, that as the act did not authorize any interference with private rights, nor necessarily require anything to be done under it which might not be done without causing a nuisance, the fact that the appellants had acted *bona fide* in discharge of their duties under the act, and in pursuance of the orders of the local government board, was no defence to the action." *Metropolitan Asylum District v. Hill*, 44 L. T. R. (N.S.) 653; 6 L. R., App. Cas. 193. See *Rex v. Burnett*, 4 M. & S. 73; *King v. Burnett*, 4 M. & S. 272; *Rex v. Sutton*, 4 Burr. 2116; 25 Sol. Jour. & Rep. 618.

1. *Vivnet v. First Municipality*, 4 La. Ann. 43; 1 Black Com. 131, 360.

Where a municipal corporation was authorized in general terms to elect a city physician, establish a city infirmary, provide for the indigent, and make all necessary contracts and agreements for the benefit of the city, and there was no infirmary for the city, *held*, that it was competent for the corporation to contract for the care and maintenance of the indigent sick at a private hospital. *Tucker v. Mayor*, 4 Nev. 20.

Where a municipality has authority to alter or repeal an ordinance prohibiting the establishment of any private hospital within the city, it may, without repealing that ordinance, grant permission to one or more individuals to erect a hospital within the limits of the city. *Bozant v. Campbell*, 9 Rob. (La.) 411.

HOTCHPOT.—(See **ADVANCEMENTS**). This word *hotchpot* is generally understood to signify mixing and blending together, and conveys much the same idea as the words *collatio bonorum*, which, in the civil law, is answerable to the word *hotchpot*, and signifies that if a child advanced by the father doth, after his father's decease, challenge a child's part with the rest, he must cast in all that he had formerly received, and then take out an equal share with the others.¹ As to *lands*, it only applies to such as are given in frank-marriage, thus: if one daughter have an estate given with her in frank-marriage by her ancestor, then, if lands descend from the same ancestor to her and her sister in fee simple (not in fee tail), she or her heirs shall have no share in them unless they will agree to divide the lands so given in frank-marriage, in equal proportions with the rest of the lands descending, *i. e.*, bringing her lands so given into hotchpot.² The chief use of the term in the American cases is in the law of advancement, where the shares of several children in the father's estate are adjusted by charging each child who has received anything by way of advancement with the value of the thing advanced

No action can be maintained against a city or town for the unlawful acts of its health committee or other officers in taking possession of a house and using it for a smallpox hospital without the consent of the owner, and without legal authority. *Lynde v. City of Rockland*, 66 Me. 309; *Spring v. Inhabitants of Hyde Park*, 137 Mass. 554; 5 Am. & Eng. Corp. Cases 356.

Where a vessel is subject to quarantine regulations the officers of a town are not authorized to appropriate any part thereof for a hospital, or to exclude the owner from the possession or control of any part of the vessel. *Mitchell v. Rockland*, 45 Me. 496; s. c., 41 Me. 363. And the consent of the owners of the vessel to the appropriation of it for a hospital, by the health officers of the town, does not render the town liable for any injuries caused by the negligence of such officers, while they are in possession. *Mitchell v. City of Rockland*, 52 Me. 118.

A municipal corporation is liable on an implied *assumpsit* when it avails itself of services and property of the plaintiff in the care and treatment of its indigent sick in a hospital. *Nashville v. Toney*, 10 Lea (Tenn.) 643; s. c., 4 Am. & Eng. Corp. Cases 400; *Aull v. Lexington*, 18 Mo. 401.

The placing of hospital property (which belongs to the State) under the direction and control of a board of managers, merely constitutes them "managers" of the property, and does

not divest the State of its proprietary rights. *Baltimore County v. Maryland Hospital for Insane*, 62 Md. 127; s. c., 7 Eng. & Am. Corp. Cases 300.

Authority of Those Conducting a Hospital Must be Shown.—In an action against a temperance corporation to recover for medicines furnished to a hospital upon the request of the alleged agent of the defendant, the plaintiff must show that the defendant was authorized by its charter to conduct a hospital. *Woman's Christian Temperance Union v. Taylor*, 8 Colo. 75; s. c., 6 Eng. & Am. Corp. Cases 259.

As to whether a patient, removed against his will to a hospital for infectious diseases, has a right to exercise the privilege to have his family physician attend him, see *Osland v. Porter*, (Dak.) 11 Am. & Eng. Corp. Cases 330, 331.

Liability of Patient of Hospital for Services Rendered by Physician.—Simply removing a person affected with smallpox, who is not in indigent circumstances, to a county pest-house by order of the county commissioners, will not render him a pauper, and he may be held liable for medicines and medical attendance furnished by a physician who was employed by the county to attend paupers, where he accepts such services without objections and receives the benefit thereof. *Osland v. Porter*, (Dak.) 11 Am. & Eng. Corp. Cases 327.

1. Lovelass on Wills 67.

2. Whart. Law Lex.

(not, however, with interest or profits), and giving him credit for his proper share of the whole estate, reckoning these charges as assets.¹ The true intention of the law is that the estate of the ancestor is to be considered as a common fund, out of which each child is to draw, at the death, an equal proportion. That part of the estate which has been given is to be estimated at what it is worth at the death, relation being had to its situation at the time of the gift.² A similar provision appears in the English Statute of Distributions, 22 & 23 Car. II, ch. 10.³

An appointee under a marriage settlement being entitled to share also in the unappointed fund, the inequality thus caused has been usually prevented by inserting what is termed the hotchpot clause, by the operation of which no child taking under an appointment can claim a share of the unappointed fund without bringing his appointed share into the common stock, a division of which is then made between the children equally. The appointee is not bound to do this unless he claims a part of the unappointed fund; but he may elect to keep his appointed share and give up his right to any unappointed part of the fund. The hotchpot clause is founded upon the same principle as the provision relating to hotchpot in the Statute of Distributions.⁴

HOTEL.—(See INNS AND INN-KEEPERS.) An inn.⁵

1. Abb. L. Dict. This applies to a total intestacy only. *Thompson v. Carmichael*, 3 Sand. Ch. (N. Y.) 120; *Walton v. Walton*, 14 Ves. 324.

2. *M'Caw v. Blewit*, 2 McCord Ch. (S. C.) 104.

3. 2 Bl. Com. 517.

4. *Wats. Comp.*, Eq. 583-4.

5. *Cromwell v. Stephens*, 2 Daly (N. Y.) 15; s. c., 3 Abb. Pr., N. S. (N. Y.) 26; *People v. Jones*, 54 Barb. (N. Y.) 311; *St. Louis v. Siegrist*, 46 Mo. 594.

In English Bankrupt Law.—In interpreting this law to whose benefits the keepers of hotels are, among others, entitled, *TINDAL, C. J.*, said: "It is evident that the word *hotel* is not used in the sense of the old word *hostel*, for that means what is now termed an inn; and as the word *inn* immediately precedes it (in the act), it could scarcely have been intended to designate the same thing by both. The modern word is introduced from the French, and rather implies a house to which people resort for lodging, than for the sort of entertainment which is to be procured only at an inn. . . I told the jury that if Mrs. R. sought her livelihood by a profit on the provisions she furnished to her guests, she must be deemed an hotel-keeper within the meaning of the bankrupt law. . .

It has been contended that I should have directed them to consider whether the profit to be derived from letting lodgings was the principal object of Mrs. R's business, and the profits from provisions only accessory; or whether the profit from supplying provisions was the principal object of her business. But that distinction is not quite correct, for it would exclude the keepers of many public hotels which are frequented by persons who require only lodging of the hotel-keeper and obtain board elsewhere." The woman who was here adjudged to be the keeper of a hotel gained a livelihood by letting lodgings to families and single men for long or short periods, and who, if required, found and cooked provisions for them, charging more than she paid, but keeping the provisions separately for the individuals for whom they were procured, and not having any general stock of her own. There might have been a doubt if she had received only lodgers, but as the house was open to all comers, and all who frequented it were to some extent supplied with provisions, the house was unquestionably a hotel. *Smith v. Scott*, 9 Bing. 14; *King v. Simmonds*, 1 H. L. Ca. 754. It makes no difference that only a particular class of people are received in the house, as invalids, to whom the

HOUSE.—(See ARSON, BAWDY HOUSE, BURGLARY, CURTILAGE, DISORDERLY HOUSE, DWELLING, MESSUAGE, PLACE.) A building, all parts of which communicate internally, but the word generally means a building intended and used as a habitation for

services of nursing are furnished. A keeper of a lodging house, who supplies board, is a hotel-keeper. *Ex parte* Thorne, *In re* Jones, 3 Ch. D. 457; *Gibson v. King*, 1 Car. & M. 458. But a lodging house keeper, who does not supply board, is not. *Ex parte* Bowers, 3 Mont. & A. 33.

In America.—A cheap lodging house, where the lodgers are not supplied with food, and to which no bar or place of entertainment is connected, except a restaurant in the basement of the building, for which a separate water-rent is paid, is not a hotel within the meaning of an ordinance providing that hotels and boarding houses may be charged an extra rate of water-rent. "It is to be deduced," said DALY, F. J., "from the origin and history of the word, and the exposition that has been given of it by English and America lexicographers, that a hotel in this country is what in France was known as a *hostellerie*, and in England as a common inn, of the superior class found in cities and large towns. . . . An inn is a house where all who conduct themselves properly, and who are able and ready to pay for their entertainment, are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay, or as to the rate of compensation, are, while there, supplied at a reasonable charge, with their meals, their lodging and such services and attention as are necessarily incident to the use of the house as a temporary house. This, as accurately as I am able to state it, is the legal definition of an inn, and this is exactly what is understood in this country by hotel. It is customary, especially in our cities, to let out furnished apartments in houses, by the week or by the month, without meals or with breakfast simply; but we do not as the French do, call such houses hotels, but merely lodging houses. We have in the cities houses of entertainment, in which the guest or traveller pays so much per day for his room, and takes his meals or not, as he thinks proper, in the restaurant, paying separately for each meal as he takes it. Where the restaurant forms a part of

the establishment, and the house is kept under one general management for the reception of all travellers or guests that may come, it is an inn, there being no material difference between it and the Elizabethan inn, in which the traveller paid separately for his apartment and for each meal. It differs from a boarding house for the reason that all who come are received, and because the guest engages for no specific time, but pays only for the time that he is there." *Cromwell v. Stephens*, 2 Daly (N. Y.) 15; s. c., 3 Abb. Pr., N. S. (N. Y.) 26.

Under an act prohibiting the granting of a liquor license to any person unless he proposes to keep "an inn, tavern or hotel," a mere drinking saloon is not within these terms. They "are used synonymously to designate what is ordinarily and popularly known as an inn or tavern, a place for the entertainment of travellers, and where all their wants can be supplied. . . . A 'hotel' is an inn, or house for entertaining strangers or travellers." *People v. Jones*, 54 Barb. (N. Y.) 311; and see *In re* Liquor Licenses, 4 Mont. Co. L. R. (Pa.) 79.

Tavern, hotel and public-house are synonymous. *St. Louis v. Siegrist*, 46 Mo. 594.

Family Hotel.—A family hotel, where rooms not designed to accommodate transient or casual guests, are taken by families or individuals for some certain period, the cooking being done for all by the proprietor, and the meals served in the hotel dining-room or in the apartments; such a hotel is not a tenement house within the meaning of a building restriction. *Musgrave v. Sherwood*, 54 How. Pr. (N. Y.) 338.

Hotel Bill.—A guaranty to be responsible for H's hotel bill covers board and lodging, but not cigars, liquors and billiards. A person keeping a house for the entertainment of travellers, with board and lodging, is an hotel keeper, and as such is under an obligation to furnish guests with board and lodging, and only such articles as he is obliged to furnish are proper items of a hotel bill. *Patterson v. Gage*, (Colo.) 16 Pac. R. 560.

shelter for animals, and is frequently confined to buildings intended for the habitation of men.¹ The message and appur-

1. "A house in a general sense means a building or shed intended or used as a habitation or shelter for animals of any kind, but appropriately a building or edifice for the habitation of man, a dwelling place, a mansion or abode for any of the human species." WEBSTER, quoted in *Schenck v. Campbell*, 11 Abb. Pr. (N. Y.) 292. The first part only of this definition was adopted in *Com. v. Lambrecht*, 3 Pa. C. C. R. 323, where it was said that "building," though not "property," might be substituted for "house" in pleading.

The word in a burglary statute, where the expression used was dwelling house or any other house whatsoever, was held, in *People v. Hickman*, 34 Cal. 242, to include every kind of building or structure "housed in" or roofed, regardless of the fact whether they are or ever have been inhabited; any structure which has walls on all sides and is covered by a roof.

"The word 'house' does not mean, it seems to me, necessarily a mere dwelling house, or a house only used, or exclusively or principally used, for a residence; the word 'house' includes a shop, or may consist of a shop." BRETT, L. J., in *Richards v. Swansea*, 1. & T. Co., 9 Ch. D. 425.

In the application of these various definitions and descriptions, the courts have adjudged the following to be houses: A dwelling house, used as a warehouse and workshop, within the meaning of an act prescribing suffrage qualifications. *Daniel v. Coulsting*, 7 M. & G. 122. A church, within an act giving a municipal corporation power to prescribe the line upon which a house shall be erected. *Corp. of Folkestone v. Woodward*, L. R., 15 Eq. 159; likewise, within a paving rate act, where the word is said to include all lands on which there is a building which may be used for the habitation of man. *Wright v. Ingle*, 55 L. J. R. M. C. 17. A chapel, within a statute providing for contribution towards the opening of a street. *Caiger v. St. Mary's*, 50 L. J. R. M. C. 59. A school-house, in an arson act. *Wallace v. Young*, 5 L. B. Monroe 155.

Under an act providing for the punishment of theft from a house, which was not burglary, a smoke house is a house. *Irvin v. State*, 37 Tex. 412. But

a tent is not. *Callahan v. State*, 41 Tex. 43.

A booth-theatre, which is taken to pieces and carried from place to place, is not a "house or other place of public resort for the public performance of stage plays," within an act forbidding performances in unlicensed houses. *Davys v. Douglas*, 4 H. & W. 180. Nor is an uninclosed and uncovered platform erected in a park, upon which the sale of liquor is conducted, a house, within the meaning of a Sunday law. *State v. Barr*, 39 Conn. 40.

"House" is held to be synonymous with "dwelling house" in the following cases: In a covenant not to build more than two houses on a piece of ground. *Schenck v. Campbell*, 11 Abb. Pr. (N. Y.) 292. In an act empowering owners and occupiers of houses to call on a water company to introduce water therein. *Cooke v. New River Co.*, 57 L. T., N. S. 228. In a statute charging the support of a rector upon the houses of inhabitants of the parish. *Surman v. Darley*, 14 M. & W. 181.

A mill is not a house, within the meaning of an act making the inhabitants of the hundred liable for the burning of houses from setting fire to the same. *Hiles v. Shrewsbury*, 3 East 457. Nor is an unfinished dwelling a house, within the same act. *Elsmore v. Inhabitants of St. Briavells*, 8 B. & C. 461; s. c., 2 Man. & R. 514. But a lot upon which piles are driven for the foundation of a church, being the only land so held and devoted in good faith to the erection of the church, is a house of public worship, so as to be exempt as such from taxation. *Trinity Church v. Boston*, 118 Mass. 164.

A house originally entire may become several distinct houses by dividing it into distinctive partitions, and allotting them distinct avenues, so that the inhabitants have no communication with each other. *Tracy v. Talbot*, 6 M. & S. 214.

A part of a building is not a house, within the meaning of an act prescribing the qualifications of electors. *Cooke v. Humber*, 11 C. B., N. S. 33; *Wilson v. Roberts*, 11 C. B., N. S. 50, unless there be independent occupation and actual severance from the rest. *Henrette v. Booth*, 15 C. B., N. S. 500. Under the same act a dwelling in the up-

per stories of a building, the lower part of which was used for a stable, was *held* to be a house. *Nunn v. Denton*, 7 M. & G. 65.

A portion of the basement of a building, separated from the rest by a party wall, having no interior communication with the rest of the building, and used as a bank, is a house within an inhabited house duty act. "A fair definition of the term is given in the books on criminal law, namely, 'a permanent building in which the renter or owner and his family dwell and lie.' . . . It must not be a mere inclosed ground, or any tent or booth, as in a market or fair, but a permanent building; and it is laid down in the authorities that a room or lodging in a private house may be the mansion, for the time, of the lodger, if the owner doth not himself dwell in the house, or if he or his lodger enter by different doors. . . . Suppose it had stood alone; suppose there had been a single room with a basement below, and with substantial walls round it, and with a door opening to the street; and suppose a man lived and carried on his business there; how could it be said that it was not a house? Then, if that be so, why is it the less a house because the owner has thought fit to allow an adjoining house to be built over it." *Chapman v. Royal Bank of Scotland*, 7 Q. B. D. 136; s. c., 58 L. J. R., Q. B. D. 670.

As one building may contain more than one house, so several buildings may constitute one house. But they must be so structurally made or placed that they may be held and enjoyed as one house. *Richards v. Swansea, I. & T. Co.*, 9 Ch. D. 425.

Two houses, by the establishment of internal communication, became one house, within the meaning of a building restriction, having been so treated by a branch of the municipal government. *Snow v. Whitehead*, 53 L. J. R., Ch. D. 885.

A series of buildings, all communicating internally, composed of a dwelling, shop, office, candle manufactory and store, bread store, flour store, bake house, mill, engine house, stables, five cottages, four used as dwellings and one as a store house, is one house, within a requirement that a railroad company desiring a part of a house should take the whole if called upon to do so by the owner. The structure was continuous, and if used for a common purpose, was a house. "Unless" said

JAMES, L. J., "we are to start with a proposition that a house ceases to be a house, either partly or partially, because a part of it is used for the purpose of business, this is as much a house as if it had been originally built in the exact shape in which it now is, and every room in the house as they are placed had been used for the purpose of a private residence." *Richards v. Swansea, I. & T. Co.*, 9 Ch. D. 425.

In an insurance policy covering a "wood house," the latter being under the same roof with a carriage house, which constituted two-thirds of the building, the term was *held* to include the carriage house, evidence having been adduced to show that the building was called "the wood house." *White v. Mutual Fire Assurance Co.*, 8 Gray (Mass.) 566.

House and Lot.—"The expression 'house and lot,' used in reference to premises in a city, ordinarily imports a house with a curtilage, shut off from the neighboring grounds by some physical objects. Thus, the deed bears upon its face an intimation that the land to be conveyed by it is inclosed within visible boundaries, and though the character of these boundaries be not indicated in the instrument, nevertheless the law permits extrinsic evidence of the actual condition of things, for the purpose of ascertaining the situation of the land," and the boundaries control the measurements given in the deed. *Smith v. Negbauer*, 42 N. J. 305.

Houses, Buildings and Other Property, in an act establishing and imposing a rate or tax for lighting and watch, does not include a railway. *Reg. v. Midland Ry. Co.*, L. R., 10 Q. B. 389. Nor a canal. *Reg. v. Neath*, L. R., 6 Q. B. 707, but does cover docks. *Peto v. Westham*, 2 E. & E. 144.

House, Store and Shop.—A complaint alleging that the defendant kept a certain house, store and shop, for the purpose of selling liquors, etc., charges but one offence. House, store and shop designate but one place. *Ramson v. State*, 19 Conn. 292.

Counting House (See COUNTING HOUSE)—Includes an attorney's office. *Re Creek*, 3 B. & S. 459.

Eating House.—A stall in a market, at which meals are furnished to the public, is not an eating house, within the meaning of a license act. *State v. Hall*, 73 N. Car. 252.

Out House—Must be part of a dwell-

ing house. *Elmore v. Inhabitants of St. Briavells*, 8 B. & C. 465.

School House.—In an act making exemption from taxation, means public school house. *Chegaray v. Mayor*, etc., of New York, 13 N. Y. 220.

Store House.—The meaning given by the dictionaries is "a building for keeping grain or goods of any kind, a repository, a ware house." But "the word is vulgarly used in different senses, and perhaps not alike in different parts of the country. A common use of it is to designate a building in which domestic supplies are kept at a place of residence. . . . It is also applied to places of business, and is there vulgarly used as synonymous with 'shop' in one of its proper senses, meaning a building in which goods are offered openly for sale." The word was thought to be used, in the arson act under consideration, with the last meaning, though the house in question would equally have come within the definition of the dictionaries. *State v. Sandy*, 3 Ired. (N. Car.) 570.

Tenement House.—"The word 'tenement house' has a common and conventional meaning. Webster, in his definitions of 'tenement,' among others, says it is 'often, in modern usage, an inferior dwelling house rented to poor persons, or a dwelling erected for the purpose of being rented; called, also, tenement house.'" There is also a definition of the term in a statute of 1867, viz: "Every house, building or portion thereof, which is rented, leased, let or hired out to be occupied, or is occupied as the home or residence of more than three families living independently of one another, and doing their cooking upon the premises, or by more than two families upon a floor so living and cooking, but having a common right in the halls, stairways, etc." The term, as used in a building restriction, does not include a "family hotel." Its connection in the covenant with other forbidden buildings and businesses, implies an application to premises about which there is something offensive. *Musgrave v. Sherwood*, 54 How. Pr. (N. Y.) 338.

Town House.—"A house or building in which is transacted the public business of a town." It is not limited to a hall for town meetings, but may include offices for all the town officers; a lock-up, school, hospital, library, or rooms for every object for which a town has authority to provide a building. A con-

dition in a deed of land to the inhabitants of a town, that it "shall not be used for any other purpose than as a place for a town hall" is not broken by the erection of a building larger than the present public business of the town requires, the unused parts of which are rented to tradesmen. "A town, having in its town house rooms which it had authority to construct, as part of such building, and not having occasion to use them for the time being, is not obliged to keep them unoccupied, but may derive a revenue from them by renting them, or may allow them to be used gratuitously." *French v. Inhabitants of Quincy*, 3 Allen (Mass.) 9.

When the House is Completed.—See COMPLETE.

House of Entertainment.—A tavern; a common inn. *Bonner v. Welborn*, 7 Ga. 304.

House of Her Husband, in a statute providing that a widow remain therein ninety days after his death, without being chargeable for rent, means the house in which he lived and owned the fee. She is not entitled as against a mortgagee or his assignee. *Young v. Estes*, 59 Me. 441.

Keep His House.—"If a trader secludes himself in his house to avoid the fair importunity of his creditors, who are thus deprived of the means of communicating with him, he begins to keep house" with intent to delay creditors, within the meaning of a bankrupt act. A denial to a creditor who demands payment, but does not ask to see the debtor, does not amount to this; but a withdrawal from his counting house, where he usually sat, to his parlor, for the purpose of avoiding his creditors, does. *Dudley v. Vaughan*, 1 Camp. 271. And where a debtor orders his servants to admit no one whom they did not know, as he feared arrest, and no one was admitted until his identity was first ascertained from a window, begins to keep his house, etc. *Harvey v. Ramsbottom*, 1 B. & C. 55.

House in Which We Live, in a devise. See *Bridge v. Bridge*, (Mass.) 15 N. E. Rep. 902.

House in the Occupation of.—A man owning two adjoining houses sold one, which was conveyed by the description, "all that dwelling house now in the occupation of P." In front of this house was a slight projection, nine feet broad, forming a sort of shallow portico, in the middle of which was the door, and which projected three feet beyond the

tenant buildings.¹ A branch

line dividing the two houses. *Held*, that the part in front of the other house did not pass by the conveyance. *Fox v. Clarke*, L. R., 7 Q. B. 748.

House of Religious Worship, in an exemption from taxation, includes "such distinct tenements as are used for that purpose, and for purposes connected with it, and does not include distinct tenements used for other purposes, though under the same roof." Stores in the basement are not a part of such a house. *Prop'r's of Meeting House in Lowell v. Lowell*, 1 Metc. (Mass.) 538.

1. Whatever, in a will, will pass by message will pass by-house, and *vice versa*. *Doe v. Collins*, 2 T. R. 502. In a devise, house is synonymous with message, and passes all within the curtilage, without *cum pertinentiis* being added. *Rogers v. Smith*, 4 Pa. St. 93.

"By the grant of a message, or house, *messuagium*, the orchard, garden and curtilage doe passe, and so an acre or more may pass by the name of a house." Co. Lit. 5b. "'House,' mese or maison, called, in legal Latine, *messuagium*, containeth the buildings, curtilage, orchard and garden." Co. Lit. 56a; *Bennett v. Bittle*, 4 Rawle (Pa.) 342; *McMillan v. Solomon*, 42 Ala. 358. But in *Kerlway* 57, a difference is taken between message and domus, the former extending to the curtilage, though not to the garden, the latter comprehending buildings only. *Hargrave's note*, Co. Lit. 5b.

"House" embraces the land on which it is built. *McMillan v. Solomon*, 42 Ala. 358. In a devise, it passes the lot on which it is built. *Com. Coun. of Richmond v. State*, 5 Ind. 334. In a sale of a tract of land, a reservation of the "house and garden" for life implies a right to use the door yard, and to necessary estovers. *Baxter v. Brand*, 6 Dana (N. Y.) 296.

By the word "house" the appurtenances proper and convenient to its occupation pass. A bequest of "the house I live in and garden" includes granaries, stables and coal sheds, though the last had been used by the testator for trade as well as domestic purposes. *Doe v. Collins*, 2 T. R. 498. So in the land clause act, by which a person is not required to sell a part of a house, or other building, or manufactory desired by a railroad, if he is willing to sell the whole, the word "house" includes garden and out houses. *Cole v. W. L. & C. P. Ry. Co.*, 27 Beav. 242.

"House," in this act, includes everything that will pass by the word in a conveyance. *King v. Wycombe Ry. Co.*, 28 Beav. 104; s. c., 28 L. J. Ch. 767; *Hewson v. L. & S. W. Ry. Co.*, 8 W. R. 467; *Pulling v. L. C. & D. Ry. Co.*, 3 De G. J. & S. 661. All that would pass by a devise of a house. But it does not include land which is not necessary for the convenient use and occupation of the house, but only for the personal use and convenience or pleasure of the owner or occupier; as a tract of grazing land. *Steele v. Midland Ry. Co.*, L. R., 1 Ch. 275. And unbuilt pleasure ground on the opposite side of the road from the house. *Ferguson v. L. B. Ry. Co.*, 33 Beav. 103; s. c., 3 De G. J. & S. 653, and see *Kerford v. Seacombe*, etc., Ry. Co., 57 L. J., Ch. 270, where the ground contained stables and a garden, but where the court refused to lay down a general rule.

The word, in an insurance policy, covers everything appurtenant and accessory to a main building, as back buildings. *Workman v. Ins. Co.*, 2 La. 507; s. c., 22 Am. Dec. 141.

A testator directed that his cousin A should continue to live at his house at C, and be at the charge of housekeeping, servants' wages, and coach horses to the number that he had maintained. He was seized of some land, which he had plowed by the coach horses, and whose produce was consumed by his domestic establishment. This land passed by the devise, and not only the house and curtilage. "By the grant or devise of an house with the appurtenances, only the garden and orchard will pass with the house; but the devise of a house with the lands appertaining will pass the land in question." The rule was controlled in this case by the testator's intention that everything about his house should be carried on after his death as before. *Blackborn v. Edgley*, 1 P. Wms. 600.

A devise of a "dwelling house, together with all the appurtenances and privileges thereto belonging, and the same which is now improved by me as a boarding house," passes stables, yard, garden and eighteen acres of orchard, pasture, plow and woodland, these having been used for the convenience of the house. *Jackson v. White*, 8 Johns. (N. Y.) 59; and see *Otis v. Smith*, 9 Pick. (Mass.) 293.

A shop fronting on a street and divided from its owner's dwelling and

of the legislature.¹

HOUSE-BREAKING.—See 2 AM. & ENG. ENCY. OF LAW 651; title BURGLARY.

HOUSEHOLD.—(See EFFECTS, EXECUTION, FURNITURE, GOODS, HOMESTEADS.) Those who dwell under the same roof and compose a family.² As an adjective: belonging to the household.³

bake-house in the rear by a yard or court communicating with the street by a passage, is not a part of the house, within the meaning of the statute enfranchising the occupiers of houses of the yearly value of £10. *Powell v. Price*, 4 C. B. 105.

1. "The term *house* means one branch of the legislature as contradistinguished from the other branch, and a majority of the entire members composing the body constitutes, in legal contemplation, the house or branch of the legislature; and, under the rules of parliamentary law, which, by the silence of the constitution, must be considered as the rule of the body so constituted, a majority of the quorum are competent to do any legislative act which the house could do, unless the particular act be required to be done by a greater number than a majority by some specific provision of the constitution." 32 Miss. 650, 680. "In all cases where a power is conferred, or a duty or restriction imposed, upon either branch of the legislature by the general designation *house*, without any qualification expressed or necessarily implied from the language employed, that term means the legislative body or quorum to do business, comprising a majority of the members elected to and qualified to act as members of such body." *Southworth v. P. & J. R. Co.*, 2 Mich. 287.

The *house* may mean either the whole number elected or a majority of its members, the most common meaning being a number of its members sufficient to do business. *State v. McBride*, 4 Mo. 303; s. c., 29 Am. Dec. 636.

In a constitutional provision that "a majority of each *house* shall constitute a quorum to do business," etc., *house* means the entire number of which each branch of the legislature is composed. In *Matter of Exec. Communication*, etc., 12 Fla. 653.

2. *Bowne v. Witt*, 19 Wend. (N. Y.) 475; *Woodward v. Murray*, 18 Johns. (N. Y.) 400. A household is the place where a man holds his house. BREWSTER, J., in *Hoopes' App.*, 60 Pa. 220.

In an act making the separate property of a married woman liable for necessities purchased for the use of the household, this term does not include a child of her husband by a former marriage. *May v. Smith*, 48 Ala. 487.

3. **Household Effects—Furniture—Goods.**—In a bequest of "household goods" all articles of household of a permanent nature, articles which are not consumed in their use and enjoyment, and which are used in, or acquired by, the testator, for his house. *Bouv. Law Dict.*; *Smith v. Findley*, (Kan.) 8 Pac. Rep. 871; 2 Wms. on Exrs. 1181. "Household furniture" passes all personal chattels that contribute to the use or convenience of the householder, or the ornament of the house. *Kelly v. Powlet*, Amb. 605; s. c., 1 Dick. 359; 2 Wms. on Exrs. 1185; 1 Roper on Legacies 273; *Kendall v. Kendall*, 5 Munf. (Va.) 272. Plate in common use passes by the term "household furniture," or "household goods;" *Masters v. Masters*, 1 P. Wms. 425; *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329; *Field v. Peckett*, 29 Beav. 573; in spite of an intention to the contrary. *Nichols v. Osborne*, 2 P. Wms. 421. It seems that it is not necessary that the plate should have been in common use, if it was suitable to the situation and quality of the testator. *Kelly v. Powlet*, Amb. 605; *Porter v. Tournay*, 3 Ves. 313.

"Household furniture and other household effects" in a will, includes all the property in the house and on the premises intended for use or consumption therein or for ornament thereof. By these terms will pass pistols, turning apparatus, models, paintings, an organ, books, wines, liquors, and a haystack, if for use, but not if for sale. The expression will not include a pony, a cow or fowling pieces, unless kept for the defence of the house. *Cole v. Fitzgerald*, 1 Sim. & Stu. 189; s. c., 3 Russ. 301. But books were *held* not to pass under a will as household furniture in *Bridgman v. Dove*, 3 Atk. 202; *Kelly v. Powlet*, Amb. 611; *Porter v. Tournay*, 3 Ves. 311; but see *Ouseley v. Anstruther*, 10 Beav. 462, where the

HOUSEHOLDER.—(See HOMESTEAD.) The head or master of a family; a person who occupies a house and has charge of, and provides for, a family therein.¹

testator's apparent intention to the contrary prevailed. So wine, liquors and provisions generally will not pass by these expressions, these being consumable and not permanent articles. *Slanning v. Style*, 3 P. Wms. 334; *Foxall v. McKinney*, 3 Cr. C. C. 206; *Porter v. Tournay*, 3 Ves. 311; but coal remaining unconsumed at the testator's death was *held* to be included in "household goods" in *Hurley's Est.*, 12 Phila. (Pa.) 47.

"Household goods" is a wider term than furniture, including everything about the house that had been usually held and enjoyed therewith, and that would tend to the comfort and accommodation of the householder. *Camagy v. Woodcock*, 2 Munf. (Va.) 234.

In order to constitute an article *household* furniture, it must be provided for, and appropriated to uses *in*, the house. "There may be articles, which are sometimes used in the house, but are carried out by day and brought in at night. These articles would not have such a fixedness as to be considered household furniture."

Accordingly, the expression will not include a watch carried by the testator, although if it were hung up for use in the house it might be so considered. *Gooch v. Gooch*, 33 Me. 535. A clock not fastened to the wall passed as household goods in *Slanning v. Style*, 3 P. Wms. 334.

Ornaments generally are included in the terms under consideration; *Field v. Peckett*, 29 Beav. 573; as bronzes, statuary, pictures. *Richardson v. Hall*, 124 Mass. 228.

Tenants' fixtures in a leasehold house, occupied by the testator, were *held* to pass as household furniture. *Paton v. Sheppard*, 10 Sim. 186; *contra*, *Finney v. Grice*, 10 Ch. D. 13, where the house was bequeathed to a different person from the legatee of the furniture.

Household furniture, etc., includes only what is in domestic use, and not articles which are in the way of testator's trade or business. *Le Farrant v. Spencer*, 1 Ves. Sr. 97, as where the testator is a cabinet maker. *Hoopes' App.*, 60 Pa. St. 220.

Where a man owned a hospital, in a town other than that of his residence, which he employed, under contracts with the naval commissioners, in enter-

taining the sick and wounded of the navy, the furniture of this hospital was not included in the expression "household" goods, as used in an exception in a marriage settlement with his wife, by which she renounced her claims upon his property. *Pratt v. Jackson*, 2 P. Wms. 302; s. c., 1 Bro. P. C. 222.

But a tavern keeper whose dwelling house is remote from his tavern, but whose family frequented the latter as much as the former, by the use of the term "household furniture" in his will, passes the furniture of the tavern. *Manning v. Purcell*, 2 Sm. & G. 284; s. c., 7 De. G. M. & G. 55.

Furniture (except bar furniture, bottles, liquors and the like) in a boarding house or hotel, which is the proprietor's home, where he eats, sleeps and lives, is his household furniture, within the meaning of a tax law; but not so if he lives elsewhere. *McWilliams v. Gable*, 3 Pa. C. C. R. 467.

Beds and furniture used by the testatrix in a boarding school kept by her, and in which she lived, passed under her will as household furniture, but the school room furniture, as the desks, etc., would not have passed. *Hoopes' App.*, 60 Pa. St. 220.

Farming utensils will not pass as household furniture. *Fitzgerald v. Field*, 1 Russ. 427.

Household furniture, in an insurance policy, covers silver spoons and pictures. *Moodinger v. Mechanic's F. I. Co.*, 2 Hall (N. Y.) 490.

A special contract by a railroad company to transport a carload of household goods at a reduced rate does not include small quantities of potatoes, salt, bacon and vinegar intended for sale. *Smith v. Findley*, (Kan.) 8 Pac. Rep. 871.

Under a law requiring assessors to list, *i. e.* describe, the property assessed, listing wheat as "household goods" is invalid. *Thompson v. Davidson*, 15 Minn. 412.

Liquors, bar furniture and beds for guests in an inn are not household goods, within the meaning of the rule that it is not a badge of fraud to permit household goods levied upon in execution to remain in the debtor's possession. *Com. v. Stalmbach*, 3 Rawle (Pa.) 341; s. c., 24 Am. Dec. 351.

1. *Woodward v. Murray*, 18 Johns. (N. Y.) 400; *Bowne v. Witt*, 19 Wend.

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HOUSE OF ILL FAME.—See 5 AM. & ENG. ENCY. OF LAW 695; title DISORDERLY HOUSE.

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(N. Y.) 475; *Aaron v. State*, 37 Ala. 113; *Carpenter v. Dorme*, 10 Ind. 125.

In a statute requiring jurors to be resident householders or freeholders of the county, "householder" "means something more than the mere occupant of a room or house. It implies in its term the idea of a domestic establishment—of the management of a household." *Aaron v. State*, 37 Ala. 125. A householder is "a person who has a family, whom he keeps together and provides for, and of which he is the head or master. He need be neither a father nor a husband, but he must occupy the position toward others of head or chief in a domestic establishment. The statute refers to the civil status of the person who is to be a competent juror, and not to his property." It does not subject him to a property qualification. *Nelson v. State*, 57 Miss. 286.

Burrill's definition of a householder is wider than that above given, viz.: "The occupier of a house."

Under either definition, it is not requisite that the householder be a married man. A single man, who rents a house, which he occupies with a younger brother for all purposes, except that he took his meals elsewhere, is a householder. "The juror in question rented the house; had actual and complete control of it; occupied it with such family as he had, and used it for all purposes, except eating, we are of opinion he was a competent juror." *Lester v. State*, 2 Tex. App. 432.

The term is similarly construed in an act providing that a householder having a permanent residence in the State, shall not be sued outside of the county of his residence. "An unmarried man, occupying a house, employing his own servants, and providing for the household as constituted, may be a householder; but an unmarried man who rents and occupies a room as a sleeping apartment and takes his meals elsewhere, is not a householder." *Katzenberg v. Lehman*, (Ala.) 2 So. Rep. 272. But one who rents a room and boards

was said to be a householder under an act prescribing the qualifications of jurors. *Robles v. State*, 5 Tex. App. 346.

A single man who keeps house and servants is a householder, within an act requiring petitioners for the opening of a road to be such. *Kamer v. Clatsop Co.*, 6 Oreg. 238.

Under an act requiring bail to be freeholders or householders, the lessor of a mill, and owner of the machinery therein, is sufficient. *Delamater v. Byrne*, 59 How. Pr. (N. Y.) 71. As is also a member of a firm, which rents a portion of building for business purposes. *S. & W. Savings Bank v. Huyck*, 33 How. Pr. (N. Y.) 323.

Under 43 Eliz. ch. 2, § 1, making substantial householders liable to serve as overseers of the poor, and similar statutes, "householder" includes all tenants of houses. Persons who reside in another parish, but who rent a house occupied by a clerk in the parish in question, where they pay rates and taxes, are householders there. *Rex v. Poynder*, 1 B. & C. 178; s. c., 2 D. & R. 258; *Rex v. Hall*, 1 B. & C. 123. But the term excludes lodgers and those having no permanent interest in the place, though having a temporary residence. It is, on the other hand, not so strict a word as housekeeper. *Rex v. Hall*, 1 B. & C. 123.

In *Reg. v. Spurrell*, L. R., 1 Q. B. 72, *Cockburn*, C. J., said: "I think a man cannot be a householder within the true construction of the statute, who has not an independent occupation. I do not think a man who occupies as a servant, in which case the occupation is that of the master, can be said to be a householder in the proper sense of the term. . . . On the other hand, if the occupation be not necessary to the service, then the fact that the advantage of the occupation is part of the remuneration for the service will not render the occupation less an occupation for a tenant than it would have been if the man had paid rent."

HOUSE OF REFUGE AND CORRECTION.

I. Definition.—A house of correction and refuge is a house for the confinement and discipline of incorrigible youth, or the punishment of juvenile delinquents.¹ It has been held that statutes providing for the commitment of minor children to houses of correction and refuge,² are constitutional, and that the commitment is not void for want of notice to the father.³

A jail may be used as a house of correction where no other has been provided; but not unless it has been established as such by the proper authority.⁴

II. Who May be Committed.—Commitment to houses of correction and refuge is regulated by the statutes of the various states where such institutions exist. But it may be generally said that

1. Anderson's L. Dict. 516; 1. Bouv. L. Dict. (15th ed.) 758. See Ainsworth v. State, 49 Ind. 758.

As to Limitation of Actions in relation to houses of correction and refuge under the Maine statute, see Weymonte v. Gorham, 22 Me. 385.

2. Such as 77 Ohio Laws 217; Ohio Rev. Stat., § 2087.

3. House of Refuge v. Ryan, 37 Ohio St. 197. See Prescott v. State, 19 Ohio St. 188.

The provisions of N. Y. Consolidation Act 1882, providing for notice to parents before committing a child to the Catholic Protectors, are not abrogated by Penal Code, § 291. People Van Heck v. N. Y. Catholic Protectors, 101 N. Y. 195.

Summary proceeding provided by the statute is not illegal, as depriving a father of the society and earnings of the child without notice or trial. Rights of father are not bound thereby. Farnham v. Pierce, 141 Mass. 203.

The court say, in this case, that "this is not a penal statute and the commitment of the public officers is not in the nature of punishment. It is a provision by the commonwealth, as a *parens patriæ*, for the custody and care of neglected children, and is intended to supply to them the parental custody which they have not. In this respect the statute manifestly differs from the construction given to the statute under which People v. Turner, 55 Ill. 280, and State v. Ray, (N. H.) 1 New Eng. Rep. 67, were decided in New Hampshire in July, 1885, and resembles more the statutes considered in Milwaukee Industrial School v. Supervisors, 40 Wis. 328; s. c., 22 Am. Rep. 702; Ferrier's Petition, 103 Ill. 367; s. c., 42 Am. Rep. 10; McLean County v. Humphreys, 104 Ill. 378; Prescott v. State, 19 Ohio St. 184; Cin-

cinnati House of Refuge v. Ryan, 37 Ohio St. 197; *Ex parte* Crouse, 4 Whart. (Pa.) 9, and Roth v. House of Refuge, 31 Md. 329.

"It does not punish the infant by confinement, nor deprive him of his liberty; it only recognizes and regulates, as in providing for guardianship and apprenticeship, the parental custody which is an incident of infancy."

Destitute Child.—Penal Code, § 291, permits police magistrates in New York to commit a destitute child to any institution authorized to take charge of minors. The time and manner of taking and holding a child is left to the regulations of the institution, as prescribed by its fundamental law. People *ex rel.* Van Heck v. New York Catholic Protectors, 101 N. Y. 195.

Putting Child in Charge of Board of Health, Lunacy and Charity.—It is said that Mass. Stat. 1882, ch. 181, § 3, providing for placing neglected children under fourteen years of age in charge of the state board of health, lunacy, charity, etc., is not a penal statute, and is not contrary to the Bill of Rights, article 12. Farnam v. Pierce, 141 Mass. 203.

Misdemeanor—Final Commitment.—Whether the house of refuge in the city of New York is bound under L. 1881, ch. 496, to receive a child on final commitment for a misdemeanor by the court of special sessions in said city,—query? Matter of Lewinski, 60 How. (N. Y.) Pr. 175. Citing Wallack v. Mayor, 3 Hun (N. Y.) 84.

4. Taunton v. Westport, 12 Mass. 355.

Jail as House of Correction.—A jail established by the court of sessions may be used as a house of correction when no other has been provided. Taunton v. Westport, 12 Mass. 355. See Com. v. Hampden, 19 Mass. (2 Pick.) 414.

HOUSE OF REFUGE AND CORRECTION.

dependent¹ and incorrigible children may be sent to such institutions for maintenance and training; and generally juvenile offenders who are guilty of felony may be imprisoned therein for punishment.²

It has been said by the supreme court of Michigan³ that a "house of correction" is not designed for persons who can, at any time, entitle themselves to a discharge, being a place of punishment, and not of confinement generally.⁴

III. Maintenance.—Where persons are committed to a house of correction and refuge established for suppressing and punishing rogues, vagabonds, and the like, they are maintained, not as paupers, but as criminals.⁵

1. Begging in Street.—N. Y. Penal Code, § 291, directing the arrest and commitment of children found begging, does not dispense with the provisions of law requiring notice to the parents or guardians of such children. A commitment without such notice is illegal. *People v. New York Catholic Protector*, 101 N. Y. 195; s. c., 38 Hun (N. Y.) 127.

Commitment to Industrial School.—A dependent girl, seven years old, is properly committed to the industrial school for girls, to be there kept and maintained until she shall arrive at the age of eighteen, unless sooner discharged, as provided by law. Illinois act of May 28, 1879, concerning the industrial school, is in harmony with the constitution, and its provisions do not authorize an infringement upon the personal liberty of the citizen. *McLean County v. Humphreys*, 104 Ill. 378.

2. See *In re Serafino*, 66 How. (N. Y.) Pr. 168; *Park v. People*, 1 Lans. (N. Y.) 263.

Thus a child under fourteen, who collects refuse from the markets or a public street is guilty, under N. Y. acts of 1877, amended by act of 1881, of a misdemeanor, and may be committed by a magistrate to an institution therein named. The magistrate, under the act of 1882, may determine the age from inspection. *Re Serafino*, 66 How. (N. Y.) Pr. 178. Compare *Re Riley*, 31 Hun (N. Y.) 612.

And a prisoner under sixteen years of age, convicted of burglary, is liable to imprisonment in State's prison, but may, after conviction, be sentenced to house of refuge. *Park v. People*, 1 Lans. (N. Y.) 263.

The New York Code Provides that where a person under the age of sixteen years is convicted of crime, the trial court may, instead of sentencing

him to imprisonment in a state prison or in a penitentiary, direct him to be confined in a house of refuge, under the provisions of the statute relating thereto. Where the conviction is had and sentence is inflicted in the first, second or third judicial district, the place of confinement must be the house of refuge established by the managers of the Society for the Reformation of Juvenile Delinquents in the City of New York; where the conviction is had and the sentence is inflicted in any other district, the place of confinement must be in the Western House of Refuge for Juvenile Delinquents. But nothing in this section shall affect the provision contained in section 713. N. Y. Penal Code, § 701.

It is said in *State v. Ray*, (N. H.) 1 N. Eng. Rep. 67, that N. H. G. L., ch. 287, § 14, authorizing a magistrate to commit any minor, charged with an offence punishable with imprisonment, to the reform school, is unconstitutional and in conflict with the Bill of Rights, article 15, granting the right of trial by jury.

Misdemeanor. — Imprisonment in County Jail.—A city recorder before whom one is convicted of a misdemeanor, punishable by imprisonment in the county jail, cannot sentence such person to imprisonment in the State house of correction. *People v. Goble*, (Mich.) 11 West. Rep. 553; 35 N. W. Rep. 91.

3. *In re Kamisky*, (Mich.) 38 N. W. Rep. 569.

4. As Place of General Imprisonment.—Consequently a house of correction is not the proper place for the imprisonment of a defendant in bastardy proceedings until he shall give bond. *In re Kamisky*, (Mich.) 38 N. W. 569.

5. Under the Massachusetts statute of 1757, ch. 54, prior to the passage of the

HOUSE OF REFUGE AND CORRECTION.

IV. Rules and Regulations.—It has been held in some States that the board of commissioners of the house of refuge for the correction and reformation of juvenile offenders, with the approval of the governor, have power to make rules and regulation in regard to the admission of offenders, so as to require a letter of application giving proper information in regard to the infant whose admission is asked, and also an examination, by a respectable medical practitioner, as to the physical and mental condition of such person; and the superintendent may refuse to receive an offender until such rules are complied with.¹

statute of 1856, ch. 142, the keeper of such a house, in order to receive of towns where such persons have their settlements, the expenses incurred for their support, must have pursued the course prescribed by the statute of 1802, ch. 22, § 2. *Boston v. Westford*, 29 Mass. (12 Pick.) 16.

Duty to Furnish Maintenance.—The Massachusetts statute of 1787, ch. 54, is peremptory upon the court of sessions in each county to provide a house of correction distinct from the common jail. *Corn. v. Hamp*, 19 Mass. (2 Pick.) 414.

Although it is necessary that the account of a master of a house of correction in Maine, for the support of a person lawfully confined therein, should be allowed by the county commissioners, such allowance is not in the nature a judgment, and *assumpsit* it is the proper remedy thereon. *Weymouth v. Gorham*, 22 Me. 385.

Same—Action to Recover.—In an action under the Maine statute of 1821, ch. 111, to recover compensation for the support of a person lawfully confined in the county house of correction, against the town wherein his settlement was, the plaintiff's claim accrues by virtue of his office as master, and proof of his having been such is indispensable to the maintenance of the action, but the indebtedness of the town is to the plaintiff for his individual benefit, and not in trust for others, and the action should be in his own name, whether he continues as master or not. *Weymouth v. Gorham*, 22 Me. 385.

Jails Used as House of Correction.—The provision in Massachusetts statute 1846, ch. 11, § 3, that when the keeper of a house of correction, which shall be united in one and the same building or establishment with the county jail, shall not be allowed by the county commissioners a reasonable sum for his

services and for the support of prisoners under his charge, he may petition the court of common pleas, and that said court may determine the amount of such allowance, applies as well to cases in which the jail and house of correction were united in one building before the statute took effect, as to those in which they were so united after it took effect. *Day v. County of Hampen*, 52 Mass. (11 Metc.) 379.

Allowance for Services.—A jail and house of correction were united in one building several months before Massachusetts statute 1846, ch. 11, was passed, and were under the charge of the deputy jailer, who was appointed by the sheriff; the county commissioners appointed a master of the house of correction, and went with him to the house, to put him in charge thereof, informed the deputy jailer of such appointment, and demanded the keys of the house. The deputy jailer refused to give up the keys without the direction of the sheriff, and afterwards had the charge of the building and of the prisoners committed to the house of correction, until after the said statute took effect. *Held*, that he was entitled to an allowance for his services as master of the house of correction, and for the expenses of the support of those prisoners, and that the court of common pleas were authorized to allow the same, after the county commissioners had refused to make him a reasonable allowance therefor. *Day v. County of Hampden*, 52 Mass. (11 Metc.) 379.

1. *Ainsworth v. State*, 49 Ind. 562.

Apprenticing Inmate.—A, a minor, was sentenced to the reform school, and, without being legally apprenticed, was taken by B as an apprentice. A remained with B some years, then absconded, was arrested, recommitted to the school, and again put out with B. Sentences to the reform school are lim-

HOUSE OF REFUGE AND CORRECTION—HUSBAND.

V. Discharge.—Where a child has been sentenced to a house of correction and refuge during minority, it cannot be discharged by the court, except by the magistrate of the institution.¹ But where a child has been convicted of a misdemeanor, and sentenced to be committed to a designated house of refuge, and the superintendents and magistrates of the latter having refused to receive the prisoner upon tender by the sheriff, and is placed in the city prison, it will be discharged upon a writ of *habeas corpus*, under a statute providing that a child convicted of any misdemeanor shall be finally committed to some such institution, and not to any prison, or jail, or penitentiary for a longer time than is necessary for its transfer thereto.²

While a commitment under the statute, to a house of correction and refuge, is evidence of the condition of the child at the time of the commitment, yet, the father may thereafter show that the cause for commitment no longer exists, and that the welfare of the child will permit its restoration to his charge.³

HOVEL.—See note 4.

HOW.—See note 5.

HUSBAND.—A married man.⁶

ited to minority. In an action by A against B for services rendered after A claimed to have attained majority, *held*, that A could not recover if, after attaining the age of twenty-one, he continued to work for B without specific contract, and without notice that his minority was ended, and that he expected wages. *Burrows v. Ward*, (R. I.) 3 N. Eng. 63.

1. *Davenport v. House of Refuge Magistrate*, 11 Phila. (Pa.) 458.

2. *Matter of Lewinsky*, 66 How. (N. Y.) Pr. 175. In this case the court say that: "It could not have been the intention of the legislature that the boy should be kept in the city prison until the question whether the house of refuge was bound to receive him was settled by legal proceedings."

3. *Farnham v. Pierce*, 141 Mass. 203.

4. In arson act of 9 Geo. I, the word *hovel* meant grain raised from the ground to keep it from mice and rats. The word, later, signified a shed put up in a field to shelter cattle or utensils. *Ecclesfield's Case*, 2 Wm. Bl. 682n.

5. *How Far*, as applied to flowing of land, may intend how long in point of duration, to what distance or extent of

surface, and to what height. *Vandusen v. Comstock*, 3 Mass. 187.

6. A man divorced is no longer a husband, within the meaning of a bigamy act. "The terms husband and wife have a very definite and precise meaning. They are descriptive of persons who are connected together by the marriage tie, and are significant of those mutual rights and obligations which flow from the marriage contract." *People v. Hovey*, 5 Barb. (N. Y.) 117.

Where a life interest was given by will, on the death of the testator's daughter, to "any husband with whom she might intermarry, if he should survive her, a divorced husband, who survived her, took. *In re Bullmore*, *Bullmore v. Wynter*, 52 L. J. R., Ch. D. 456.

Ship's Husband.—The general agent of the owners, in regard to all the affairs of the ship in the home port. *Story on Agency* 35. The person who, in the home port, where the vessel belongs, does what the owner would otherwise do, obtains a cargo for her, and attends to everything essential to the due prosecution of the voyage for which the cargo has been obtained. *Gillespie v. Winberg*, 4 Daly (N. Y.) 322.

HUSBAND AND WIFE.—(See BREACH OF PROMISE, COMMUNITY, CURTESY, DIVORCE, DOWER, HOMESTEAD, MARRIAGE, MARRIAGE SETTLEMENTS, MARRIED WOMEN, NULLITY SUITS, PARENT AND CHILD, SEPARATION DEEDS.)

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I. THE UNITY OF HUSBAND AND WIFE.—1. The Fiction of Unity and the Consequences thereof.—At common law one of the fictions most often referred to was, that by marriage the husband and wife become one legal person.¹ The woman by marriage lost all

1. 1 Blackst. Com. 442; 2 Kent Com. 129; Story Eq., §§ 1367, 1370; 1 Bishop M. & D., §§ 754-760; Wells v. Caywood, 3 Colo. 487, 491; Hooker v. Bagge, 63 Ill. 160, 162; Long v. Kinney, 49 Ind. 235, 238; Trader v. Lowe, 45 Md. 1, 14; Burdeno v. Amperse, 14 Mich. 91, 92;

Patterson v. Patterson, 45 N. H. 164, 166; Barron v. Barron, 24 Vt. 375, 398; White v. Wager, 25 N. Y. 325, 329 (1862).

"It is an established doctrine of the common law that in consequence of the unity of person between husband and

legal identity,¹ she became *civiliter mortua*;² she was covered by or merged in her husband;³ she was called a "*feme covert*," and her condition was called "coverture."⁴

To the civil law this fiction was unknown.⁵

In equity the civil law was followed to a great extent and the fiction of unity was ignored.⁶

The course of modern legislation has been universally to do away with this fiction in its strictness, and to recognize the separate existence of husband and wife. But great confusion has been caused by the fact that a technical rule of construction has led many courts to limit to a few cases statutes intended by legislatures to destroy this fiction generally.⁷

This fiction of legal unity affected at common law all the reciprocal capacities of husband and wife, and many of their mutual rights and obligations; and by assuming that it was the wife whose identity was lost gave rise to all the disabilities of married women. To illustrate: husband and wife being one person could not contract together or wrong each other civilly or criminally, or sue each other; they could not testify for or against each other;⁸ and a sale by a trustee to his wife was like a sale to himself;⁹ in some cases one could act for the other.¹⁰

wife, neither the husband nor the wife can grant the one to the other, an estate in possession during the lifetime of the grantor. . . . The rule itself is one of those stubborn mandates of the common law which requires absolute obedience from the courts, whatever they may think of the justice or equity of its application in a particular case." See, also, *Doherty v. Madgett*, 58 Vt. 323 (1886).

1-2. See authorities cited *ante*, note, p. 789. *O'Ferrall v. Simplot*, 4 Iowa (1857) 389: "Under the common law the existence of the wife was hardly recognized; she was in fact *civiliter mortua*. Her property became vested in the husband (subject to some slight exceptions), and the wife became legally a mere menial of the husband."

3. *Long v. Kinney*, 49 Ind. 235, 238.

4. *Barron v. Barron*, 24 Vt. 375, 398: "At common law the husband and wife are treated as one person; her legal existence is merged in that of her husband. . . . From this principle arises the necessity, at law, of all conveyances, covenants, marriage settlements and the like being made through the interposition of trustees."

5. Story Eq., § 1367, *et seq.*; *post*, § 2.

6. *Morrison v. Thistle*, 67 Mo. 596, 600.

7. *Barge, Col. & For. L.* 202: "The Roman law treated the husband and

wife as distinct persons, who might have separate estates. It enabled them to make contracts and incur debts in their own names, and permitted the wife to be sued without her husband."

Morrison v. Thistle, 67 Mo. (1878) at p. 600: "While it is true that, at law, a woman having separate estate could make no contracts of the sort, in equity the rule is entirely different and so firmly established as to require no citation of authorities."

7. *Albin v. Lord*, 39 N. H. 196, 201. *Wells v. Caywood*, 3 Colo. (1877) 490: "The general tendency of legislation in this country has been to make husband and wife equal in all respects in the eye of the law. . . . The courts, which have ever been conservative, construed them in a spirit so narrow and illiberal as to almost entirely defeat the intention of the law makers; but generally with a promptness that left little room for doubt, a succeeding legislature would reassert in a more unequivocal form the same principles which the courts had before almost expounded out of existence."

8. See *post*, § 8.

9. *Dundas v. Dundas*, 64 Pa. St. 325, 332, 333. But see *Belcher v. Black*, 68 Ga. 93, 95.

10. *Buford v. Speed*, 11 Bush 338, 343; *Kerchner v. Kempton*, 47 Md. 568, 569; see *post*, II, § 15.

The wife being merged in the husband took his name.¹ If property vested in them with a third person they took one half, not two thirds.² If real estate vested in them they took one estate, and became tenants by entireties.³

These various matters will be now separately discussed.

2. Contracts Between Husband and Wife.—By the *common law*, contracts between husband and wife are absolutely void for want of parties and the wife's power to consent.⁴ A mere personal executory contract between them is unqualifiedly void,⁵ and a transfer from one to the other can be affected only through a third party.⁶ A wife can execute a power in favor of her husband,⁷ and can deal with him in her representative capaci-

1. Stewart M. & D., § 468; Schouler H. & W., § 63; see *post*, II., § 4.

2. Litt., § 291; Back v. Andrews, 2 Vern. 120; next note.

3. Marbourg v. Cole, 49 Md. 402, 411; 33 Am. Rep. 266; see *post*, IV, CONJUGAL ESTATES OF HUSBAND AND WIFE.

4. **Contracts Between Husband and Wife.**—Beard, 3 Atk. 72; (H. C. of Chan. Eng. 1754); Stone v. Gazzam, 46 Ala. 269, 273; Pillow v. Wade, 31 Ark. 678; Dibble v. Hulton, 1 Day (Conn.) 221; Hooker v. Baggs, 63 Ill. 161, 162; Martin 1 Me. 394, 398; Allen v. Hooper, 50 Me. 371, 374; Jenne v. Marble, 37 Mich. 319, 323; Frezzell v. Rozier, 19 Mo. 448, 449; Aultman v. Obermeyer, 6 Neb. 260, 264; Patterson, 45 N. H. 164, 166; White v. Wager, 25 N. Y. 328, 332, 333; Fowler v. Trebein, 16 Ohio St. 493, 497; Johnston, 31 Pa. St. 450, 453; Barron, 24 Vt. 375, 398. Wallingsford v. Allen, 10 Pet. (U. S. 1836) 583, 594 :

"Agreements between husband and wife, during coverture, for the transfer from him of property directly to the latter are undoubtedly void at law."

In Preston v. Fryer, 38 Md. (1873) 221, it was *held* that a deed from a married woman of her separate estate, directly to her husband, is a nullity; and upon the death of the husband, he having survived his wife, the property will descend to her heirs at law.

Roby v. Phelen, 118 Mass. (1875) 542: "The husband and wife being incompetent to contract with each other, the note made by her to him was, as between them, wholly void, and his indorsement of it to the plaintiffs could not make it binding upon her, although it might estop him to deny its validity in an action against him by the indorsees." See, also, Valensia v. Valensia, 28 Fed. Rep. 599 (1886).

In re Reuter, 5 Dem. (N. Y.) 162 (1887), it was *held* that a wife had no

claim against the estate of her deceased husband for working for him in his business of cheese making.

In Fuller v. Lambert, 78 Me. 325 (1887), it was *held* that an express promise by a husband to his wife to pay her money to help support her and their child does not change their relative rights and obligations, and hence is not supported by a legal consideration.

5. Jenne v. Marble, (1877) 321: "This is an action at law by the assignee of a husband against his wife on personal covenants for the payment of rent on a lease from the husband to the wife, and for the value of certain farm live stock claimed to have been sold to her . . . At common law there were mutual disabilities—husbands not being able to act any more than their wives in mutual contracts . . . In the next place, it is executory entirely on the part of the wife, involving no present transfer or charge of her property, or any of it." The court *held* that the transaction was not such as to create a valid right of action for the husband against the wife. *Supra*, note 4.

See, also, Fuller v. Lambert, 78 Me. 325 (1887).

6. Gebb v. Rose, 40 Md. (1874) 387, 392. "The only mode by which a *feme covert* can convey her estate, not held to her separate use, to her husband, except in the execution of a power, is by means of a conveyance to a third person for his use, he joining with his wife in the deed. That this may be done has been expressly decided in Thatcher v. Omans, 3 Pick. (Mass.) 521." See, also, Stoy v. Stoy, 41 N. J. Eq. 370 (1886).

7. Bradish v. Gibbs, 3 Johns. Ch. (N. Y.) 523, 536; Hoover v. Society, 4 Whart. (Pa.) 445, 453. Schley v. McCeney, 36 Md. (1872) 273: "There

ties;¹ but the validity of any other contract between them must be based either upon the doctrines of equity or upon the provisions of some statute.

In Equity the duality of husband and wife has always been recognized, and so has been the capacity of married women to hold, convey and charge by contract property which is called their equitable separate property or their sole and separate estate. (See MARRIED WOMEN). Therefore, courts of equity give effect to a husband's promises,² and transfers to his wife,³ and also enforce a wife's agreements with her husband respecting her sole and separate property,⁴ though they do not recognize any personal obligation she may attempt to assume.⁵ The contract must, of course, be equitable and valid in all other respects. The intervention of a trustee is not necessary,⁶ but any contract made directly between husband and wife will be valid in equity, if it would have been valid at law if made through a trustee or third

can be no question made of the right of a *feme covert* to execute a power, whether collateral, appendant or in gross, and in no case is the concurrence of the husband necessary, unless made so by the power itself. The law prescribes no particular ceremonies to be observed in the execution of a power; but the terms of the power may direct it to be executed by a note in writing, or by will, or deed, or may prescribe any ceremonies which the will or caprice of the party creating it may think proper, all of which must be complied with, however unessential or unimportant they may appear to be in themselves." 2 Wash. Real Prop. 317; 1 Sugden on Pow. 211; Hawkins v. Kemp, 3 East 410, 430; *post*, IV., § 5.

1. See Richards, 2 Barn. & Ad (Eng. George IV) 447, and Noble v. Kreuzkamp, 111 Pa. St. 68 (1886).

2. In McCampbell v. McCampbell, 2 Lea (Tenn. 1879) 661, it was held that a note executed by a husband to his wife during coverture, in consideration of money collected by him on a chose in action payable to the wife or distributive share due her, will, upon satisfactory proof of intention, constitute a declaration of trust in favor of the wife which equity will enforce, the estate being solvent, and the rights of creditors not involved.

3. Murray v. Glasse, 23 L. J., Ch. (Eng.) 126, 127; Sims v. Ricketts, 35 Ind. 181, 192, 193; 9 Am. Rep. 679; Moore v. Page, 111 U. S. (1883) 117, 118, MR. JUSTICE FIELD: "It is no longer a disputed question that a husband may settle a portion of his prop-

erty upon his wife, if he does not thereby impair the claims of existing creditors, and the settlement is not intended as a cover to future schemes of fraud. . . . And his direct conveyance to her, when the fact that it is intended as such settlement is declared in the instrument or otherwise clearly established, will be sustained in equity against the claims of creditors."

4. In Wormley v. Wormley, 98 Ill. (1881) 544, a purchaser of land procured the title to be made to his wife under an agreement, on the part of the wife, that she would convey to the husband when requested so to do. The court, at page 553, say: "But it is said that a contract of this character, between husband and wife, cannot be enforced in a court of equity. Whether a contract from a married woman to her husband, to convey lands, can be enforced in equity, we shall not stop to consider; but where the facts are as here established there is ample authority for a court of equity to grant relief."

5. Because married women can contract in equity only respecting their property. See Jenne v. Marble, 37 Mich. 319, 323; *post*, IV., § 6. But see Morrison v. Thistle, 67 Mo. 596.

6. Jones v. Clifton, 101 U. S. 225, 229; 9 Am. Rep. 679; Sims v. Ricketts, 35 Ind. (1871) 181, 193. "Whenever a contract would be good at law when made with trustees for the wife, that contract will be sustained in equity, when made with each other, without the intervention of trustees."

See, also, Furrow v. Athey, 21 Neb. 671 (1887).

party.¹ A number of instances in which contracts between husband and wife have been recognized in equity are given in the notes.²

Statutes affecting contracts between husband and wife may do so because they affect the unity of husband and wife and refer expressly to husband and wife, or because they enlarge the powers and capacities of married women. Some statutes expressly prohibit contracts or some contracts between husband and wife, others expressly authorize them. A statute prohibiting contracts between husband and wife destroys their prior capacity only so far as such capacity is expressly referred to or is necessary to secure the efficiency of the statute.³

A statute authorizing contracts between husband and wife generally includes all contracts each could make with a third party,⁴ but if it specifies certain contracts, the capacity it gives is confined to these.⁵ If annexed to a general statute empowering a married woman to contract, there is a clause excepting certain specified contracts with her husband, such statute gives her the power to make all contracts with her husband, but those excepted, which it enables her to make with third parties.⁶

1. See note 6, *ante*; also *Barron v. Barron*, 24 Vt. 375, 398; also *Pennison v. Pennison*, 46 Mo. 77, 81.

2. The relation of grantor and grantee may exist between husband and wife. See *Murray v. Glasse*, 23 L. J., Ch. 126, 127; *Sperling v. Rockport*, 8 Ves. (Engl.) 164, 175.

See note 5, *infra*.

In *Rich v. Tubbs*, 41 Cal. (1871) 34, it was held that if the husband purchases real estate with the separate property of the wife, but takes the conveyance to himself, the land thus purchased is also the separate property of the wife, as between the husband and the wife.

In *Jacobs v. Hesler*, 113 Mass. (1873) 157, a wife placed in her husband's hands her separate property, to be used by him in his business. The court, on page 760, say: "Upon these facts we are of the opinion that the bill cannot be maintained; a husband and wife cannot make contracts with each other; and, though he may doubtless be a trustee for her, yet when a wife, with her own hands, pays money of her separate property to her husband, there is no presumption that he receives it in trust for her, but the burden is on her to prove the fact. In the absence of such proof, the money must be deemed to have been given to him with the intention that it should be applied to the use or benefit of either or both of them, at his discretion."

So, also, courts of equity give effect to deeds of separation between husband and wife, see *Stewart M. & D.*, §§ 181-192; to gifts between them; *Kohner v. Ashenauer*, 17 Cal. 578, 582; *Underhill v. Morgan*, 33 Conn. 105, 107; *Warlick v. White*, 86 N. C. 139; *Stewart H. & W.*, §§ 41, 42.

3. See *Ingoldsby v. Juan*, 12 Cal. 564, 575, 576. In *Maclay v. Love*, 25 Cal. (1864), 367, 382: "But if the case is held to be within the prohibitory clause of the sixth section of the 'act defining the rights and duties of husband and wife,' it is insisted that the provision is unconstitutional. Conceding, for the purposes of the argument, that portion of the section requiring the instrument to be signed by the husband to be unconstitutional—a question we do not now intend to decide—this will not vitiate the remainder of the section, if valid in other respects."

4. See MARRIED WOMEN.

5. *Jenne v. Marble*, 37 Mich. 319, 323; *Sturmfeltz v. Frickey*, 43 Md. 569, 571. In *Robertson v. Bruner*, 24 Miss. (1852) 242, 244: "But, except to the extent that the power has been given by this statute to make contracts, she has no more power than she had at common law, and any contract not made for the purposes or according to the provisions of the statute is invalid."

6. *Goree v. Walthell*, 44 Ala. 161, 164, 165; *Trader v. Lowe*, 45 Md. 1, 14; *Gregory v. Dodds*, 60 Miss. 549,

Married women acts not referring to contracts between husband and wife, but giving a married woman the capacity to contract with the assent or joinder of her husband do not generally enable her to contract with him—the requirement of his joinder is presumed to exclude the idea of an intention to include contracts with himself.¹

Married women acts not specially referring to husband and wife, but giving married women the right to contract generally, have given rise to much dispute. Some cases hold that such statutes do not destroy the unity of husband and wife, but simply remove the disabilities of married women, and that, therefore, the disability of the husband and wife to contract together because of their unity is not removed;² others give such statutes the fullest effect, and hold that they fully enable husband and wife to contract together.³ As courts of equity are not troubled with the doctrine of unity, so far as married women's separate property is concerned, it is consistent with all the views that in equity a married woman's contracts with her husband relating to her statutory property should be governed by the same rules which apply to her contracts as to her equitable separate property.⁴ (See MARRIED WOMEN).

552. In *Whitney v. Wheeler*, 116 Mass. (1875) 490, 492: "Before the recent statutes, securing to married women their separate rights of property, gifts *causa mortis* from a husband to his wife were sustained. The proviso that nothing in those statutes shall authorize the husband to convey or give property to his wife, does not operate to render invalid what was before held to be valid."

1. *Kenneman v. Pyle*, 44 Ind. 275; *Scarborough v. Watkins*, 9 Mon. B. (Ky.) 540, 545; 50 Am. Dec. 528; *Gebb v. Rose*, 40 Md. 387, 392. In *Breit v. Yeaton*, 101 Ill. (1882) 242, 263, it is said: "And inasmuch as it was only by enabling laws that a married woman could convey her real property, and the statute made it imperative that, to do so, she must join with her husband, a deed of conveyance by her to him, was absolutely void." *Brooks v. Kearns*, 86 Ill. 574.

2. The New York Statute of 1849, ch. 375, enabled married women to devise and convey, as if unmarried, but in the case of *White v. Wager*, 25 N. Y. (1862) 328, where a deed was executed by a wife, in contemplation of death, to her husband in good faith and voluntarily, it was held that the disability of a husband to take land by conveyance from his wife was not removed by the above statute, and that

the deed was wholly ineffectual. See also, *Lord v. Parker*, 3 Allen (Mass.) 127, 129; *Aultman v. Obermeyer*, 6 Neb. 260, 264; *Knowles v. Hull*, 90 Mass. 562.

3. In *Hamilton v. Hamilton*, 89 Ill. (1878) 349: "Since the act of March 30th, 1874, relating to married women, took effect, a wife may make contracts with her husband for lawful purposes, except so far as is otherwise provided in the act itself, and they may be enforced." See, also, *Banks v. Banks*, 101 U. S., 240; *Wells v. Caywood*, 3 Colo. 487, 494; *Robertson*, 25 Iowa 350, 355; *Ransom*, 30 Mich. 328; *Albin v. Lord*, 39 N. H. 196, 203, 204.

4. *Whitridge v. Barry*, 42 Md. 140, 152. In *Hall v. Eccleston*, 37 Md. (1872) 510, 520: "We suppose it to be equally clear that a contract, founded upon proper consideration by which the husband and wife bind themselves to execute a mortgage of the separate estate of the wife, will be enforced by a court of equity, and such estate held liable for the debt intended to be secured (*Stead v. Nelson*, 2 Beav. 245), and it is quite as free from doubt that the separate estate held by the wife is liable in equity for all the debts, incumbrances or other engagements which she, together with her husband, may, by express terms or clear implication, charge thereon."

Ante-nuptial contracts are generally extinguished by the marriage of the parties.¹ And the same is true when one of several obligors marries one of several obligees.² This is strictly true at law, but it does not apply to marriage settlements and other contracts which are enforced only in equity.³

The *enforcement* of such contracts between husband and wife as are valid depends upon the law of the forum;⁴ but is still generally in equity. (See SUITS BETWEEN HUSBAND AND WIFE, *infra*, § 6).

3. Torts Between Husband and Wife.—As husband and wife are one, not only does their marriage extinguish all rights growing out of ante-nuptial personal wrongs,⁵ but while it continues it is a continually operating discharge of rights arising from such wrongs.⁶ So that one spouse cannot recover, at common law, against the other, for slander⁷ or assault and battery.⁸ Nor does this right arise after the marriage has been dissolved by death,⁹ or divorce.¹⁰ Nor does equity differ from law as to personal

1. Ante-nuptial Contracts.—*Power v. Lester*, 23 N. Y. (1861) 527, 529: "It was a general rule of the common law that, where a man married a woman to whom he was indebted, the debt was thereby released. Thus, if the husband obligor took the obligee to wife, the bond was discharged at law, because husband and wife make but one person in law, which unity of persons disabled the wife from suing the husband." See, also, *Flenner v. Flenner*, 29 Ind. 564, 566.

2. Suttles v. Whitlock, 4 Mon. (Ky.) 451, 452.

3. Cannel v. Buckle, 2 P. Wms. (Eng.) 242; *Moore v. Ellis*, Bunb. (Eng. Exchequer) 205; *Cotton v. King*, Vern. (Eng. H. C. of Chan.) 290; *Neves v. Scott*, 9 How. (U. S.) 196, 208; *West v. Howard*, 20 Conn. 581, 587; discussed fully *Stewart M. & D.*, §§ 32-43. See, also, *Spencer v. Boardman*, 118 Ill. 553 (1887).

4. *Infra*, § 6. See *Stewart H. & W.*, §§ 35, 37, 435.

5. Torts.—Inference from *Abbott v. Abbott*, 67 Me. 306, 309; 24 Am. Rep. 27; *post*, II, § 9, and cases in next note.

6. Phillips v. Barnet, 1 Q. B. D. (Eng.) 436, 438, 439; *Peters*, 42 Ia. 183; *Abbott*, 67 Me. 304, 306; 24 Am. Rep. 27; *Libby v. Berry*, 74 Me. 286, 288; *Freethy*, 42 Barb. (N. Y.) 641, 645; *Walker v. Reamy*, 36 Pa. St. 410, 414. In *Shuttleworth v. Winter*, 55 N. Y. 625, 631, (1874), "a wife does not become the debtor of her husband by making an extravagant or unauthorized use of property which he intrusts to her management and control. If she there-

with purchases property, real or personal, without authority, his remedy is to rescind the contract and recover from the vendors what they have received, if he can, and if he cannot, he must take the property purchased."

7. Abbott v. Abbott, 67 Me. 307: "We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically, the married woman has remedy enough. The criminal courts are open to her. She has the privilege of the writ of habeas corpus, if unlawfully restrained. As a last resort, if need be, she can prosecute at her husband's expense a suit for divorce, etc."

8. Phillips v. Barnet, 1 Q. B. Div. (Eng.) 436, 439; *Peters v. Peters*, 42 Ia. 183, 184; *Schultz v. Schultz*, 89 N. Y. 684; *Com. v. Barry*, 2 Green Cr. R. 285, 288; *Libby v. Berry*, 74 Me. 286, 288.

9. Phillips v. Barnet, 1 Q. B. Div. 436, 440.

10. Abbott v. Abbott, 67 Me. 305. "The defendants forcibly carried the plaintiff to an insane asylum. The case assumes the act to have been wrongful and wanton. The plaintiff and one of the defendants, at the time, were husband and wife; since then she was divorced. Can an action of tort for such an injury, instituted after divorce, be sustained by her against her former husband? We have no doubt that it cannot be maintained." See *Stewart M. & D.*, § 442; *Phillips v. Barnet*, 1 Q. B. Div. 436, thoroughly discusses the whole subject, and is followed by *Abbott v. Abbott*, 67 Me. 305, above.

wrongs.¹ But courts of equity do secure to married women the enjoyment of their property, and will prevent its destruction or injury by the husband.² Some modern statutes have placed married women on a footing from which they can sue their husbands for torts, even at law,³ but mere property acts do not give them this power;⁴ so that, a wife with statutory separate property which she holds as a *feme sole* cannot sue her husband in trespass or trover for breaking it or removing it.⁵ She must take preventative measures to preserve it.⁶

4. Crimes Between Husband and Wife.—The relation of husband and wife does not authorize criminal conduct of one towards the other. Prosecutions of husbands for assaulting their wives, etc., are common enough. But the relation may prevent certain conduct of one relating to the other's property from being criminal.⁷ So one spouse cannot steal from the other,⁸ but *quære* if they are living apart,⁹ and even a third party who joins an adulterous wife in taking possession of her husband's property is not guilty unless he took part in the asportation.¹⁰ So one spouse is not guilty of

See, also, *Nickerson v. Nickerson*, 65 Tex. 281 (1887).

1. See cases in preceding notes.

2. See §§ 1, 2, *ante*. The wife may have an injunction to protect her estate from her husband. *Heck v. Volkmer*, 29 Md. 507, 511. And a writ of ejectment if he excludes her from her real estate. *Minier v. Minier*, 4 Laws (N. Y.) 42.

3. *Larison v. Larison*, 9 Ill. App. 27, 31. See *Peters v. Peters*, 42 Iowa 183, 184.

4. *Stewart H. & W.*, § 15. "Statutes relating to estates or property rights of husband and wife do not affect their personal status or relation. Thus a statute authorizing conveyances between husband and wife does not remove their incapacity to contract together personally."

5. *Walker v. Reamy* (1860), 36 Pa. St. 410, 414: "And as the only object of the act was to afford a protection to the estates of married women, we may assume that it was not intended that she should so 'fully' own her 'separate property' as to impair the intimacy of the marriage relation. It was not intended to declare that her property should be so separate that her husband could be guilty of larceny of it, or liable in trespass or trover for breaking a dish or a chair, or using it without her consent."

6. See *post*, § 6; *supra*, n. 2.

7. **Crimes.**—*Thomas v. Thomas*, 51 Ill. (1869) 162, 165: "Again, if it belonged to the husband, it could not, even under that

law, be *held* larceny. That act has not so far destroyed the relation of husband and wife as to render either guilty of larceny by converting the property of the other. Whatever is the civil liability, if any, it is not larceny." See note 9, below.

8. Last note above, and *Queen v. Kenney*, 2 Q. B. D. (Eng.) 307, 311; *Reg. v. Tolfree*, 1 Moody C. C. 243 (Eng. Crown Cases, 1824-1844); *Reg. v. Mutters*, 10 Cox C. C. 50 (Eng. v. Ireland, 1864); *State v. Banks*, 48 Ind. 187, 199; *Com. v. Hartwell*, 3 Gray 450; *Snyder v. People*, 26 Mich. 106, 108, 111; *State v. Parker*, 26 Alb. L. J. 423; *Walker v. Reamy*, 36 Pa. St. 410, 414; *Overton v. State*, 43 Tex. 616, 618.

9. If she be living apart in adultery: *State v. Banks*, 48 Ind. (1874) 198, approving *Lord Campbell* in *Regina v. Featherstone*, *DEARSLY* Eng. Crown Cases, (1858), 369, says: "The general rule of law is, that a wife cannot be found guilty of larceny for stealing the goods of her husband, and that is upon the principle that the husband and wife are, in the eye of the law, one person; but this rule is properly and reasonably qualified when she becomes an adulteress. She thereby determines her quality of wife, and her property in her husband's goods ceases."

10. *State v. Banks*, 48 Ind. 199. "We have made a careful examination of the authorities, and they very clearly establish the following propositions: . . . (6) An adulterer is not guilty of larceny if he merely assist the

arson in burning the other's house.¹

Modern statutes have not changed this law, generally.²

5. Wills Between Husband and Wife.—A husband could always will his property to his wife as to a stranger, for his will takes effect only upon his death and after the marriage unity has been destroyed.³ But at common law the wife was merged in her husband, and except under a power,⁴ or by virtue of a statute,⁵ or in a representative capacity,⁶ even now she cannot will at all.⁷ But when for any reason she can will generally to strangers, she can will to her husband, because, as already stated, the unity of husband and wife cannot interfere. So a general power in a deed,⁸ or in a statute,⁹ enabling her to will, includes wills to her husband. But statutes enabling her to will, provided her will does not affect the rights of her husband,¹⁰ and, probably, provided her husband consent,¹¹ exclude wills to her husband. Some statutes expressly prohibit wills between husband and wife, or limit the amount that can be willed; others put the surviving husband or wife upon an election between the will and the law. (See DOWER). The effect of the will depends on the law existing at the time of the testator's death.¹²

A man's will is revoked by his subsequent marriage and

adulteress in carrying away her necessary apparel." See *Queen v. Kenny*, 2 Q. B. D. 307, 311.

1. *Snyder v. People*, 26 Mich. (1872) 106, 111; 12 Am. Rep. 302. "If, therefore, the husband shall be guilty of the great wrong to his wife and family of setting fire to the house they inhabit, he is no more guilty of arson in so doing than the wife was at common law for a like wrong to the dwelling house of the husband. The case is a very proper one for a penal statute, but none has yet been enacted to meet it. The house in legal contemplation, as regards the offence under consideration, is the dwelling house of the husband himself."

2. *Thomas v. Thomas*, 51 Ill. 162, 165; *Walker v. Reamy*, 36 Pa. St. 410, and note 1, above.

3. Wills.—See Litt., § 168; 1 Bish. M. W., § 37; *Morse v. Thompson*, 4 Cush. (Mass.) 562, 567; *Burdeno v. Amperse*, 14 Mich. 90, 93; *Wakefield v. Phelps*, 37 N. H. 295, 302.

4. *Bradish v. Gibbs*, 3 Johns. Ch. (N. Y.) 523, 535.

The Kentucky Gen. St., § 2, permits any one *sui juris* and not "a married woman" to dispose of his estate by will. A woman made a will during her husband's lifetime and after his death adopted, identified and left it as her

will. *Held*, that it was properly admitted to probate. *Porter v. Ford*, 82 Ky. 191 (1887).

5. *Fitch v. Brainard*, 2 Day (Conn.) 163, 180; *Morse v. Thompson*, 4 Cush. (Mass.) 562, 568; *Wakefield v. Phelps*, 37 N. H. 295, 301.

6. *Scammel v. Wilkinson*, 2 East 552, 557.

7. See article on MARRIED WOMEN. Discussed at length, *Stewart H. & W.*, §§ 340, 354. "If a wife make a will during her husband's lifetime, and do not republish it after his death, it is not valid to pass her estate." *Osgood v. Breed*, 12 Mass. 525.

8. *Bradish v. Gibbs*, 3 Johns. Ch. (N. Y.) 523, 535.

9. See *Wakefield v. Phelps*, 37 N. H. 295; *Morse v. Thompson*, 4 Cush. (Mass.) 562, 567, dissenting opinion. This is so because there is no additional incapacity due to the marriage relation, as there is in the case of contracts between husband and wife.

10. *Morse v. Thompson*, 4 Cush. (Mass.) 562, 566; next note.

11. See cases in above notes; also, *Hood v. Archer*, 1 McCord (S. Car.) 225, 477; *Wakefield v. Phelps*, 37 N. H. 295, 306. See generally, INTERPRETATION.

12. *Wakefield v. Phelps*, 37 N. H.

birth of issue,¹ unless it provides for such issue,² or for the issue by a former marriage.³ A woman's will is revoked by her subsequent marriage alone,⁴ unless by statute she has full power to make a will, in which case, probably, her will is revoked as a man's is.⁵ (See WILLS).

A devise to "my wife" means, in the case of several wives, the wife at the time the will was made;⁶ if there was no wife at such time, but the testator was about to marry, his intended wife takes.⁷ A devise to "my wife" is void if the woman had deceived the testator into thinking himself married;⁸ and so of a devise to "my husband."⁹ Generally, legacies and devises by one spouse to the other are construed as other legacies and devises are.¹⁰

6. Suits Between Husband and Wife.—At common law suits between husband and wife are entirely unknown,¹¹ because husband and wife are one, and, as has been seen, cannot be under obligation to each other either in contract or in tort.

In equity, however, suits between husband and wife have been known from early times, and in courts of equity have been enforced those obligations which, it has been shown, husband and wife could mutually incur.¹² In such cases the wife is represented by a trustee or next friend.¹³ Thus, at law a man cannot even confess judgment in favor of his wife,¹⁴ but when courts of

295, 306. See *Stewart H. & W.*, §§ 22, 36.

1. *Wellington v. Burr*, (King's Bench Eng.) 2165, 2171; *Doe v. Lancashire*, 5 Term Rep. (Eng.) 49, 63; *Marston v. Roe*, 8 Ad. & E. (King's Bench 1837) 14, 55; 1 *Jarman Wills* 122, *et seq.*

2. *Marston v. Roe*, 8 Ad. & E. (Eng.) 14, 54; *Brush v. Wilkins*, 4 Johns. (N. Y.) Ch. 506, 510.

3. *Yerby v. Yerby*, 3 Call (Va.) 289, 295. For this and notes 1 and 2. *supra*, see article WILLS.

4. *Forse v. Hembling*, 4 Rep. 60, 61; *Douglas v. Cooper*, 3 Mylne & K. (Eng. H. Court of Chan. 1835) 378, 381; *Hodsden v. Lloyd*, 2 Bro. C. C. 540, 544; *Stewart H. & W.*, § 351.

5. *Fuller v. Fuller*, 79 Ill. 99, 103.

6. *Neblock v. Garratt*, 1 Russ. & M. (H. Court of Chan. Eng.) 629, 630; *Franks v. Brooker*, 27 Beav. (Eng.) 635.

7. *Schloss v. Stiebel*, 6 Sim. (Eng.) 1, 5.

8. *Wilkinson v. Joughlin*, L. R., 2 Eq. 319, 322.

9. *Kennell v. Abbott*, 4 Ves. (Eng.) 802, 809.

10. *Orrick v. Boehm*, 49 Md. 72, 101.

11. **Suits.**—See 1 Black. Com. 120; 2 Kent Com. 129; *Doe v. Daley*, 8 Q.B. 934, 938; *Countz v. Markling*, 30 Ark. 17, 24; *Larison v. Larison*, 9 Ill. App. 27, 31; *Peters v. Peters*, 42 Iowa 182, 184; *Hobbs v. Hobbs*, 70 Me. 177, 182; *Barton v. Barton*, 32 Md.; *Pittman v. Pittman*, 4 Ore. 298, 300. In *Chestnut v. Chestnut*, 77 Ill. (1875) 346, 351: "If the provisions of the common law which prohibit a husband and wife from prosecuting suits at law against each other are to be repealed, altered or modified, it must be done by legislative action." *Roseberry v. Roseberry*, 27 W. Va. 759 (1886).

12. See §§ 2-4, *ante*.

13. *Story Eq. Pl.*, §§ 61, 63; *Freethy v. Freethy*, 42 Barb. (N. Y.) 641; *Bridges v. McKenna*, 14 Md. 258, 270; *Heck v. Volkmer*, 29 Md. 507, 511. In *Barton v. Barton*, 32 Md. 214, which was a suit by the widow against the executors of her husband for money which she had loaned him before marriage, at 224: "There is no doubt of the right of a married woman to sue, by her next friend, either at law or in equity, in any matter perfectly cognizable in such courts."

14. *Countz v. Markling*, 30 Ark. 17, 21.

law and equity are combined, as in Pennsylvania, he can.¹ A wife cannot sue out a writ of *scire facias* against her husband on a decree for alimony.² A husband cannot at law sue his wife on a covenant to pay rent.³ And one cannot sue the other for assault and battery.⁴ But in equity a wife can institute proceedings against her husband for the protection of her property;⁵ or for a suitable provision out of her choses in action which he is therein seeking to reduce to possession.⁶ (See WIFE'S EQUITY, *infra*, § 39); or to make him account;⁷ or to have him removed from a trust;⁸ in seeking to protect her property from his creditors she may make him a party defendant;⁹ she may file her claim against his insolvent estate;¹⁰ or a bill against him for partition;¹¹ or a bill against him for the cancellation of a contract.¹² So a husband may, in equity, hold a wife responsible for money of his appropriated by her.¹³

One spouse can, however, be made the garnishee of the other.¹⁴ Under the many statutes passed of late years, many difficulties have arisen. When a statute expressly authorizes suits between husband and wife, it gives a new remedy but no right;¹⁵ so that a statute enabling a married woman to sue her husband does not enable her to sue him for a personal wrong to herself.¹⁶ Statutes authorizing married women to sue and be sued, as if unmarried, do not authorize suits between husband and wife,¹⁷ except in equity,¹⁸ for the reasons given under contracts between husband and wife, but there is also the contrary view.¹⁹ Statutes authoriz-

1. *Rose v. Latshaw*, 90 Pa. St. 238, 240; *Lahr v. Lahr*, 90 Pa. St. 507, 511.

2. See note 11, *ante*. Also, consult *Stewart M. & D.*, § 378.

3. *Jenne v. Marble*, 37 Mich. 319, 323.

4. See note, 8, § 3, *ante*.

5. See notes 1, 2, p. 792. See, also, *Walter*, 48 Mo. 140, 145; *Bridges v. Phillips*, 25 Ala. 136.

6. *Wiles v. Wiles*, 3 Md. 1, 8; 56 Am. Dec. 733.

7. *Whitman v. Albernathy*, 33 Ala. 154, 161.

8. *Bryan v. Bryan*, 35 Ala. 290, 295.

9. *Bridges v. McKenna*, 14 Md. 258, 270. See *post*, IV., § 5.

10. *Oswald v. Hoover*, 43 Md. 360, 368.

11. *Moore v. Moore*, 47 N. Y. 467, 469; 7 Am. Rep. 466.

12. *Hardin v. Gerard*, 10 Bush (Ky.) 259, 261.

13. *Davidson v. Smith*, 20 Iowa 466, 468.

14. *Odenhall, Garn v. Devlin*, 48 Md. 439, 446: "It is settled that the relation of debtor and creditor may exist between husband and wife, growing out of the appropriation by him of the wife's sepa-

rate estate When such a debt exists, the creditor of the wife, by a proceeding like the present, may make the husband a garnishee with respect thereto."

15. *Peters v. Peters*, 42 Iowa 182, 183. See INTERPRETATION.

16. *Libby v. Berry*, 74 Me. 286, 288; *Peters v. Peters*, 42 Iowa 182, 183.

17. *Barton v. Barton*, 32 Md. (1869) 214, 224: "The fourth section confers upon a married woman . . . the right to sue . . . as if she were a *feme sole*. . . . It is true that public policy, originating in the delicate relations existing between husband and wife, forbids a wife from maintaining an action at law against her husband during the coverture, and her only remedy against him is by a proceeding in equity."

18. See, also, *Smith v. Gorman*, 41 Me. 405, 408; *Libby v. Berry*, 74 Me. 286, 288; *Freethy v. Freethy*, 42 Barb. (N. Y.) 641, 645; *ante*, §§ 2, 3.

19. In *Emerson v. Clayton*, 32 Ill. (1863) 493, 498, the court, in commenting on the act of 1861, which provided that all the property, both real and personal, belonging to any married

ing suits as to property do not authorize personal suits.¹ If the statute gives a new remedy at law it does not destroy the old remedy in equity,² but if it gives a new right enforceable at law, such right cannot be enforced in equity.³ Cases are found of suits between husband and wife in detinue,⁴ replevin⁵ and trover;⁶ and of one spouse making the other a garnishee.⁷

After the marriage has been dissolved by *death* or *divorce*, suits can be brought between the parties or their representatives to enforce any right which existed during coverture;⁸ but such event does not create rights, it simply removes impediments to remedies.⁹ (See, also, MARRIED WOMEN, SUITS OF).

7. Possession Between Husband and Wife.—Three general rules of the law relating to Possession, namely, (1) possession of chattels is *prima facie* proof of ownership; (2) delivery involves a change of possession; and (3) retention of possession by a grantor is a badge of fraud, are particularly difficult to apply to husband and

woman, however acquired, should be her sole and separate property under her sole control; "and shall not be subject to the disposal, control or interference of her husband," said: "We are well satisfied that the act can have no very beneficial operation in favor of married women, or be effective in the protection of her separate property, unless the 'sole control' conferred upon her over it is made to extend to the commencement and prosecution of suits for its recovery even against her husband, should he, contrary to her wishes, and in contempt of her rights, unlawfully interfere with it."

1. *Chestnut v. Chestnut*, 77 Ill. 346, 350; *Jenne v. Marble*, 37 Mich. 319, 323; *Pitman v. Pitman*, 4 Oreg. 298, 300. See *Stewart H. & W.*, § 15.

2. *Bridges v. McKenna*, 14 Md. 258, 270. See *Bispham's Principles of Equity*, (4th ed.) ch. 2.

3. *Larison v. Larison*, 9 Ill. App. 27, 30, 31.

4. *Scott v. Scott*, 13 Ind. 225, 230.

5. *Jones v. Jones*, 19 Iowa 236, 242; *Howland v. Howland*, 20 Hun (N. Y.) 472, 473.

6. *Berdell v. Parkhurst*, 19 Hun (N. Y.) 358, 360.

7. *Tunks v. Grover*, 57 Me. 586, 588.

This note and the three above show the advanced condition of legislation in those States.

8. In *Davidson v. Smith*, executor, 20 Iowa (1866) 466, where, during a sickness of the husband, the wife removed from his person a belt containing a large sum of money, but a small portion of which was returned to him, notwithstanding his repeated requests, and where, after

her death, a claim for the amount not returned was filed by the assignee of the husband against her estate, it was *held* that the possession of the money by the wife was the possession of the husband during her life; and that if, after her death, her executor takes possession of it as part of her estate, the husband may assert his right to its possession, which is then, for the first time, in contemplation of law, denied.

In *Phillips v. Barnet*, (1876) 1 Q. B. D. (Eng.) 436, it was *held* that a wife, after being divorced from her husband, could not sue him for an assault committed upon her during coverture.

But the rights which exist between husband and wife are few—thus, in *Abbott v. Winchester*, 105 Mass. (1870) 115, it was *held* that a promissory note made and given by a husband to his wife before their marriage, becomes a nullity on the marriage, and is not revived by the death of the husband.

See, also, *King v. Green*, 2 Stewt. (Ala.) 133, 135; *Blake v. Blake*, 64 Me. 177, 180, 182; *Abbott v. Abbott*, 67 Me. 304, 306; *Carleton v. Carleton*, 72 Me. 115; *Barton v. Barton*, 32 Md. 214, 224.

9. In *Abbott v. Abbott*, 67 Me. 304, 309: "But she can only recover for such a wrong as she and her husband could have recovered for in their joint names while the marriage relation subsisted. She succeeds, after death or divorce, to just such rights as existed before that time. The language of the law is that the right survives to her. But there must be some right in existence to survive . . . It would not be the survival of a claim, but it would be one newly created."

wife so long as they are regarded as one person and occupy one home, making common use of the contents and appurtenances thereof.

Presumption of Ownership of Property in the Possession of Husband and Wife.—At common law a wife had no property in possession during coverture, as will be seen below, but her possession was her husband's possession,¹ and even money in her pocket was deemed in her husband's actual possession.² As a consequence, the possession of husband and wife was the possession of the husband,³ and so far as it was evidence of title at all, it was evidence of the husband's title.⁴ And although married women came to hold equitable separate property and statutory separate property, the presumption still exists that they have no property, and that all the property about the family home is in the possession of the husband and belongs to him.⁵ But this presumption is rebuttable, and the wife's title can be proved.⁶ Still the presumption of the husband's ownership does exist; and it continues even after his death, so that property held by a man's widow, who is also his administratrix, is presumed to be held by her in the latter capacity.⁷ And it goes so far that even when a wife has bought property in her own name, the purchase money is presumed to have been her husband's.⁸ This, perhaps, makes

1. Possession.—See § 1, *ante*; also *Bell v. Bell*, 37 Ala. 536, 542; also, *post*, IV., § 3.

2. *Carleton v. Lovejoy*, 54 Me. 445, 446; *Cox v. Scott*, 9 Baxt. 305, 309, *post*, IV., § 3.

3. In *Topley v. Topley*, 31 Pa. St. (1858) 328, 329, the court say: "The husband, as the head of the family, is presumed to be the owner of all the personal property possessed by the family until the contrary appears."

Personal property in the possession of a married woman is presumed to belong to her husband. If the fact is otherwise it must be so shown. *Hembrecht v. Carlos*, 24 Mo. App. 264, (1887). See, also, *Bynum v. Frederick*, 81 Ala. 489, (1887).

4. This follows from the last proposition. See *Robinson v. Brems*, 90 Ill. 351, 354.

5. See note 3, above. Also, *Bell v. Bell*, 37 Ala. 536, 541; *Allen v. Eldridge*, 1 Colo. 287, 290; *Huff v. Wright*, 39 Ga. 41, 43; *Robinson v. Brems*, 90 Ill. 351; *Davison v. Smith*, 20 Iowa 466; *Com. v. Williams*, 7 Gray (Mass.) 337, 338; *Hill v. Chambers*, 30 Mich. 422, 428; *Walker v. Reamy*, 36 Pa. St. 410, 416; *Nelson v. Hollins*, 9 Baxt. (Tenn.) 553, 555; *Stanton v. Kirsch*, 6 Wis. 334, 341; *Whiton v. Snyder*, 88 N. Y. (1882) 299, 304, 305. This last case dis-

tinguishes between the presumption regarding ordinary household furniture and that concerning her wearing apparel and ornaments.

6. See note 3 *ante*. In *Mason v. Bowles*, 117 Mass. (1875) 86, it was held that "a lease of a shop to a man, and notes signed by him for goods therein, are not conclusive evidence against his wife, who is carrying on business on her separate account, that the goods belonged to the husband; and in an action of replevin by her against an officer, who has attached the goods as the property of the husband, she may show by parol evidence that the goods are hers."

7. The presumption in favor of the husband must be overcome in every case. *Bradshaw v. Mayfield*, 18 Tex. 21, 27.

8. In *Seitz v. Mitchell*, 94 U. S. (1876) 580: "Purchases of real estate or personal property made during coverture by the wife of an insolvent debtor, are justly regarded with suspicion. She cannot prevail in contests between his creditors and her, involving their right to subject property so acquired to the payment of his debts, unless the presumption that it was not paid for out of her separate estate be overcome by affirmative proof." Also, *Price v. Sanchez*, 8 Fla. 136, 142; *Huff v. Wright*,

but little difference as far as her husband or a stranger is concerned, for as against them a gift (of the purchase money) from her husband to her is good,¹ and may be inferred from circumstances;² but as against her husband's creditors (as when she sues for taking her goods for her husband's debts,³) she must prove not only that the purchase was made for her,⁴ but that it was made out of her separate funds,⁵ or upon her separate credit.⁶ And it has even been held that a creditor of the wife's seizing goods alleged to be hers must prove that they are hers, and not her husband's.⁷ But a wife's possession under a mortgage has been held *prima facie* evidence of her title.⁸

As to Real Estate, it has been held that when the husband and wife live together on the wife's farm, the husband is presumed the tenant, and owns the crop, unless the wife proves that he farmed it as her agent;⁹ but this rule is in conflict with the rules that the increase of separate property is separate property (see

39 Ga. 41; *Farrell v. Patterson*, 43 Ill. 52, 59; *Glann v. Younglove*, 27 Barb. (N. Y.) 480, 481; *Aurand v. Schaffer*, 43 Pa. St. 363. *Contra*, *Saunders v. Garrett*, 33 Ala. 454, 456; *Kluender v. Lynch*, 4 Keyes (N. Y.) 361, 363; *Stoll v. Fulton*, 38 N. J. L. 430, 437. See *Stewart H. & W.*, §§ 120, 132.

1. *Jennings v. Davis*, 31 Conn. 134, 142; next note.

2. *Jackson v. Jackson*, 91 U. S. 122, 125; *Andrews v. Oxley*, 38 Iowa 578, 580; *Bent v. Bent*, 44 Vt. 555, 559; *Weymouth v. Chicago*, 17 Wis. 550, 551; *Faddis v. Woolomes*, 10 Kan. 56; *Miller v. Bannister*, 109 Mass. 289; *Peters v. Fowler*, 41 Barb. (N. Y.) 567, 468; *Jennings v. Davis*, 31 Conn. 134; *Manny v. Rixford*, 44 Ill. 129, 133; *Skillman v. Skillman*, 13 N. J. Eq. 403; *Bradshaw v. Mayfield*, 18 Tex. 21, 25.

3. *Duress v. Horneffer*, 15 Wis. (1862) 195. "In trespass by a firm, one member of which is a married woman, against an officer, for taking, on an execution against the husband of the female plaintiff, goods which are alleged to belong to the firm, it is necessary for the plaintiffs to show that the interest of the female plaintiff in the goods was her separate estate."

4. See *Marshall v. Curtwell*, L. R., 20 Eq. 328, 331; *Grain v. Shipman*, 45 Conn. 572, 583; *Wormley v. Wormley*, 98 Ill. 544.

5. *Glann v. Younglove*, 27 Barb. 480, 483; *Curry v. Bott*, 53 Pa. St. 400, 403.

6. In *Erdman v. Rosenthal*, 60 Md. (1883) 312, a bill was filed by a married woman for an injunction to restrain an execution issued against her husband,

and levied upon personal property which she claimed to be hers, the court, on p. 316, said: "The husband being in apparent possession and active control of the property, dealing with it as his own, it is incumbent upon the wife, in order to defeat the rights of the creditors of the husband, to establish by clear and undoubted proof a *bona fide* right and title to the property. The simple assertion of title as against the husband or his creditors will not do; there must be clear affirmative proof to show how the property was acquired, and if purchased, that it was paid for by the money or purchased upon the credit of the wife exclusively." *Seitz v. Mitchell*, 94 U. S. 580; *Hinkle v. Wilson*, 53 Md. 292. See *Marshall v. Curtwell*, L. R., 20 Eq. 328, 331; *Grain v. Shipman*, 45 Conn. 572, 583; *Wormley*, 98 Ill. 544; *Bent*, 44 Vt. 455; *Curry v. Bott*, 53 Pa. St. 400, 403; *Blumer v. Pollock*, 18 Fla. 707.

7. *Crane v. Seymour*, 3 Md. Ch. 483, 486.

8. *Morrison v. Roch*, 32 Wis. (1873) 254. "A husband and wife joined in conveying real estate and in the covenants of the deed, but a bond and a mortgage of the same lands given to secure part of the purchase money ran to the wife alone. In an action on such bond and mortgage, by one claiming as her assignee, *held*, that the presumption must be that the wife was the former owner of the premises and owned the mortgage, and could assign it without the concurrence of the husband."

9. *Langford v. Greirson*, 5 Ill. App. (1879) 362. "The occupancy and cul-

MARRIED WOMEN), and that the wife's separate property in the possession of the husband and wife is in her possession, and will, therefore, probably not prevail.¹ In fact, it is well settled that a husband may manage his wife's property without acquiring any rights therein, or in any way rendering it liable for his debts.²

As the possession of husband and wife is thus at best equivocal, neither can rely upon possession to prove acquisition of title from the other,³ and a wife can assert her title even to property which she has allowed her husband to have taxed in his name;⁴ and this is because it is the policy of the law to encourage the trust and intimacy of the marriage relation.⁵ And there is no such

tivation in apparent control, by the husband, of the wife's lands, where nothing appears to show his or her actual interest in them, will raise a presumption of tenancy in him, and consequent ownership of the crop, subject to her lien for a reasonable rent, but this is not conclusive upon her right to the crop, and is liable to be overcome by proof tending to show that his performance of such labor is fairly consistent with her claim to the crop."

Under § 5, 1 R. S. 1876, p. 550, crops grown upon the land of a married woman are her separate property, and are not subject to execution to pay the debts of the husband. The supreme court of the State, in *Stout v. Perry*, 70 Ind. (1880), at p. 504, does not appear to agree with the case in Illinois, above cited; that case is not, however, referred to: "We think the court erred, as a conclusion of law from the facts found, in holding that the husband was the tenant of the wife. The finding shows that there was no such express agreement, and no such implied agreement will arise between husband and wife, living together as a common family, concerning matters which go to the support and benefit of the household." See *Bowen v. Arnsden*, 47 Vt. 563, 573.

1. *DeBlane v. Lynch*, 23 Tex. (1859) 25, 27. "So far as I am informed, the proposition that crops produced on the land of the wife remain the separate property of the wife, is founded and supported upon what is supposed to be the true import of the term, 'increase of land,' used in the act of 1848." *Stout v. Perry*, 70 Ind. 504; *Russell v. Long*, 52 Iowa 250.

2. *Langford v. Greirson*, 5 Ill. App. (1879) 362, 366. "Nor do we think the supreme court ever intended to hold absolutely, as matter of law, that he could not apply his whole time, skill and labor

to the cultivation of her land without subjecting its product to liability for his debts. Whose is the property in such cases is still a question of fact, to be determined in each by its own circumstances."

Miller v. Peck, 18 W. Va. (1881) 75. "A married woman having personal property, which she is allowed to hold by statute as her separate property, may barter and trade with reference thereto through her husband as her agent, and will be entitled to the increase thereof, though living with her husband." *Cooper v. Ham*, 49 Ind. 393; *Stewart H. & W.*, § 87.

3. *Bell v. Bell's Admr.*, 37 Ala. (1861) 536, 542. "She cannot claim that she holds property in possession adversely to her husband, except upon the ground that it is a separate estate; for her possession, except so far as chancery recognizes her right to hold a separate estate, and confers upon her, in reference to such estate, the privileges of a *feme sole*, is the possession of the husband. The claim that she held them adversely to her husband, no matter how long, could never avail." *Veal v. Robinson*, 70 Ga. 809, 817.

4. *Deck v. Smith*, 12 Neb. 389, 395.

5. In *Cole v. Van Riper*, 44 Ill. (1867) 58, 63, in commenting upon the statute which provided that all property of married women should be under their sole control and enjoyed as if unmarried, the courts say: "That this statute cannot be enforced according to its literal terms without impairing to a very large extent the strength of the marriage tie . . . Can she forbid the husband the use of such portion as she may choose, allow him to occupy only a particular chair, and to take from the shelves of the library a book only upon her permission? This would all be very absurd and we know the legislature had no idea of enacting a law to be thus in-

thing as adverse possession as between husband and wife as long as they cohabit.¹

How Delivery Can be Made Between Husband and Wife.—By delivery is meant a change of possession intended to accompany a change of title. Gifts between husband and wife are valid and are not uncommon (See MARRIAGE SETTLEMENTS); but the donor's intention to divest himself or herself of the property, and the carrying out of that intention by delivery, must be clearly proved by the donee, wife² or husband,³ as the case may be. Owing to the intimacy of their relations, actual delivery is very difficult to prove, and the only safe way of perfecting a gift between them is by constructive delivery by some writing or formal instrument, like a bill of sale.⁴ This reasoning does not, however, apply to mere personal effects or ornaments used by husband or wife,⁵ or to such other property as the one or the other uses or enjoys alone.⁶

How Far Apparent Possession of Husband or Wife May be Fraudulent.—In the case of conveyances by a debtor, the general rule is, that if, after the conveyance is made, he retains possession

terpreted." *Snyder v. People*, 26 Mich. 106, 109; s. c., 12 Am. Dec. 302; *Walker v. Reamy*, 36 Pa. St. 410, 414.

1. See note 3, *ante*.

2. *Delivery.*—In *Breton v. Woolven*, L. R., 13 Ch. Div. 416, 421, the court held, that gift to wife was incomplete because she could not show a transfer of the property or declaration of trust, although the wife produced the following note: "My dearest wife—I this day make you a present of the plate, etc., now at Mapping and which they are taking care of for me, for your sole use and benefit, etc." *Colteen v. Missing*, 1 Madd. (Eng. 1815) 176, 183; *Pierce v. Pierce*, 7 Biss. (U. S.) 426; *Machen v. Machen*, 38 Ala. 364, 368; *Wheeler v. Wheeler*, 43 Conn. 503, 509; *Woodson v. Pool*, 19 Mo. 340, 345; *Skillman v. Skillman*, 13 N. J. Eq. 403; *Dilts v. Stevenson*, 17 N. J. Eq. 407, 413; *Woodruff v. Clark*, 42 N. J. L. 108, 202; *Neufville v. Thomson*, 3 Edw. Ch. (N. Y. 1840) 92, 94; *Paschell v. Hall*, 5 Jones Eq. (N. C. 1860) 108, 109, 112; *Campbell v. Campbell*, 80 Pa. St. 208, 306; *Wade v. Cartrell*, 1 Head (Tenn. 1858) 346.

3. *Re Pierce*, 7 Biss. (U. S.) 426, 427. In States such as *Illinois*, where husband and wife in respect to her separate estate stand before the law as strangers, such a high degree of proof is not now necessary. *Patten v. Patten*, 75 Ill. 446.

4. *Cox L. R.*, 1 Ch. Div. 302, 306; *Enders v. Williams*, 1 Met. (Ky.) 346,

350. This is simply a wise precaution and was pursued in the above cases; also in *Hutchins v. Dixon*, 11 Md. 29, 40.

5. *In re Pierce and Whaling*, 7 Biss. (1877), 426. A gift of personal property by an insolvent husband to wife, without any visible change of possession does not constitute an adverse interest in the wife so as to compel the institution of separate proceedings for the purpose of litigating the rights of the parties. The court say, on page 427: "Now, if it had been an article of apparel, or simply the wardrobe of the wife, or jewels, or any expensive personal articles which in a sense might be said to be appropriated to the use of the wife, it possibly might be different." *Gentry v. McReynolds*, 12 Mo. 535; *Rogers v. Fales*, 5 Pa. St. 154, 158.

6. *Pinkston v. McLemore*, 31 Ala. (1857) 308: "Although the general principle that possession is presumptive evidence of the ownership of personal property, may not ordinarily apply to possession by the wife during coverture; yet, where it appears that the wife was authorized by a decree of the chancery court to accumulate property for her separate use, had means sufficient to have purchased it, and claimed and controlled it as her own, and that the husband had no property or means with which to procure it; this is sufficient, *prima facie*, to establish the wife's ownership, and cast the onus upon the husband's creditors to show its liability for his debts."

of the property conveyed, such conduct is evidence of an actual intent to defraud his creditors, and must be explained.¹ How far this rule applies to husband and wife has given rise to much dispute. It is said that a husband's possession of his wife's property is not in itself evidence of fraud, because he has the right, growing out of the right of cohabitation, to use and possess her property in their home;² but this is not true if his possession is not consistent with the purpose for which the property was given to or purchased by her.³ If a husband should give his wife, or sell to her, chattels for which she would have no use, but which he would have to continue to use in his business, as if a laborer should give his wife his horse, cart and tools, certainly some special circumstances would have to be proved to rebut the presumption that he meant to secure himself against his creditors.⁴ A wife may make her husband her agent, and be bound by his acts, as we shall see, but, on account of the presumed coercion of the wife by her husband,⁵ it is not a fraud if she stands by and allows him to say that goods which are really hers belong to him.⁶ Some authorities hold that a wife cannot assert her title to property which she has allowed her husband to be the apparent owner of and thus get credit;⁷ and this is certainly the rule if she has done this intentionally.⁸ In some States statutes specially provide that a schedule of the separate property of married women shall be filed, and that transfers between husband and wife shall be recorded; and it seems that general statutes which provide that "no property whereof the grantor shall remain in possession shall pass as against his creditors, unless by bill of sale duly recorded" apply to all transfers between husband and wife where the grantor apparently remains in possession.⁹ So that to rebut the presumption of fraud transfers between husband and wife should be by formal instrument duly recorded.

1. **Fraudulent Possession.**—*Stadtler v. Wood*, 24 Tex. 622; *Bullis v. Borden*, 21 Wis. 136; *Stewart H. & W.*, § 109. See May, Bump, and other authors on *Fraudulent Conveyances*.

2. *Larkin v. McMullin*, 49 Pa. St. (1865) 29, 34: "A change of possession ordinarily attends a transfer of the title of chattels, and therefore the law looks with jealousy upon a transfer of title without a corresponding change of possession where such change is possible, but as between husband and wife separate possession in the wife is not ordinarily possible, and is not therefore to be expected or required." See, also, *Lee v. Mathews*, 10 Ala. 682, 687.

3. *Clayton v. Brown*, 17 Ga. 217, 219; *Enders v. Williams*, 1 Met. (Ky.) 346, 350.

4. *Clayton v. Brown*, 17 Ga. 217, 219.

5. *Bank v. Lee*, 13 Pet. (U. S.) 107, 118. See I., § 6, and II., §§ 2, 3; this is the common law doctrine.

6. This is on the general principle of estoppel that he who holds his peace when he ought to have spoken, will not be heard when he should be silent.

Bank v. Lee, 13 Pet. (U. S.) 107, 118; *Drake v. Glover*, 30 Ala. 390; *Murray v. Fox*, 11 Mo. 555, 565; *Palmer v. Cross*, 1 S. & M. (Miss.) 48, 68; *Carpenter*, 27 N. J. Eq. 502, 504; *Early v. Rolfe*, 95 Pa. St. 58, 61; *Ladd v. Hildebrandt*, 27 Wis. 135; 9 Am. Rep. 445. See *Stewart H. & W.*, § 417.

7. *Re Pierce*, 7 Biss. (U. S.) 426, 429; *Moreland v. Mygall*, 14 Bush (Ky.) 474, 477; *Bowen v. Amsden*, 47 Vt. 569.

8. That is, for the purpose of deceiving his creditors. *Lyman v. Cessford*, 15 Iowa 229, 234.

9. Md. R. C. 1878, § 45, p. 390.

8. Husband and Wife as Witnesses For or Against Each Other.—(See EVIDENCE, TESTIMONY, WITNESSES.) *At common law*, with certain exceptions named below, the rule was that a husband and wife could not testify, the one for or against the other,¹ in any legal proceeding in which the other was a party,² or which involved the other's pecuniary interests,³ or criminal responsibility.⁴ This was because (1), husband and wife were one, and as no one could testify for or against himself, neither could his wife testify for or against him;⁵ (2) to allow one to testify for the other would be to put him or her under a great temptation to commit perjury;⁶ and (3) to allow one to testify against the other would be to endanger the harmony and confidence of the marriage relation.⁷

1. *As Witnesses.*—2 Stark. Ev., p. 706, *et seq.*; 1 Best Ev., § 175; 1 Greenl. Ev., § 334, *et seq.*; 2 Tay. Ev., § 1227; 1 Black. Com. 443; 2 Kent Com. 179, 180; 1 Hale P. C. 301; Rex v. Cliviger, 2 Term (Eng.) 263; Rex v. Locker, 5 Esp. (Eng. 1806) 107; Bank v. Mandeville, 1 Cranch (U. S.) 575; Gilleland v. Martin, 3 McLean (U. S. 7th Circuit 1840) 490; Wilson v. Sheppard, 28 Ala. 623; Pryor v. Roburn, 16 Ark. 671; Dawley v. Ayers, 23 Cal. 108; Merriam v. Hartford, 20 Conn. 354; 52 Am. Dec. 344; Kemp v. Donham, 5 Har. (Del.) 417; Keaton v. M'Givier, 24 Ga. 217; Waddams v. Humphrey, 22 Ill. 661; Kyle v. Frost, 29 Ind. 398; Karney v. Paisley, 13 Iowa 89; Higdon, 6 Marsh. J. J. 48; 22 Am. Dec. 84; Smead v. Williamson, 16 B. Mon. (Ky.) 492; Tulley v. Alexander, 11 La. An. 628; Dwelly, 46 Me. 377; Bradford v. Williams, 2 Md. Ch. 1; Griffin v. Brown, 2 Pick. (Mass.) 304; State v. Armstrong, 4 Minn. 335; Moore v. McKee, 13 Miss. 238; Tomlinson v. Lynch, 32 Mo. 160; Craig v. Kittredge 20 N. H. 169; Kelley v. Proctor, 41 N. H. 139; Don v. Johnson, 18 N. J. L. 87; White v. Stafford, 38 Barb. (N. Y.) 419; Rice v. Keith, 63 N. C. 319; Bird v. Hueston, 10 Ohio St. 418; Gross v. Reddy, 45 Pa. St. 406; Donnelly v. Smith, 7 R. I. 12; Footman v. Pendergrass, 2 Strob. Eq. (S. Car.) 317; Kimbrough v. Mitchell, 1 Head (Tenn. 1858) 539; Gee v. Scott, 48 Tex. 510; 26 Am. Rep. 331; Cameron v. Fay, 55 Tex. 38; Barny v. Reed, 1 Hen. & M. (Va. 1806) 154; Manchester v. Manchester, 24 Vt. 649; Farrell v. Ladwell, 21 Wis. 182; Zane v. Fink, 18 W. Va. 693.

In Stein v. Bowman, 13 Pet. (U. S. 1839) 209, 221, the supreme court of the United States say: "It is a general

rule that neither a husband nor wife can be a witness for or against the other." Co. Lit. b; Hawk. b 2, ch. 46, § 70; Gilb. Ev. 11; Bull. N. P. 286; Fitch v. Hill, 11 Mass. 286.

2. Bentley v. Cook, 2 Term 265, 269; Higdon, 6 Marsh. J. J. (Ky.) 48; 22 Am. Dec. 84; Bird v. Davis, 14 N. J. Eq. 467.

3. Labaree v. Wood, 54 Vt. (1882) 454. "The rule is firmly established, that to exclude a witness on the score of a future interest it must appear that the judgment in the cause in which he is called to testify can be used in evidence, for or against him, in a subsequent case, in which he is a party. If such judgment can be so used, the witness is interested and his wife cannot testify." See, also, Cobb v. Edmondson, 30 Ga. 30; Pyle v. Maulding, 7 Marsh. J. J. (Ky. 1832) 202.

4. Com. v. Easland, 1 Mass. 15; Den v. Johnson, 18 N. J. L. 87, 99, 100.

5. Turner v. State, 50 Miss. 351, 354. A logical result of the unity of husband and wife.

6. Davis v. Dinwoody, 4 Term (Eng.) 678, 679.

7. *Re Alcock*, 12 Eng. L. & Eq. 354, 355; Stapleton v. Crofts, 18 Ad. & E. (Eng. N. S.) 367, 369; Lucas v. Brooks, 18 Wall. (U. S.) 436, 452; Mitchinson v. Cross, 58 Ill. 366, 369; Blake v. Graves, 18 Iowa 312, 317; Tully v. Alexander, 11 La. An. 628; Dwelly, 46 Me. 377, 380; McKen v. Frost, 46 Me. 239; Bradford v. Williams, 2 Md. Ch. 1; Kelly v. Drew, 12 Allen (Mass.) 107; Dunlap v. Hearn, 37 Miss. 471, 474; Turner v. State, 50 Miss. 351; Young v. Gilman, 46 N. H. 484, 486; Den v. Johnson, 18 N. J. L. 87, 98; Marsh v. Potter, 30 Barb. (N. Y.) 506; Gibson v. Com., 87 Pa. St. 253; State v.

This common law rule applied equally to the husband and the wife;¹ and with some differences to both civil and criminal cases.² It was a rule involving public policy, and could not be waived by the consent of the parties.³ Just as soon as marriage exists, the rule applies, though one of the parties has been summoned to testify before the marriage took place;⁴ but it has no application, except as to confidential communications,⁵ after the marriage has been dissolved by death,⁶ or divorce.⁷

The exceptions referred to above were as follows: husband and wife could testify for or against each other in prosecutions of the one for criminal injury to the other,⁸ as for assault and battery,⁹ rape,¹⁰ shooting,¹¹ and forcible abduction.¹² Dying declarations of one who has been murdered are admissible in a trial of the other for the murder.¹³ A wife's affidavit is evidence against her hus-

Workman, 15 S. C. 540, 546; *Gee v. Scott*, 48 Tex. 510; 26 Am. Rep. 331; *Cram v. Cram*, 33 Vt. 15, 20; *Manchester v. Manchester*, 24 Vt. 649.

1. *Rex v. Sergeant*, 1 Ryan & M. (Eng. 1825) 352, 354.

2. Legislation in *Maryland* has removed incapacity of husband and wife to testify for and against each other in civil matters, but not in criminal. *Turpin v. State*, 55 Md. (1880) 462, 478.

3. *Turpin v. State*, 55 Md. 477. "But the incompetency of a husband or wife to testify for or against each other in a criminal prosecution at common law arose, not from interest in the result of the suit, but was based upon considerations of public policy, growing out of the marital relation."

Stein v. Bowman, 13 Pet. (U. S.) 223. "Can the wife, under such circumstances, either voluntarily be permitted or by force of authority be compelled to state facts in evidence which render infamous the character of her husband? We think, most clearly, that she cannot be. Public policy and established principles forbid it." See *Turner v. State*, 50 Miss. 351; *Randall*, 5 City Hall Rec. 141, 153; 1 Greenl. Ev., § 340. As to statute, see *Jordan v. Henderson*, 19 Iowa 365.

4. *Pedley v. Wellesley*, 3 Car. & P. (Eng. King's Bench 1829) 558.

5. *Stein v. Bowman*, 13 Pet. (U. S.) 223. "Confessions, which, if ever made, were made under all the confidence that subsists between husband and wife. It is true the husband was dead, but this does not weaken the principle. Indeed, it would seem rather to increase than lessen the force of the rule."

Ames v. Ames, 33 La. Ann. 1317, 1327; *State v. Jolly*, 3 Dev. & B. Eq. (N. Car. 1839) 110, 112; *Stewart M. & D.*, §§ 439, 470.

6-7. *Stewart M. & D.*, §§ 470, 439.

No reasons of public policy, etc., then demand silence.

8. In *Stein v. Bowman*, 13 Pet. (U. S.) 221: "It is a general rule that neither a husband nor a wife can be witness for or against the other. . . .

This rule is subject to some exceptions; as where the husband commits an offence against the person of his wife."

1 Hale P. C. 301; Hawk. b. 2, ch. 46, § 77; Bull N. P. 287; 1 Bl. Com. 413.

"The wife may exhibit articles of the peace against her husband." Bull N. P. 287; *Bentley v. Cooke*, 3 Doug. (Eng. King's Bench, George III) 422; *Wakefield*, 2 Lew. C. C., (Eng. Crown Cas. 1828) 287; *State v. Neil*, 6 Ala. 685; *Goodwin v. State*, 60 Ga. 509; *State v. Bennett*, 31 Iowa 24; *State v. Dyer*, 59 Me. 303; *Turner v. State*, 50 Miss. 351, 354; *People v. Chagaray*, 18 Wend. (N. Y.) 642; *State v. Parrott*, 79 N. C. 615; *Whipp v. State*, 34 Ohio St. 87, 89; 32 Am. Rep. 359.

9. *Whipp v. State*, 34 Ohio St. 87; 32 Am. Rep. 35.

10. *Audley*, 3 How. St. Tr. 402, 413; Hut. 115, 116.

11. *Whitehouse*, cited 2 Russ. Crimes 606.

12. 1 East P. C. (Eng.) 454; 1 Greenl. Ev., § 343.

13. *Rex v. Woodcock*, 2 Leach (Eng. Com. L. Cas., decided by twelve judges) 563; *Stoop*, Add. (Pa.) 381; *People v. Green*, 1 Denio (N. Y.) 614; *State v. Belcher*, 13 S. C. 459.

band when she exhibits articles of peace against him.¹ Declarations of one while acting as the agent of the other are admissible against the other.² In trials for treason one was compellable to testify against the other. The rule was never applicable in purely collateral proceedings.³

Statutes have almost destroyed the common law rule. Statutes abolishing incapacity to testify on account of interest do not change the rule as to husband and wife,⁴ whose incapacity, as has been seen, depends on other reasons as well; nor do mere general statutes authorizing all persons to testify affect the marital in-

1. *Rex v. Doherty*, 13 East (Eng.) 171; *Rex v. Mead*, 1 Burr. (Eng.) 542; *Rex v. Ferrers*, 1 Burr. (Eng.) 635; *Lawley*, Bull N. P. 287. See note 8, p. 807.

The necessity of the case made this and the above exceptions; for in criminal matters of this character there are seldom other witnesses.

2. *Schmied v. Frank*, 86 Ind. (1882) 250, 257. "We think it appears from the deposition that the witness was acting for, and as the agent of, his wife, the appellee, in the purchase of said note, and that this was understood by the appellant. The statement made by the appellant to the witness had the same force and effect as if made to the appellee herself. Nor do we think the statements made by the witness to his wife, nor by her to him, in regard to the purchase, were confidential communications, within the meaning of the statute, and, therefore, incompetent." *Robertson v. Brost*, 83 Ill. 116; *Bradford v. Williams*, 2 Md. Ch. 1, 3; *Chesley*, 54 Mo. 347; *Thomas v. Hargrave*, *Wright* (Ohio) 595; *Gibson v. Gibson*, 16 Vt. 464; *Town v. Lamphire*, 37 Vt. 52; *Lunay v. Vantyne*, 40 Vt. 501; *Birdsall v. Dunn*, 16 Wis. 235, 241; *Arndt v. Harshaw*, 53 Wis. 269.

In *Watkins v. Turner*, 34 Ark. (1879) 675: "The result of the cases here and elsewhere upon this subject is that the common law disability to testify for or against each other, as between husband and wife, remains. That in all cases where they act as agents for each other, their acts, declarations and admissions, in the course of the business of the agency, may be proven by others, and will bind the principal, but they cannot themselves testify in the case."

3. In *Gravel Road Co. v. Madans*, 102 Ill. 417, 420, "Starkie says 'the husband and wife cannot be witnesses for each other, for their interests are identical; nor against each other, on grounds of public policy.' In *Best on Law of Evi-*

dence, section 175, it is said of the latter branch of the rule that it applies only 'where the husband or wife is a party to the suit in which the other is called as a witness, and does not extend to collateral proceedings between third parties.' In 3 Paige (N. Y.) 37, *CHANCELLOR WALWORTH*, speaking of the competency of a wife in this regard, says 'she may be examined as a witness between other parties, although her husband has a collateral interest in opposition to the party calling her.'"

See, also, *Rex v. Bathwick*, 2 Barn. & Ad. (Eng.) 639, 647; *Griffin v. Brown*, 2 Pick. (Mass.) 308; *Fitch v. Hill*, 11 Mass. 286; *Den v. Johnson*, 18 N. J. Eq. 87, 99; *Baring v. Reeder*, 1 Hen. & M. (Va. 1806) 154, 168; 1 Greenl. Ev., § 342.

4. In *Turpin v. State*, 55 Md. (1880) 462, 477: "The object and intent of the act of 1864 was to remove the incapacity of persons called to testify, arising from crime or from their interest in the subject-matter of the suit. But the incompetency of a husband or wife to testify for or against each other in a criminal prosecution at the common law arose, not from interest in the result of the suit, but was based upon considerations of public policy growing out of the marital relation."

Looking at the language of the first section of the act of 1864, we think it very clear that, standing alone, it would not operate to alter the rule of the common law."

See, also, *Stapleton v. Crofts*, 18 Add. & E. (N. S.) 367; *Alcock*, 12 Eng. L. & Eq. 354, 355; *Lucas v. Brooks*, 18 Wall. (U. S. S. Ct.) 436, 452; *Jones*, 6 Biss. 68; *Sumner v. Cook*, 51 Ala. 521; *Lincoln v. Madans*, 102 Ill. 417, 421; *Mitchinson v. Goss*, 58 Ill. 366, 369; *Russ v. Steamboat*, 14 Iowa 363; *McKeon v. Frost*, 46 Me. 239; *Dwelly*, 46 Me. 377; *Peaslee v. McLoon*, 16 Gray (Mass.) 488; *Kelly v. Drew*, 12 Allen (Mass.) 107; *Anon.*,

capacity.¹ The rule must be changed expressly or by necessary implication;² and a statute enabling the parties litigant to any suit and their husbands and wives to testify, does not change the common law rule in criminal suits.³ But when parties to suits are enabled to testify, and husband and wife are joint parties, he may testify as to his interest, and she as to hers.⁴ When a statute provides that all parties may testify except that husband and wife cannot in certain cases, they can in all other cases.⁵

II. THE CONJUGAL RIGHTS AND OBLIGATIONS OF HUSBAND AND WIFE, AND ACTIONS ARISING THEREFROM.—1. **Conjugal Rights and Obligations Defined.**—Conjugal rights and obligations are those which attach to one *as husband* or *as wife*. They include not only the rights and obligations of husband and wife towards each other—such as the right of cohabitation and the obligation to support—but also their rights and obligations towards third parties, such as the husband's right to recover damages for injury to his wife, and his obligations to make good damage done by her. And then, these rights and obligations give rise to special suits, which must be considered.

2. **Conjugal Right of Love, Honor, etc.**—It is not essential to the validity of a marriage that the parties should love each other; and courts take no notice of the mutual feelings of husband and wife except so far as these manifest themselves in conduct, and constitute cruelty, desertion, or some other cause for divorce. Still, the alienation of the affections of a spouse is one of the grounds of damage in a suit for criminal conversation.⁶

3. **Conjugal Right of Cohabitation and Intercourse.**—Normally, and

58 Miss. 18; Byrd v. State, 57 Miss. 243; 34 Am. Rep. 440; Dunlap v. Hearn, 37 Miss. 471; Young v. Gilman, 46 N. H. 484; Longendyke, 44 Barb. (N. Y.) 366; Schultz v. State, 32 Ohio St. 276; Gibson v. Com., 87 Pa. St. 253; State v. Workman, 15 S. C. 540; Gee v. Scott, 48 Tex. 510; 26 Am. Rep. 331; Crane, 33 Vt. 15. But see Merriam v. Hartford, 20 Conn. 354; Berlin, 52 Mo. 151, 153.

1. See above note; also §§ 11-18 Stewart H. & W., on Construction. See article INTERPRETATION.

2. Turpin v. State, 55 Md. (1880) 462, 478. "The words of the section in which 'the parties and their wives and husbands are declared to be competent and compellable to give evidence,' in our opinion, apply only to civil suits, and have no reference to criminal prosecutions. This is apparent, not only from the phraseology of this part of the law, where it speaks of 'the parties litigant,' and of 'persons in whose behalf any suit, action or other proceeding may be brought or defended,' lan-

guage only applicable to civil suits, but also from the terms by which the parties themselves and their wives and husbands are made not only competent but compellable to testify, a provision which, evidently, was not intended to apply to criminal prosecutions." Wilke v. People, 53 N. Y. 525; Steen v. State, 20 Ohio St. 333.

3. Above note, and Pillow v. Bushnell, 5 Barb. (N. Y.) 156.

4. Klenk v. Knobbe & Wife, 37 Ark. (1881) 298. "In an action against a husband and wife to foreclose a mortgage on a homestead, the wife may defend to avoid foreclosure of dower, and, as to this, may testify for herself, but not in aid of the defence of her husband." Hanover, 78 Ill. 412; Clouse v. Elliott, 71 Ind. 302; 5 Am. Rep. 105; Marsh v. Potter, 30 Barb. (N. Y.) 506; Duval v. Davey, 32 Ohio St. 604; Kalme v. Ormo, 49 Wis. 371.

5. Minier, 4 Lans. (N. Y.) 421, 425. No other view could possibly be taken.

6. Love.—Yundt v. Hartranft, 41 Ill. 9, 17; *post* II., § 14.

in the theory of the relation, parties who marry always contemplate cohabitation and sexual intercourse. The law not only presumes that husband and wife have a common home,¹ but often that a man and woman living in a common home are married.²

Cohabitation is in fact a conjugal right;³ the husband has the right to the wife's,⁴ and the wife to the husband's company;⁵ a husband's agreement to pay his wife for living with him is without consideration,⁶ and each has the right to enter the family residence,⁷ whichever owns it.⁸ It is not, however, a right which can be specifically enforced in the United States;⁹ but, if it is intentionally infringed for a certain time, it is generally, by statute as desertion, a cause for divorce;¹⁰ and if a wife wrongfully leaves her husband, she forfeits her right to support,¹¹ and by deserting her, he forfeits his right to her services;¹² and if the husband abandons his wife and the State, she becomes in many respects a *feme sole*.¹³ If a third party interferes with this right by separating one spouse from the other, the wronged spouse

1. *Cohabitation*.—A direct inference from the common law doctrine of the unity of husband and wife. Firebrace, Law R., 4 P. & D. (Eng. Queen's Bench 1841) 63, 67; Hanberry, 29 Ala. 719; Davis, 30 Ill. 180; Sanderson v. Ralston, 20 La. An. 312; Greene, 11 Pick. (Mass.) 410, 415; Hackettstown v. Mitchell, 28 N. J. L. 516, 58; Wilborns v. Saunders, 5 Cold. 60, 79; Stewart M. & D., §§ 221, 253; *post*, II., § 4.

2. *Badger v. Badger*, 88 N. Y. (1882) 546, 558. "The plaintiff proved a long cohabitation, matrimonial and respectable in its character, and relied upon the inference of marriage to be drawn from it." Com. v. Hurley, 14 Gray 411, as to proof of marriage by cohabitation. See Stewart M. & D., §§ 132, 135, 136.

3. *Barnes v. Allen*, 30 Barb. (N. Y. 1860) 663, 668. "The husband is entitled to the assistance and society of the wife, and she is not justified in leaving him without cause shown." Anon., Deane & S. 295, 298, 300; Price, 2 Fost. & F. (Eng. Crown Cases, 1860) 263, 264; Westlake, 34 Ohio St. 621, 628; 32 Am. Rep. 397; *Ximines v. Smith*, 39 Tex. 49, 52; Stewart M. & D., § 175.

4. *Ximines v. Smith*, 39 Tex. 49, 52. *post* II., § 21.

5. *Clark v. Harlan*, 1 Cin. Rep. 418, 422; *post* II., § 21.

6. *Roberts v. Frisby*, 38 Tex. (1873) 220. "I do not know how far a husband would be morally bound by a post-nuptial contract in which he hires his wife to live with him; but the legal

obligation cannot be recognized in this court."

7. *Snyder v. People*, 26 Mich. (1872) 106, 111. "The property is hers alone, but the residence is equally his; the estate is in her, but the dwelling house, the domus, is that of both." *Rex v. Gould*, 2 East P. C. 644; Cal. Civ. Code, § 157; Com. v. Hartnett, 3 Gray (Mass.) 450, 452; 12 Am. Rep. 60.

8. *Walker v. Kearny*, 36 Pa. St. (1860) 410, 414. "It was not intended by allowing her to own her property 'as fully after marriage as before' that he should not sit at her table, or use her furniture or house."

9. *Baugh v. Baugh*, 37 Mich. (1877) 59, 62. "But no court in this country has any power to compel discordant husbands and wives to live together." Stewart M. & D., § 175.

10. See DIVORCE.

11. 12 Md. 294, 314; *post* II., § 7.

12. *Reese v. Waters*, 9 Watts (Pa. 1841) 90, 94; *post* II., § 8.

13. In *Gregory v. Pierce*, 4 Met. (Mass.) (1842) 478: "The principle is now to be considered as established in this State, as a necessary exception to the rule of the common law, placing a married woman under disability to contract or maintain a suit, that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name, as a *feme sole*." Stewart M. & D., § 177.

may sue such party for damages.¹ The right may be waived by consent;² and is forfeited by such conduct as would entitle the other party to a divorce;³ and it is suspended during divorce proceedings.⁴

Matrimonial cohabitation involves sexual intercourse, and is presumably contemplated by those who marry;⁵ and from such cohabitation sexual intercourse is implied.⁶ In fact sexual intercourse is a conjugal right.⁷ If, owing to some physical or psychic effect, existing at the time of the marriage, in one of the parties to a marriage, the enjoyment of this right is permanently impossible, the marriage may be avoided.⁸ (See NULLITY SUITS). But the mere denial of the right does not work a forfeiture of any other conjugal right, and is not cruelty,⁹ or desertion,¹⁰ though it may be an indignity,¹¹ and accompanying an offer to resume cohabitation, may render such an offer of no effect;¹² nor does

1. *Barnes v. Allen*, 30 Barb. (N. Y.) 663, 668; *Westlake*, 34 Ohio St. 621, 628; 32 Am. Rep. 397; *post* II., § 21.

2. *Gray*, 15 Ala. 779, 784; *Beakert*, 32 Cal. 467, 470; *Cox*, 35 Mich. 461.

3. In *Walker v. Walker*, 9 Wall. (U. S. 1869) 750: "It is contended that deeds of separation between husband and wife cannot be upheld, because it is against public policy to allow parties sustaining that relation to vary their duties and responsibilities by entering into an agreement which contemplates a partial dissolution of the marriage contract. If the question were before us, unaffected by decision, it would present difficulties, for it cannot be doubted that there are serious objections to voluntary separations between married persons. But contracts of this nature for the separate maintenance of the wife, through the intervention of a trustee, have received the sanction of the courts in England and in this country for so long a period of time that the law on the subject must be considered as settled."

The above extract shows that the right may be waived by consent in a deed of separation. See, for exact point, *Grove*, 37 Pa. St. 443, 447; *Stewart M. & D.*, §§ 175, 257. DIVORCE.

4. *Burns*, 60 Ind. 259; *Harper*, 29 Mo. 301. DIVORCE.

5. *Sexual Intercourse*.—Discussed in *Stewart M. & D.*, §§ 1, 17, 63, 103, 104, 173.

6. In *Burns v. Burns*, 60 Ind. (1877) 260: "Cohabitation will be inferred, nothing appearing to the contrary, from the fact of the living together of husband and wife. We use the terms

'cohabit' and 'cohabitation' as implying sexual intercourse." *Harper v. Harper*, 29 Mo. 301, 303; *Stewart M. D.*, §§ 308, 311, 384, 410.

7. *Southwick*, 97 Mass. (1867) 329. "The statute does not signify merely a refusal of matrimonial intercourse, which would be a breach or violation of a single conjugal or marital duty, but" *Orme v. Orme*, 2 Eng. Ecc. 354, 356; *Forster v. Forster*, 1 Hagg. Const. 144, 154; 4 Eng. Ecc. 363; *Shaw v. Shaw*, 17 Conn. 189, 196; *Steele v. Steele*, 1 McAr. (D. C.) 605; *Gibbs v. Gibbs*, 18 Kan. 419; *Fishli v. Fishli*, 2 Litt. 338, 341; *Cowles v. Cowles*, 112 Mass. 298; *Canfield v. Canfield*, 34 Mich. 579; *Melvin v. Melvin*, 58 N. H. 569; *Cook v. Cook*, 32 N. J. Eq. 331; *Coble v. Coble*, 2 Jones Eq. (N. Car. 1853) 392; *Gordon v. Gordon*, 48 Pa. St. 226; *Magill v. Magill*, 3 Pitts. Rep. 25.

8. See MARRIAGE and NULLITY SUITS, for discussion of IMPOTENCE.

9. *Cowles v. Cowles*, 112 Mass. (1873) 298. "This libel for divorce alleges cruel and abusive treatment only. In support of it the wife's utter denial of sexual intercourse is relied on. Such conduct is not to be regarded as within a reasonable interpretation of the statute." *Eshback v. Eshback*, 22 Pa. St. 843, 845. *Contra*, Cal. Civ. Code, § 96.

10. *Southwick*, 97 Mass. (1867) 329, where it was *held* that desertion must mean a refusal to live together, and consequently a mere refusal by a wife of sexual intercourse was not desertion.

11. *Coble v. Coble*, 5 Jones (N. Car.) Eq. 392, 395; *Stewart M. & D.*, § 282.

12. *Fishli v. Fishli*, 2 Litt. (Ky. 1823) 338, 341. See DIVORCE.

it justify separation.¹ The excessive indulgence of this right by one of the parties to the injury of the other's health,² or the insisting upon it when the other party is delicate, weak or ill,³ or by one who has a venereal disease,⁴ is cruelty, and justifies separation, or a suit for divorce. This right is waived or forfeited with the right of cohabitation. If one of the parties indulges in sexual intercourse with anyone but the other spouse, the injured spouse may sue for divorce for adultery,⁵ or sue the third party for criminal conversation,⁶ or kill the third party *in flagrante delicto*, and be guilty only of manslaughter.⁷

4. Conjugal Right to Fix Matrimonial Home and Regulate Household.

—The husband is the head of the family.⁸ He decides where the family residence shall be,⁹ and may change it as often as his pleasure, business or health dictates;¹⁰ and his wife must live where he directs,¹¹ as long as he acts in good faith,¹² and in spite of an ante-nuptial contract to the contrary;¹³ but she has the right to live with him,¹⁴ and he cannot banish her to a lonely place

1. In *Eshback v. Eshback*, 23 Pa. St. 343, 345: "It has been several times decided that the 'reasonable cause' which justifies a wife's desertion and abandonment of her husband must be such as would entitle her to a divorce." See, also, *Reid*, 21 N. J. Eq. 331, 333.

2. *Melvin v. Melvin*, 58 N. H. 569, 571.

3. *Shaw v. Shaw*, 17 Conn. 189, 196; *English v. English*, 29 N. J. Eq. 71, 74, 79.

4. *N. v. N.*, 3 Swab. & T. 234, 239; *Canfield v. Canfield*, 14 Mich. 519; *Cook v. Cook*, 32 N. J. Eq. 475; *Long v. Long*, 2 Hawks (N. Car. 1822) 189, 192. See *Cruelty*, under DIVORCE.

5. See *Adultery*, under DIVORCE.

6. See *post* II., § 22; *Yundt v. Hartman*, 41 Ill. 9.

7. See CRIMINAL LAW, MANSLAUGHTER. *Rex v. Kelly*, Car. & K. (Eng. 1845) 814; *State v. Holme*, 54 Mo. 153, 166; *Shufflin v. People*, 62 N. Y. 229, 235; 20 Am. Rep. 483; *State v. Harman*, 78 N. Car. 515; *State v. Neville*, 6 Jones (N. Car.) 433; *Desty Cr. L.*, § 128 n. 1; 2 Bish. Cr. L., § 638.

8. **Right as Head of Family.**—*Glover v. Alcott*, 11 Mich. (1863) 485. "But the husband must, as a general rule, still be regarded as the head of the family," notwithstanding statutes giving the married women great power, as in Michigan. *Elijah v. Taylor*, 37 Ill. 247; *Com. v. Wood*, 97 Mass. 225; *Com. v. Barry*, 2 Green Cr. Rep. 285, 287. See Cal. Civ. Code, § 156; Ga. Code 1873, § 1753.

9. *Kennedy v. Kennedy*, 87 Ill. (1877) 250, 252. "In the case of *Davis v. Davis*, 30 Ill. 180, the general and

well recognized rule of law was announced that the domicile of the husband is that of the wife, and the rule was recognized in the case of *Ashbaugh v. Ashbaugh*, 17 Ill. 476, where it was said, the residence of the wife follows that of the husband." *Firebrace v. Firebrace*, Law R., 4 Pro. & D. (Eng.) 63, 67; *Hanberry v. Hanberry*, 29 Ala. 719; *Hardenbergh*, 14 Cal. 654; *Cutler*, 2 Brewst. (Pa.) 511; cases collected, *Stewart M. & D.*, §§ 221, 253.

10. *Cutler v. Cutler*, 2 Brewst. (Pa.) 511, 513.

11. See note 9, *ante*. Also, *Cochrane* 8 Dowl. P. C. 630, 636; *Price*, 2 Fost. & F. (Eng. Cr. Cas. 1860) 263, 264.

12. *Hardenbergh v. Hardenbergh*, 14 Cal. 654; *Boyce v. Boyce*, 23 N. J. Eq. 337; *Bishop v. Bishop*, 30 Pa. St. 412, 415; *Cutler v. Cutler*, 2 Brewst. (Pa.) 511; *Powell v. Powell*, 29 Vt. 148; *Gleason v. Gleason*, 4 Wis. 64, 66. This is an illustration of the elementary principle of law that fraud vitiates everything.

13. *Hair v. Hair*, 10 Rich. (S. Car. 1859) Eq. 163, 175. "My opinion is, he made the promises in the manner charged in the bill. But they created a moral obligation only. . . . Such a promise is a nullity. The contract of matrimony has its well understood and its well defined legal duties, and it is not competent for the parties to interpolate into the marriage compact any condition in abridgment of the husband's lawful authority over her person, or his claim to her obedience."

14. *Clark v. Harlan*, 1 Cin. Rep. 418, 422; *ante* II., § 3.

for punishment;¹ nor can he take her to a place where her health is endangered;² nor, perhaps, can he remove her from her native land,³ or make her live with his relations.⁴

Consequently, a husband's domicile is usually the place where he has established his family,⁵ although during his absence his wife has moved;⁶ and the wife's domicile, except in certain cases where she has a separate domicile for divorce, is that of her husband.⁷

So the husband may decide who shall visit the family home,⁸ and may prevent its being used for purposes of prostitution,⁹ or illegal liquor selling,¹⁰ although it belongs to the wife.¹¹

When the husband is insane, the wife is head of the family,¹² and so she is when he is absent.¹³

5. Conjugal Right to Marriage Name.—The husband being the head of the family, the wife and children generally adopt his family name—by custom, the wife is called by the husband's name. But whether marriage shall work any change of name at all, is, after all, a mere question of choice, and either may take the other's name, or they may join their names together.¹⁴

1. *Boyce v. Boyce*, 23 N. J. Eq. 337, 348. This follows from her right to live with him.

2. For this would be cruelty. See *Cruelty*, under DIVORCE.

Cutler v. Cutler, 2 Brewst. (Pa.) 511, 513; *Powell v. Powell*, 29 Vt. 148; *Gleason v. Gleason*, 4 Wis. 64; *Stewart M. & D.*, §§ 261, 273.

3. *Bishop v. Bishop*, 30 Pa. St. (1858) 412. "The refusal of a wife to accompany her husband to a foreign country is not, in itself, a willful and malicious desertion, within the meaning of the act."

4. *Powell v. Powell*, 29 Vt. (1856) 149. "In this case the wife merely refused to live with her husband in a particular locality 'near his relations,' which he persisted in doing. *Held*, that in the absence of proof that this was a mere simulated excuse, the court would regard it as made in good faith; and if her refusal to live with him in that locality was because she believed she could not live happily there, it should not be regarded as willful."

5. *Platt v. New*, Law R., (Eng.) 3 App. 336; *Stewart H. & W.*, § 29.

6. *Porterfield v. City of Augusta*, 67 Me. (1877) 556. "Where a ship-master sailed from his home in Brooklyn December, 1866, and his wife shortly after came on a visit with her children and trunks, to Augusta, and there lived with her mother till summoned by her husband to meet him at Brooklyn, whither

he returned July, 1867. *Held*, that he was not meanwhile taxable in Augusta."

7. *Barber v. Barber*, 21 How. (U. S. S. Ct.) 582, 594; *Stewart M. & D.*, § 221.

8. *Com. v. Wood*, 97 Mass. (1867) 225, 228. "How far he may exercise force in restraining her is not precisely settled. But there can be no doubt that he may exercise as much power as may be reasonably necessary to prevent her, as well as other inmates of the house, from making it a brothel."

9. See above note.

10-11. *Com. v. Pratt*, 126 Mass. 462; *Com. v. Wood*, 97 Mass. 225; *Com. v. Barry*, 2 Green Cr. Rep. 285; 115 Mass. 146. The common law doctrine is that the wife is under the husband's protection, influence, power and authority, and that he is the head of the household.

12. *Robinson v. Frost*, 54 Vt. 105, 111; 41 Am. Rep. 835.

13. There must be a head of the family at all times.

See *post*, III., § 2. Also *Sawyer v. Cutting*, 23 Vt. 486, 491; *Felker v. Emerson*, 16 Vt. 653.

14. *Name*.—*Converse v. Converse*, 9 Rich. (S. Car.) Eq. 535, 570. "But in general, wives have surnames by courtesy only, adopted from their husbands, and it is inconvenient that they should have appellations different from husbands." *Fendall v. Goldsmith*, Law R., 2 P. D. 263; *Snook*, 2 Hilt. (N. Y. City 1860), 566.

6. **Conjugal Right to Personal Custody, Chastisement and Restraint.**—The husband as head of the family has a right of gentle restraint over his wife's movements.¹ He may, by reasonable measures, enforce cohabitation and a common residence;² he may lock her up to prevent her from eloping,³ or going into lewd company and squandering her money,⁴ and she will not be released on a writ of *habeas corpus*;⁵ nor is it of itself cruelty if he prevents her from visiting her family,⁶ or relations,⁷ or from going to church.⁸ But he has no right to confine her unreasonably or arbitrarily,⁹ and if he does so she will be released on a writ of *habeas corpus*;¹⁰ so if he injures her health by moral or physical restraint, it is cruelty.¹¹ But a husband cannot get possession of his wife in any case by a writ of *habeas corpus* unless she is restrained against her will.¹² If the wife is an infant, the husband or her parents, in the discretion of the court, may be awarded custody of her.¹³

See *Day v. Browning*, Law R., 10 ch. Div. 294, where it was *held* that a man could not be prevented from giving the exact name to his place which his neighbor had called his for sixty years. *Du Boulay Law R.*, 2 P. C. 430; *Linton*, 10 Fed. Rep. 895; *Clark v. Clark*, 19 Kan. 522; *Johnston v. Goodenow*, 44 Vt. 662.

1. This follows from the husband being the head of the family. 2 *Blackat. Com.* 445; 2 *Kent Com.* 181; *Com. v. Barry*, 2 *Green Cr. Rep.* 285, 289, n.; *Price*, 2 *Fost. & F. (Eng.)* 263.

2. *Cochrane*, 8 *Dowl. (Eng.) P. C.* 630.

3. The husband is the wife's protector; he can exert his influence and authority for the purpose of preserving the marital relation. *Cochrane v. Cochrane*, 8 *Dowl. P. C.* 630; *State v. Craton*, 6 *Ired. (N. Car.)* 169.

4. *Lister v. Lister*, 1 *Strange, (Recorder's Ct. at Madras 1800)* 477; 8 *Mod. (Eng. George II)*, 22, 23.

5. In the case of *Cochrane v. Cochrane*, 8 *Dowl. (Eng.) P. C.* 630, the wife applied for a writ of *habeas corpus*, and it was *held* that, "Where a wife absents herself from her husband, on account of no misconduct on his part, and he afterwards, by stratagem, obtains possession of her person, and she declares her intention of leaving him again whenever she can, he has a right to restrain her of her liberty, until she is willing to return to a performance of her conjugal duties."

6. *Waring v. Waring*, 2 *Phillim. (Eng. Ecc. Ct. 1815)* 132; 1 *Eng. (Ark.)* 210, 213.

7. *Fulton v. Fulton*, 36 *Miss. (1858)* 518.

"The husband has the perfect legal right to determine who shall be received at the matrimonial mansion as visitors and guests, and who shall be excluded therefrom; and hence, if, in the exercise of this right, he prohibits his wife from receiving at that place the visits of her child by a former husband, this constitutes no legal excuse for an abandonment of the matrimonial domicile by her."

8. That is, if he prevents her from going to a particular church. *Lawrence v. Lawrence*, 3 *Paige (N. Y. 1832)* 267.

"Although it is an act of great unkindness and of unreasonable oppression on the part of the husband to refuse to permit his wife to attend a particular church, of which she is a member, such refusal is not alone a sufficient ground to justify a separation."

9. *Kelly v. Kelly*, Law R., 2 P. & D. 31, 34, 37.

10. *Lister v. Lister*, 8 *Mod. (Eng. George II)* 22, 23.

11. See *Cruelty*, under *DIVORCE*. *Kelly v. Kelly*, Law R., 2 P. & D. 31, 32. See *Stewart M. & D.*, § 261-273.

12. *Ex parte Sandilands*, 12 *Eng. L. Eq.* 463. "Where a wife is voluntarily and without any restraint absent from her husband, a court of common law has no jurisdiction, upon his application, to issue a writ of *habeas corpus* to bring up her body." *Rex v. Leggatt*, 18 Q. B. 781; *Rex v. Wiseman*, 2 *Smith* 617.

13. *Gibbs v. Brown*, 68 *Ga. (1882)* 805. "It is true that the parent is entitled to the custody and the service of a child during its minority; and so, too,

If the husband is insane, the wife is the head of the family, and has a right, superior to that of his father, to be his guardian.¹ But a wife has no right of locking her husband up corresponding to that of the husband, above discussed.

Though the old writers say that a husband may chastise his wife with a rod no thicker than his thumb,² modern law recognizes no such right,³ and a husband is not justified in beating his wife, even though she be drunk,⁴ or insolent.⁵ Wife whipping in many States is a special misdemeanor.

7. Conjugal Right of Support.—A husband is bound to support his wife, and a wife may be bound to support her husband; and husband and wife may be both bound to support their family.

The Husband's Liability.—By the common law, the husband is bound to support his wife,⁶ even though he be an infant.⁷ He cannot charge her or her estate with the expenses of her support.⁸

is the husband entitled to the custody and the service of the wife; yet, whenever any dispute arises between the husband and wife, or parent and child, touching these matters, and the aid of the law is invoked by writ of *habeas corpus* on account of the detention of either, it becomes the duty of the court, on hearing all the facts, to exercise its discretion and determine to whom the custody of such wife or child shall be given."

1. See notes 12 and 13, p. 813.

Robinson v. Frost, 54 Vt. 105, 110; 41 Am. Rep. 835.

2. Blackst. Com. 444; Towbridge v. Carlin, 12 La. Ann. 882; Adams v. Adams, 100 Mass. 365, 370; 1 Am. Rep. 211; Bradley v. State, 1 Miss. 156; State v. Oliver, 70 N. Car. 60; 1 Grant Cas. (Pa.) 589, 392.

3. Fulgham v. State, 46 Ala. (1871) 143, 147. "I, therefore, think that the common law of 'wife whipping' among 'the lower rank of people' in Great Britain has never been the common law of this State. . . . The rule of love has superseded the rule of force." Schouler H. & W., § 68; Pearman, 1 Swab. & T. (Eng.) 601, 602; State v. Buckley, 2 Harr. (Del.) 552; Gholston v. Gholston, 31 Ga. 625; Knight v. Knight, 31 Iowa 451; Poor v. Poor, 8 N. H. 307; State v. Oliver, 70 N. Car. 60; Edmonds v. Edmonds, 57 Pa. St. 232; Gorman v. State, 42 Tex. 221; Shackett v. Shackett, 49 Vt. 195; Pillar v. Pillar, 22 Wis. 658.

4-5. Com. v. McAfee, 108 Mass. (1871) 458, 461: "In Pearman v. Pearman 1 Swab. & Trist. (Eng.) 601, it is said that there is no law authorizing a man to beat his drunken wife. Beating a wife is held to be un-

lawful in New York. 2 Paige 501. There is no authority in its favor in this commonwealth. Beating or striking a wife violently with the open hand is not one of the rights conferred on a husband by the marriage, even if the wife be drunk or insolent."

6. Support.—"It is an unquestionable rule of law that if a husband turn his wife out of doors, or by his misconduct compel her to leave him, she goes forth under such circumstances to the world with an implied credit for necessities. In other words, he is bound to provide her with necessary lodging, clothes and subsistence, and, in case of her sickness, medicines, medical attendance and reasonable expenses incurred during illness; and, if he fails to make such provision, she may obtain the same on his credit, and the person so making it may sue the husband and recover therefor." Washburn v. Washburn, 9 Cal. 475; Shelton v. Shelton, 18 Conn. 417; Cooper v. Cooper, 49 Ind. 393, 416; Graves v. Graves, 36 Iowa 310; Garland v. Garland, 50 Miss. 694; Allen v. Allen, 29 N. H. 63; Gage v. Gage, 34 N. Y. 293.

In *Ex parte Jackson*, 45 Ark. 158 (1886), it was decided that at common law it is not a criminal offence to leave a wife and child without the means of support.

7. Cantine v. Phillips, 5 Harr. (Del.) 429. "The same necessity exists as to the family of an infant; and if old enough to contract marriage, an infant is liable on contracts for the necessary board and lodging of his wife and children."

8. Grant v. Green, 41 Iowa 88; Rogers v. Boyd, 33 Ala. 175; Strong v.

The wife may enforce her right to support directly, by a suit for *maintenance*,¹ or for *alimony* with divorce,² or indirectly, by pledging his credit to others who supply her with *necessaries*.³ The husband's neglect of this duty, if it results in her death, is manslaughter at least;⁴ and sometimes a husband's failure to support is punishable criminally by statute;⁵ and by statute it may be a cause for divorce.⁶ This obligation, cannot, however, be enforced if the wife has sufficient means of her own,⁷ or has waived or forfeited her rights. She may waive her rights for valuable consideration,⁸ as in a deed of separation.⁹ She forfeits them by leaving her husband against his will when he is not in fault,¹⁰ or by his leaving her for her fault;¹¹ but not by becoming insane.¹² The husband's obligation to support his wife is not destroyed by married women's separate property acts, except so far as through them she has means of her own.¹³ The right ceases with divorce,¹⁴ but may continue some time after the husband's death.¹⁵

Skinner, 4 Barb. (N. Y.) 546; Methodist v. Jacques, 1 Johns. (N. Y.) Ch. 450; Callahan v. Patterson, 4 Tex. 61; McCormick v. McCormick, 7 Leigh (Va.) 66.

1. Stewart M. & D., § 179.

2. See ALIMONY; DIVORCE. Stewart M. & D., §§ 358-400. See Way v. Way, 67 Wis. 662 (1887).

3. Note 6, p. 815.

4. See MANSLAUGHTER; CRIMINAL LAW.

Reg. v. Plummer, 1 Car. & K. 600; Desty. Cr. L., §§ 57a, 87a.

5. See Conn. Acts 1881, p. 79; same provisions in Pennsylvania; Stewart M. & D., § 177.

6. See DIVORCE.

7. See ALIMONY; DIVORCE. Stewart M. & D., §§ 179, 180, 372.

8. See I., § 2, ante, contracts between husband and wife in equity. Also Pearson v. Darrington, 32 Ala. 227, 243.

9. See extract from Walker v. Walker, 9 Wall. (U. S. S. Ct.) 750, in note 7 to II., § 3, ante. Also Stewart M. & D., §§ 181-192, 382.

10. Schunckle v. Bierman, 89 Ill. (1878) 454, 457. "When a wife left her husband's house without his consent, and without justification by his conduct towards her, and went to that of the plaintiff with her nursing babe, and the husband made repeated efforts by himself and through others to procure her return home, and tried to induce the plaintiff to assist him in the same purpose, but the plaintiff made no endeavor to persuade her to go back to her husband, and forbade the husband coming

to his house, it was held that, in the absence of any express agreement to pay, the husband was not liable to the plaintiff for the board and lodging of the wife and child."

11. Hardie v. Grant, 8 Car. & P. (Eng.) 512. "If a husband has put away his wife for adultery he is not liable even for necessities supplied to her, if it be proved on the trial of an action for the price of such necessities that she has been guilty of adultery."

12. For that is no fault of hers. Wray v. Wray, 33 Ala. 187; Wray v. Cox, 24 Ala. 337, 343.

See Goodale v. Brockner, 25 Hun (N. Y.) 621.

13. 9 Rich. (S. Car.) Eq. 535, 570; Holt v. Holt, L. R., 1 P. & D. 610; Dixon v. Hurrell, 8 Car. & P. (Eng) 717. "If a husband and wife separate by mutual consent, the husband is liable for reasonable maintenance for his wife, unless she has a competent provision either from the husband or from some fund of her own; and if she has such provision, it lies on the husband to show that."

14. See DIVORCE. The decree of the court determines the question. When the wife is in the right, alimony is generally awarded.

15. An example of this is found in the old English statute of 9 Hen. III, ch. 7, § 3, which provides that the widow "shall tarry in the chief house of her husband by forty days after the death of her husband, within which days her dower shall be assigned her." This was called the widow's "quarantine."

The Wife's Liability.—By the common law, all the wife's personalty,¹ and all her earnings and labor,² belong to her husband, and even under separate property acts, she is still his helpmeet, and cannot charge him for domestic services;³ in this way she is bound to support him. In some States, statutes, which seem to have given rise to no decision, create various means of making a wife support her needy husband.⁴

Their Joint Liability.—Husband and wife are jointly liable for the support of their family,⁵ so far at least that one cannot recover from the other for expenses paid.⁶ And statutes in some States make them jointly liable.⁷

8. Conjugal Right to Personal Services.—A wife has no right to her husband's services, though he is bound to support her, as has been seen.

At common law, however, a husband has an absolute right to his wife's time, wages and earnings, and the products of her labor, skill and industry.⁸ He may contract to furnish her services to others.⁹ He sues for the price of them,¹⁰ and for the loss of them,¹¹ in his own name. She cannot release an obligation for them,¹²

1. See *post*, IV., §§ 4, 5.

2. See *post*, II., § 8.

3. *Mewhiter v. Halten*, 42 Iowa 288; 20 Am. Rep. 618; *post*, II., § 8.

4. Eng. Marr. Woman's Act 1882, ch. 75, § 20; Cal. Civ. Code, § 176; Iowa R. C. 1880, § 2226; Mass. P. S. 1882, p. 817, § 36; N. J. Rev. 1877, p. 308; Nev. R. S. 1873, § 174; Vt. R. S. 1880, § 2377.

5. *Stewart M. & D.*, § 404. "Both parents are legally and morally bound to support their helpless offspring according to their respective abilities. The husband is primarily bound, because, controlling to some extent the family funds and wife's property, he is best able, and because he is entitled primarily to the custody and services of the child. But the wife is also bound."

Finch v. Finch, 22 Conn. 411; *Plaster v. Plaster*, 47 Ill. 290; *Harris v. Harris*, 5 Kan. 46. After father's death; *Denham v. Natick*, 10 Mass. 135; Though father's liability may continue after his death. *Miller v. Miller*, 64 Me. 484.

6. *Finch v. Finch*, 22 Conn. 411; *Fittler v. Fittler*, 33 Pa. St. 50, 57.

7. Ala. Code 1876, §§ 2705, 2706; Iowa R. C. 1880, § 2214. See *Baker v. Flournoy*, 58 Ala. 650; *Jones v. Glass*, 48 Iowa 345.

8. *Seitz v. Mitchell*, 94 U. S. (1876) 580, 584. "And nowhere, so far as we are informed, has it been adjudged that

her earnings or the product of them, made while she is living with her husband and engaged in no separate business, are not the property of the husband when the rights of his creditors have been asserted against them."

Glenn v. Johnson, 18 Wall. (U. S. S. Ct.) 476; *Todd v. Todd*, 15 Ala. 743; *Hinman v. Parkis*, 33 Conn. 188; *Hazelbaker v. Goodfellow*, 64 Ill. 237; *Cranor v. Winters*, 75 Ind. 301; *Glover v. Alcott*, 11 Mich. 471; *Henderson v. Warmark*, 27 Miss. 830, 834; *Hoyt v. White*, 46 N. H. 172; *Skillman v. Skillman*, 15 N. J. Eq. 478; *Filer v. R. R.*, 49 N. Y. 47.

Raybold v. Raybold, 20 Pa. St. 308; *Jones v. Reid*, 12 W. Va. 350; *Connors v. Connors*, 4 Wis. 112. See note 10, below.

9. *Harrington v. Gies*, 45 Mich. 374.

10. *Cranor et ux. v. Winter's Exr.*, 75 Ind. (1881) 301. "The earnings of the wife during the marriage belong to her husband, and, in the absence of an averment that he gave them to his wife, or that she was carrying on business with her separate property, he had a right to bring suit therefor making the wife a co-plaintiff as the meritorious cause of action. To such an action the coverture of wife is no defence." *Skillman v. Skillman*, 13 N. J. Eq. 403.

11. *Brooks v. Schwerin*, 54 N. Y. 343; 10 Am. Rep. 327.

12. *Skillman v. Skillman*, 13 N. J. Eq. 403.

except as his agent,¹ or by his consent.² Even if her earnings have been invested, the investment is *pro tanto* his,³ and may be seized by his creditors.⁴ If he dies, her earnings accrued before his death go to his personal representatives.⁵ The husband may forfeit this right by desertion, it seems,⁶ and he may waive it.⁷ And this right has been the first to be destroyed by statutes.

The husband, *in equity*, independently of statute, may give his wife her earnings;⁸ this may be done either by an ante-nuptial or a post-nuptial settlement. (See MARRIAGE SETTLEMENTS). The mere ability to earn is not property,⁹ and a husband may, therefore, waive the right to have his wife labor for him, even as against his creditors,¹⁰ but moneys received or due for labor, earnings in the fuller sense, are property, and a gift of such must not defraud creditors.¹¹ The burden of proof lies upon the

1. *Knowing v. Manly*, 49 N. Y. 192; 10 Am. Rep. 346; *post*, III., § 3.

2. *Hinman v. Parkis*, 33 Conn. 18; notes 8-11, *infra*, and 1, p. 819.

3. *Apple v. Ganong*, 47 Miss. (1872) 189: "Under the married women's acts of 1839, 1846 and 1857, in force prior to the Code of 1871, the husband owned the proceeds of the wife's labor; and real estate purchased in part with her earnings is subject to be taken to that extent in settlement of his debts."

4. See above note and *Swartz v. Saunders*, 46 Ill. 18; *Duncan v. Roselle*, 15 Iowa 501, 503; *Cramer v. Referd*, 17 N. J. Eq. 368; *Raybold v. Raybold*, 20 Pa. St. 308; *Campbell v. Bowles*, 30 Gratt. (Va.) 652.

5. This is the logical result of the husband's ownership. *Todd v. Todd*, 15 Ala. 743.

6. The marriage relations having ceased, the right to the wife's service, which is an incident to cohabitation, also comes to an end. *Mason v. Mitchell*, 3 Hurl. & C. (Eng. Exch. 1866) 528; *Rees v. Waters*, 9 Watts (Pa. 1839) 90; *Starrett v. Wynn*, 17 Serg. R. (Pa.) 130.

7. *Peterson v. Mulford*, 36 N. J. L. 481, 487. See note 8, *infra*.

8. *Andrews v. Andrews*, 8 Conn. (1830). "Where a man and woman of advanced age, and each the owner of a large estate, real and personal, mutually agreed that in contemplation that the intended wife . . . and should be entitled to the avails of her personal labor . . . it was held that such agreement was founded upon sufficient consideration . . . and was not opposed to sound policy." *Keith v.*

Woombell, 3 Pick. (Mass.) 211; *Skillman v. Skillman*, 15 N. J. Eq. 478.

9. *Hoyt v. White*, 46 N. H. (1865) 45.

"The personal services and earnings of the wife, and the profits and income of any business in which she may engage, at common law, and under our statutes of 1846 and 1860, relating to the rights of married women, belong to the husband absolutely and cannot be held by the wife to her sole and separate use. But, while the husband may thus enjoy and appropriate the earnings of the wife and the profits of her services, still under our law regulating the trustee process, the husband's creditors cannot on that process hold any of the avails of the wife's personal services or earnings." *Peterson v. Mulford*, 36 N. J. L. 481; *Abbey v. Deyo*, 44 N. Y. 343; *Rush v. Vought*, 55 Pa. St. 437.

10. *Peterson v. Mulford*, 36 N. J. L. 482; *Quidort v. Pergeaux*, 18 N. J. Eq. 472. Outsiders have nothing to do with the marriage relations between husband and wife. See next note.

11. *Hazelbaker v. Goodfellow*, 64 Ill. (1872) 241. "If, with the assent of the husband, the wife were to carry on any kind of business, she would be entitled to the profits, if it was *bona fide* hers, and not intended to shield the husband's property from his creditors. So, no reason is perceived why a husband might not, if the transaction were not tainted with fraud, permit his wife to raise and sell grain, stock and other farm products and receive the profits. But in such case the transaction would have to be fair and free from fraud as to creditors." *Basham v. Chamberlain*, 7 Mon. B. (Ky.) 443; *Keith v. Woom-*

wife to clearly prove the gift.¹

Effect of Statutes.—Married women's property acts which do not refer expressly to earnings do not change the husband's common law rights in the same.² So a statute which provides that a married woman may earn money on her separate account does not affect her earnings, unless it appears that they were acquired by her on her separate account.³ But in most States the statutes provide that the wife's earnings "shall be" her separate property, and that she may trade on her separate account.⁴ Under such statutes the product of all labor of hers for parties other than her husband, belongs to her;⁵ she can contract for her services and recover on the contract;⁶ she can sue alone for them,⁷ and make her husband, if need be, garnishee; a debt due by her husband cannot be set off in such a suit,⁸

bell, 8 Pick. (Mass.) 211; *Kramer v. Referd*, 17 N. J. Eq. 367.

1. The wife's earnings, as has been seen, belong *prima facie* to the husband. *McLemore v. Pinkston*, 31 Ala. 267, 270; *Skillman v. Skillman*, 15 N. J. Eq. 478, 481.

2. See MARRIED WOMEN; INTERPRETATION. *Seitz v. Mitchell*, 94 U. S. 580; *McLemore v. Pinkston*, 31 Ala. 267; *McMurty v. Webster*, 48 Ill. 123; *Marshall v. Duke*, 51 Ind. 61; *Duncan v. Roselle*, 15 Iowa 501; *Merrill v. Smith*, 37 Me. 394; *Glover v. Alcott*, 14 Mich. 470; *Apple v. Ganong*, 47 Miss. 187; *Hoyt v. White*, 46 N. H. 45; *Rider v. Hulse*, 33 Barb. (N. Y.) 264; *Syme v. Riddle*, 88 N. Car. 463; *Raybold v. Raybold*, 20 Pa. St. 301.

3. *McCluskey v. Provident Institution for Savings*, 103 Mass. (1869) 300, 304. "By the Gen. Sts., ch. 108, § 1, it is provided among other things, that the property which a married woman 'acquires by her trade, business, labor or services, carried on or performed on her sole and separate account, shall be and remain her sole and separate property.' This provision leaves the property which she acquires by trade, business, labor or services not carried on or performed by her on her sole and separate account, to be as it was at common law, the property of her husband." *Beckback v. Ackroyd*, 11 Hun (N. Y.) 365.

4. *Meriwether v. Smith*, 44 Ga. 541; *Martin v. Robson*, 65 Ill. 129; 16 Am. Rep. 578; *Musgrove v. Musgrove*, 54 Ill. 186; *Atteberg v. Atteberg*, 8 Oreg. 224; *Haas v. Shaw*, 91 Ind. 384; *Orrell v. Van Gorder*, 96 Pa. St. 180.

5. *Brooks v. Schwerin*, 54 N. Y. (1873) 343. "Under the provisions of

the act of 1860 (ch. 90, Laws of 1860) concerning the rights and liabilities of husband and wife as modified in 1862, which authorizes a married woman to perform any labor or service on her separate account, and gives her her earnings therefor (section 2), and empowers her to bring an action in her own name for injuries to her person (section 7), the services of the wife in the household still belong to her husband, and so far as an injury to her disables her from performing such services the loss is his, and he, not she, can recover therefor. But when she labors for another, her services and earnings no longer belong to her husband, but to herself, and so far as she is disabled from performing such service she can recover for the loss."

6. *Larimer v. Kelly*, 10 Kan. 298, 305; *Cooper v. Alger*, 51 N. H. 172, 175.

7. *Tunks v. Grover*, 57 Me. (1870) 586. "By virtue of R. S., ch. 61, § 3, a married woman may commence by trustee process, and maintain in her own name, an action for the recovery of the wages of her personal labor not performed for her own family, and summon her husband as trustee of her debtor. . . .

Ubi jus, ibi remedium; and when the legislature has conferred rights of this description upon married women, in such emphatic terms, it is not for us to deny the appropriate process to enforce them, although long cherished and familiar doctrines of the common law are thereby overturned." *Allen v. Eldridge*, 1 Colo. 288; *Meriwether v. Smith*, 44 Ga. 543; *Fowle v. Tidd*, 15 Gray (Mass.) 94; *Burke v. Cole*, 97 Mass. 114; *Cooper v. Alger*, 51 N. H. 174.

8. *Whiting v. Beckwith*, 31 Conn. 553.

and neither her husband,¹ nor his creditors,² have any right to such earnings, though, as with her other separate property, she may give them to her husband,³ and such a gift, it seems, is presumed, if, with her consent and without promising to repay her, he uses them,⁴ or mixes them with his own money.⁵

But these statutes do not impliedly authorize contracts between husband and wife for her services,⁶ and she cannot recover from him for services rendered;⁷ though this may perhaps be done if the statute itself or some other statute authorizes contracts between husband and wife.⁸ She is still bound without charge to look after his home and children, and to perform the domestic duties of wife;⁹ she is still his "helpmeet."¹⁰

These statutes are prospectively construed;¹¹ indeed, they could not deprive the husband of money for her services, already paid or due.¹²

9. Conjugal Liability in Contract.—There is no liability of a wife

1-2. See note 5, p. 819. Inasmuch as the husband has no rights, his creditors, who must claim through him, have none. *Glenn v. Johnson*, 18 Wall. (U. S. S. C.) 476.

3. *Schaeffer v. Sheppard*, 54 Ala. 244; *Bowden v. Gray*, 49 Miss. 547; *Quidort v. Pergeaux*, 18 N. J. Eq. 472, 480; *Hallowell v. Horter*, 35 Pa. St. 375.

4-5. *Hill v. Hill*, 38 Md. (1873) 183. "A claim by a widow against the estate of her deceased husband for money which she alleged she lent him during coverture will not, in the absence of proof of an express promise or agreement on his part to repay it, be allowed. To establish the relation of debtor and creditor between a husband and wife, growing out of the use or appropriation by the husband of the wife's money, being her separate estate, where the receipt and appropriation are with her knowledge and acquiescence, there must be an agreement on his part to repay it." *Hallowell v. Horter*, 35 Pa. St. 375.

6. *Mewhirter v. Halten*, 42 Iowa 288; 20 Am. Rep. 618; *Reynolds v. Robinson*, 64 N. Y. 589; *Glover v. Alcott*, 11 Mich. 471.

7. *Mewhirter v. Halten*, 42 Iowa (1875) 288, 291. "We feel very clear that the legislature did not intend by this section of the statute to release and discharge the wife from her common law and scriptural obligation and duty to be a 'helpmeet' to her husband. If such a construction were to be placed upon the statute, then the wife would have a right of action against the

husband for any domestic service or assistance rendered by her as wife. . . . Certainly, such consequences were not intended by the legislature, and we cannot so hold in the absence of positive and explicit legislation." 26 Am. Rep. 618.

8. *Reynolds v. Robinson*, 64 N. Y. 589, 593.

9-10. See note 7, *ante*. Also *Glover v. Alcott*, 11 Mich. 471; 20 Am. Rep. 618.

11. See INTERPRETATION; STATUTES.

12. *Jassay v. Delins*, 65 Ill. 469. "Where the wife had at the time of her marriage \$2,000, that being before the act of 1861, and in 1862 went into the millinery business, which she continued until 1871. *Held*, that the \$2,000 belonged to her husband, and that the profits arising from the millinery business prior to the act of 1869, at least beyond the interest in the wife's separate capital which was employed, was to be regarded as the wife's earnings, and as such belonged to the husband, and liable for his debts." See, also, *Rider v. Hulse*, 33 Barb. (N. Y.) 264.

In *Kent v. Rand*, 2 N. E. Rep. 858; N. H. (1886): A married woman borrowed money for the use of her husband in his own business. After his death the widow promised to pay the debt. Court *held* that widow was not liable. "The contracts of married women, owing to the disability of coverture, are void at common law. Being void, no debt ever existed and hence they furnish no consideration for a subsequent promise made during widowhood." See MARRIED WOMEN.

as wife for contracts of her husband, and a wife could not make any contracts at common law for her husband to be liable on, though she could charge him as his agent in law or in fact. And when, under statute or otherwise, a wife can make contracts, her husband is not liable upon them *as husband*,¹ though he may, of course, be liable if he joins with her.²

But as to a wife's *ante-nuptial contracts*, her husband comes into full liability, and he is liable on all such contracts of hers,³ whether he gets any property with her or not,⁴ and even though he be a minor.⁵ On such contracts husband and wife must be sued jointly. The husband's liability ceases with the coverture,⁶ unless it has been fixed by judgment.⁷ If the wife dies after judgment, he continues liable;⁸ if he dies, his estate is liable.⁹ If not fixed by judgment, the husband's liability is destroyed by an absolute divorce, by his death, or by hers.¹⁰ But marriage does not suspend or destroy her liability,¹¹ so that, if he dies, she

1. *Holmes v. Reynolds*, 55 Vt. (1883) 39, 42. "Where the wife has the capacity to contract independently of her husband, he would not be liable by virtue of his marital relations upon contract entered into by her, but there is no reason why he cannot jointly contract with her in all cases where she has the capacity to contract." *Frieber v. Stover*, 30 Ark. 727; *Franklin v. Foster*, 20 Mich. 75; *Hill v. Goodrich*, 46 N. H. 41.

2. See above note, and *Sturmfeltz v. Frickey*, 43 Md. 569.

3. *Anderson v. Smith*, 33 Md. (1870) 467. "The amount claimed being a subsisting debt of the wife at the time of her marriage, and one that might have been enforced against her notwithstanding her minority, her husband of course became responsible for it upon the marriage." *Heard v. Stamford*, 3 P. Wms. (Eng.) 407, 412; *Cowley v. Robertson*, 3 Camp. (Eng. King's Bench, 1814) 438; *Sharkes v. Bell*, 8 Barn. & C. (Eng.) 1; *Moore v. Leseur*, 18 Ala. 606; *Harrison v. Trader*, 27 Ark. 288; *Hawarth v. Warmser*, 58 Ill. 48; *Hetrick v. Hetrick*, 13 Ind. 44; *Hamlin v. Bridge*, 24 Me. 145; *Hawes v. Bigelow*, 13 Mass. 384; *Barnes v. Underwood*, 47 N. Y. 351; *Dickson v. Miller*, 19 Miss. 594; *Wilson v. Wilson*, 30 Ohio St. 365; *Cole v. Shurtleff*, 41 Vt. 311; *Platner v. Patchin*, 19 Wis. 333.

4. *Heard v. Stamford*, 3 P. Wms. (Eng.) 400.

5. *Roach v. Quick*, 9 Wend. (N. Y.) 238; *Cole v. Seely*, 25 Vt. 220; 60 Am. Dec. 258.

This is on the principle that, if the infant can enter into the marriage con-

tract, then he must undertake the usual responsibilities attached to it.

6. *Gray v. Thacker*, 4 Ala. 136; *Moore v. Leseur*, 18 Ala. 606; *Angel v. Felton*, 8 Johns. (N. Y.) 140; *Carl v. Wonder*, 5 Watts (Pa.) 97, 98; *Platner v. Patchin*, 19 Wis. 333.

7. *Fultz v. Fox*, 9 B. Mon. (Ky.) 499; *Bryan v. Doolittle*, 38 Ga. 255; *Burton v. Burton*, 5 Harr. (Del.) 441.

8. If a judgment is valid at the time it is rendered, it of course remains so until barred by lapse of time. *Bryan v. Doolittle*, 38 Ga. 255.

9. *Burton v. Burton*, 5 Harr. (Del.) 441.

10. *Bryan v. Doolittle*, 38 Ga. 255, 257. "By the common law the husband is not liable to pay the debts of the wife contracted by her before marriage, unless judgment was obtained against him therefor during the coverture." 2 Kent Com. 145.

Wilson v. Wilson, 30 Ohio St. 365, 371; *Fultz v. Fox*, 9 B. Mon. (Ky.) 499; *Carlton v. Moore*, 2 Jones Eq. (N. Car.) 204; *Heard v. Stamford*, 3 P. Wms. (Eng.) 409; *Williams v. Kent*, 15 Wend. (N. Y.) 360; *Cole v. Shurtleff*, 41 Vt. 311.

11. *Fultz and wife v. Fox*, 9 B. Mon. (Ky.) 500. "As the law stood previous to the passage of the act, the debt of a *feme sole* was not, on her marriage, considered as transferred to her husband. If it had been, he or his executor would have been liable after the termination of the coverture. The debt remained hers, notwithstanding her marriage, and upon her husband's death, if the debt was unpaid, her liability existed, as it had done prior to

continues liable;¹ and if she dies, her administrator is liable to the extent of assets,² even though he be her widower;³ and she is liable after an absolute divorce.⁴ The statute of limitations runs for her during coverture.⁵ Bankruptcy of the husband at common law destroyed any right to bring suit at all during coverture, at law;⁶ but in equity she could perhaps be held liable if she had separate property.⁷ This liability is not affected by any antenuptial or post-nuptial agreement between the husband and wife,⁸ nor do married women's statutes destroy the husband's liability, unless they so state,⁹ except in Illinois.¹⁰ But in many States there are statutes expressly destroying this liability or limiting it to the amount of the property gotten by the husband from his wife.¹¹

10. Conjugal Liability in Tort.—There is no liability of a wife as wife for her husband's torts, but a husband is generally liable for those of his wife.

her marriage. The contract was the contract of the wife, and not of the husband, and therefore, the law exempting his estate from the payment of the debt cannot be regarded as having the effect of impairing the obligation of the contract." *Gage v. Reed*, 15 Johns. (N. Y.) 403; *Mallory v. Vanderheyden*, 3 Barb. Ch. (N. Y.) 9, 23.

1. *Parker v. Steed*, 1 Lea (Tenn. 1878) 206. "Suit on contract of woman *dum sola*. She married during pendency of the suit. Revivor had against the husband. He then died. The suit allowed to abate as to him. *Held*, the suit might well proceed against the surviving wife, the debt as to her not having been extinguished by the marriage." See *Hawk v. Harman*, 5 Binn. (Pa. 1812) 43, 50.

2-3-4. This follows naturally from the principles laid down in notes 4 and 5. *Humphrey v. Boyce*, 1 Moody & R. (Eng. 1830) 140; *Jones v. Walkup*, 5 Sneed. (Tenn. 1858) 135.

5. *Moore v. Leseur*, 18 Ala. (1851) 606. "A promise by the husband to pay the debt of the wife, contracted *dum sola*, is not in law the promise of the wife, and will not take the demand as against her out of the influence of the statute of limitations." *Kline v. Guthart*, 2 Pa. St. 490; *Farrar v. Bessey*, 24 Vt. 89.

6. *Miles v. Williams*, 10 Mod. 160. "If debt be brought against a man and his wife, on a bond by the wife *dum sola*, they may plead a discharge by the bankruptcy of the husband." *Mallory v. Vanderheyden*, 3 Barb. Ch. (N. Y.) 9, 22.

7. Since equity has charge of her

separate property. *Hamlin v. Bridge*, 24 Me. 145. Consult *Jones v. Glass*, 48 Iowa 345.

8. *Harrison v. Trader*, 27 Ark. (1871) 288. "The husband is liable for the debts of his wife, created *dum sola*, and no contract entered into between the parties in contemplation of marriage can change the responsibility and obligation of the husband in this respect, so as to affect the rights of parties outside of the marriage agreement.

. . . . We cannot hold otherwise than that a compact, no matter how solemnly entered into between a man and woman, that would attempt to, and which has for its object the contravention of the general policy of the law in settling the relations of domestic life, and which creditors, third parties and the public are interested to preserve, is invalid." This language appears to be a little extravagant when it is remembered that most of the State legislatures have abolished this doctrine of the common law. See, also, *Christian v. Hanks*, 22 Ga. 125; *Taylor v. Miller*, 2 Lea (Tenn.) 153; *Powell v. Manson*, 22 Gratt. (Va.) 177.

9. See MARRIED WOMEN, INTERPRETATION. *Conner v. Berry*, 46 Ill. 370; *Berley v. Rampacher*, 5 Duer. (N. Y. City 1856); 183; *Alexander v. Morgan*, 31 Ohio. St. 541; *Platner v. Patchin*, 19 Wis. 333.

10. *Howarth v. Warmser*, 58 Ill. 48; *Dickson v. Miller*, 19 Miss. 594.

11. See Ala. Code 1876, § 2704; Cal. Civ. Code, § 170; *Wood v. Orford*, 52 Cal. 412; *Md. acts* 1880, §§ 31, 32; *N. Car. Rev.* 1873, p. 590; *Pa. Purd. Dig.* 1872, p. 1006; *Colo. R. S.* 1877, § 1754.

Wife's Ante-nuptial Torts.—A husband at common law takes his wife with all her liabilities,¹ and he is, therefore, liable on her ante-nuptial torts,² for the same reasons and to the same extent as he is liable on her ante-nuptial contracts;³ and to the same extent, also, as he is liable for her post-nuptial torts committed out of his presence and without his directions.⁴ This liability extends to acts done by her in a representative capacity,⁵ for example as guardian or administratrix.⁶ It is in many States removed by express statutes, but the weight of opinion is that it is not affected by married women's property acts.⁷

Wife's Post-nuptial Torts.—A husband, at common law, is liable for all torts committed by his wife during coverture;⁸ it makes no difference if they are living apart, so long as he is really her husband.⁹ But he cannot, unless his wife is agent in fact,¹⁰ be liable for a wrong of hers based on her invalid contract, as where she got credit by pretending that she was unmarried,¹¹ or misappropriated money placed in her keeping.¹² If he allows her to act as administratrix, he is responsible for all her torts;¹³ but her

1. *Ferguson v. Collins*, 8 Ark. 241; *Hawk v. Harman*, 5 Binn. (Pa. 1812) 43; 50.

2. *Ferguson v. Collins*, 8 Ark. 241, 252. "If an executrix commit a *de-vastavit* and then marry, the husband, as well as the wife, is chargeable for it during the coverture." *Phillips v. Richardson*, 4 Marsh. J. J. (Ky. 1830) 212; *Brown v. Kemper*, 27 Md. 666; *McCready*, 1 Tuck. (N. Y. Surrogate) 374; *Hubble v. Fogartie*, 3 Rich. (S. Car.) 413; *Allen v. McCullough*, 2 Heisk. (Tenn.), 174, 182.

3. *Heard v. Stamford*, 3 P. Wms. (Eng.) 407, 412; *Hawk v. Harman*, 5 Binn. (Pa.) 43.

4. *Baker v. Young*, 44 Ill. 42, 48; *Bell v. Bennett*, 21 Ind. 427; *Enders v. Beck*, 18 Iowa 86; *Heckel v. Lurvey*, 101 Mass. 344; *Carleton v. Haywood*, 49 N. H. 314, 318; *Kowing v. Manly*, 49 N. Y. 192; 10 Am. Rep. 346.

5-6. If, as is shown by the extract in note 2 above, the husband is liable for his wife's acts as executrix before marriage, *a fortiori*, he is liable for her acts in that capacity after marriage. *Allen v. McCullough*, 2 Heisk. (Tenn.) 174; 5 Am. Rep. 27.

7. *McAlfresh v. Kirkendall*, 36 Iowa 224. See *Stewart H. & W.*, §§ 14, 15.

See INTERPRETATION; MARRIED WOMEN.

8. *Baker v. Young*, 44 Ill. 42, 47. "The words in this case were spoken by the wife alone, and the question sought to be raised is, whether a judgment can be recovered against him for

slander uttered by the wife. The rule is laid down by Chitty, that for torts committed by the wife during marriage, as for slander, assault, etc., 1 Chitty, Pl. 92 . . . they were compelled to find a verdict against both defendants, they being husband and wife." *Wright v. Kerr*, Addis. 13; *Vine v. Saunders*, 5 Scott (Eng. 1843) 359; *Head v. Briscoe*, 5 Car. & P. (Eng.) 484; *Hope v. Carnegie*, Law R., 7 Eq. 254; *Ferguson v. Collins*, 8 Ark. 241; *Ball v. Bennett*, 21 Ind. 427; *Hinds v. Jones*, 48 Me. 348; *Brazil v. Moran*, 8 Minn. 236; *Dailey v. Houston*, 58 Mo. 361; *Carleton v. Haywood*, 49 N. H. 314; *Fowler v. Chichester*, 26 Ohio St. 9; 10 Am. Dec. 698; *Jackson v. Kirby*, 37 Vt. 448.

9. *Overholt v. Ellswell*, 1 Ashm. (Pa. District Ct. Oyer & Term.) 200.

10. *Taylor v. Green*, 8 Car. & P. 316, 318.

11. For the obvious reason that the creditors looked to the woman alone for payment. *Woodward v. Barnes*, 46 Vt. 332; *Liverpool v. Fairhurst*, 9 Ex. (Eng.) 422; *Andrews v. Ormsbee*, 11 Mo. 400; *Keen v. Hartman*, 48 Pa. St. 497, 499.

12. *Andrews v. Ormsbee*, 11 Mo. 400; *Carleton v. Haywood*, 49 N. H. 314.

13. See note 2, *ante*, and notes 9 and 10, p. 826. *Bohe v. Frouner*, 18 Ala. 89; *McCready*, 1 Tuck. (N. Y. Surrogate) 374; *Moffitt v. Com.*, 5 Pa. St. 359; *Moon v. Henderson*, 4 Desaus. Eq. (S. Car. 1816) 459; *Tabb v. Boyd*, 4 Call (Va.) 453.

unauthorized dealing with an estate does not render him liable as executor *de son tort*.¹

For these torts, a husband may be liable, according to their character, alone or jointly with his wife, as follows:

(1) If the tort is committed in his presence, and nothing more appears, it is his sole tort, as she is presumed to have acted under his coercion.²

(2) If the tort is committed in his presence, but she appears to have acted deliberately and freely, it is their joint tort.³

(3) If the tort is committed in his presence and against his will, it is her tort, and he is liable with her.⁴

(4) If the tort is committed out of his presence, but by his direction, she is jointly liable with him.⁵

(5) If the tort is committed out of his presence and without his knowledge or consent, he is liable with her.⁶

1. *Hinds v. Jones*, 48 Me. 348. "An action does not lie against the husband, as an executor *de son tort*, for acts of his wife, done without his knowledge. Otherwise, where he advises or aids her in the commission of the wrongful acts; for every one thus participating becomes a principal."

2. *Bail v. Bennett*, 21 Ind. 428. "The husband is liable for the torts and frauds of the wife committed during coverture. If committed in his company, or by his order, he alone is liable. If not, they are jointly liable, and the wife must be joined in the suit with the husband." 2 Kent Com. 143. *Marshall v. Oakes*, 51 Me. 308; *Miller v. Sweitzer*, 22 Mich. 391; *Brazil v. Moran*, 8 Minn. 236; *Dailey v. Houston*, 58 Mo. 361; *Cassin v. Delany*, 38 N. Y. 178; *Park v. Hopkins*, 2 Bail. (S. Car.) 411; *Sisco v. Cheeney*, *Wright* (Ohio) 9; *McKeown v. Johnson*, 1 McCord (S. Car.) 578; *McQueen v. Fulgham*, 27 Tex. 463; *Jackson v. Kirby*, 37 Vt. 448. See next note.

3. *Carleton v. Haywood*, 49 N. H. (1870) 318. "The presumption, *prima facie*, is that the wife acted under coercion, if the husband was actually present. This presumption arises as well in civil suits for torts, as in criminal cases. But it may be rebutted by facts showing that the wife was the instigator or more active party; or that the husband, though present, was incapable of coercion; or, in cases relating to acts of violence, that the wife was the stronger of the two. 2 Hill Torts 590; Sch. Dom. Rel. 102; 1 Wheaton's Cr. L. 102; 2 Kent's Com. 150. In such cases the responsi-

bility for the wife's misdoings is not cast upon the husband alone, but they are either liable jointly, or, in certain cases, she alone is made responsible." *Nolan v. Traber*, 49 Md. 460; 33 Am. Rep. 277; *Cassin v. Delany*, 38 N. Y. 178.

4. See above note.

5. *Handy v. Foley* (1876), 121 Mass. 259. "A husband and wife are jointly liable for a tort done by her in his absence, but under his direction and instigation." On p. 261: "Even in criminal cases, the husband's mere direction and instigation will not protect his wife from liability for acts done in his absence and beyond his immediate influence and control; and the presumption of coercion, which exists when she acts in his presence, is *prima facie* only, and may be rebutted . . . The statement in 2 Kent Com. 149, that if the wife commits a tort 'in his company or by his order, he alone is liable, is too general, and must be limited to the case of her acting by his coercion."

23 Am. Rep. 270; *Cassin v. Delany*, 38 N. Y. 178; *Clark v. Boyer*, 32 Ohio St. 209; 30 Am. Rep. 593.

6. In *Baker v. Young*, 44 Ill. 42, where a wife spoke slanderous words of the plaintiff out of the presence of her husband, without his knowledge or consent, the husband was held to be jointly responsible with his wife, although it was "urged that he did not become *particeps criminis*, and should not be found guilty without having been accused, and having an opportunity of defending himself."

Bail v. Bennett, 21 Ind. 427; *Enders v. Beck*, 18 Iowa 86; *Heckel v. Lurvey*, 101 Mass. 344; 3 Am. Rep. 366; *Carle-*

In cases (1), (2) and (4) he is liable because she is his agent, and to the same extent that any master is for the act of his servant.¹ In cases (3) and (5) he is liable because she is his wife, and, as is the case with his ante-nuptial contracts and torts, his liability, unless it has been fixed by judgment, ceases with the dissolution of the marriage.² In case (1) she cannot be sued.³ In cases (3) and (5) he cannot be sued as joint-wrongdoer,⁴ but must be sued as husband.⁵ In cases (2) and (4) they are jointly liable for a joint tort.⁶

The husband's liability for his wife's torts *as husband* has been removed by statute in some States;⁷ but such statutes do not destroy his liability in cases when he is liable *as master*.⁸ But his liability is not affected by general married women's property acts.⁹

ton v. Haywood, 49 N. H. 314; Kowing v. Manly, 49 N. Y. 192; 10 Am. Rep. 346; Matthews v. Fietzel, 2 E. D. Smith (N. Y. City 1855) 90, 91; Park v. Hopkins, 2 Bail. (S. Car. 1830) 411, 412; Barnes v. Harris, Busb. (N. Car.) 15, 17; McQueen v. Fulgham, 27 Tex. 463.

1. Cox v. Hoffman, 4 Dev. & B. (N. Car.) 180, 182. "Secondly the defendant was liable for the injury done to the property of the plaintiff by the negligence, carelessness or unskillfulness of his servants in their performance of his business. The wife, in the eye of the law, is his servant; and the husband would be equally liable to third persons for her negligent and careless acts in doing his business as he would be for the acts of any other of his servants."

2. Ferguson v. Collins, 8 Ark. 241; Phillips v. Richardson, 4 Marsh. J. J. (Ky.) 212; Crane v. Van Dwyne, 9 N. J. Eq. 259; Moffitt v. Com., 5 Pa. St. 359; Hawk v. Harman, 5 Binn. (Pa.) 43; Allen v. McCullough, 2 Heisk. (Tenn.) 174; 5 Am. Rep. 27; Stewart M. & D., §§ 448, 468.

3. Note 2, p. 824.

4-5. Ferguson v. Brooks, 67 Me. (1877) 251, 255. "But the plaintiff did not allege the commission of any trespass by Augustus W. Brooks. The suit is not for a tort alleged to have been committed jointly by the husband and wife, but is charged in the first count as committed by the wife, and in the second by her and her servants, agents and employes."

"Where a suit is thus brought against husband and wife for a tort committed by the wife the liability of the husband necessarily follows from the existence of the marital relation, and a verdict

that the wife is guilty disposes of the whole issue raised by a joint plea of not guilty."

Park v. Hopkins, 2 Bail. (S. Car.) 411; Sisco v. Cheeney, Wright (Ohio 1833) 9, 10.

6. See notes 3, 5, p. 824. Also Vine v. Saunders, 5 Scott 359, 370; Heckle v. Lurvey, 101 Mass. 344; Handy v. Foley, 121 Mass. 259; 23 Am. Rep. 280; Miller v. Sweitzer, 22 Mich. 391; Carleton v. Haywood, 49 N. H. 314; Roadcap v. Sipe, 6 Gratt. (Va.) 213.

7. Md. acts 1880, ch. 253, §§ 31, 32; Mass. P. S. 1882, p. 819, § 9; Mich. R. S. 1882, §§ 7714, 8959.

8. Ricci v. Mueller, 41 Mich. (1879) 215. "A husband is no longer liable for his wife's torts. Burt v. McBain, 29 Mich. 260. Unless, therefore, her use of the buggy is in some way connected with the husband's authority, or fault, he cannot be held for her negligence, if she was negligent, any more than for that of anyone else."

Hill v. Duncan, 110 Mass. 238.

9. Choen v. Porter, 66 Ind. (1879) 195, 199. "In the case of Ball v. Bennett, 21 Ind. 427, cited in the original opinion in this cause, which was decided without any very elaborate consideration it is true, after the passage of the most of our statutes enlarging the rights of married women, it was held that the husband was liable for the torts and frauds of the wife, committed during coverture. We find nothing in our statutes which, in our opinion, evinces an intention on the part of the legislature to change the common law on that subject."

McElfresh v. Kirkendall, 36 Iowa 224; Ferguson v. Brooks, 67 Me. 251; Kowing v. Manly, 57 Barb. (N. Y.)

except in Illinois¹ and Kansas,² or even by a provision that a husband shall not be liable for his wife's debts.³ Still, when a wife may sue and be sued as to her separate property without her husband, he is not liable for a tort committed by or through it, unless he took part in the tort, as where the wife's farm contains a nuisance,⁴ or her cattle have committed depredations.⁵ But he is liable with her for conversion, when she receives stolen goods in the course of her separate business, as she never legally acquired the goods.⁶ A husband is not liable for the torts of an insane wife.⁷

11. Conjugal Liability in Crime.—Marriage never renders a wife liable for the crimes of her husband; but a husband is liable for all crimes of his wife committed during coverture in his presence and with his knowledge and consent. According to circumstances he may be liable as principal,⁸ or as accessory,⁹ and alone¹⁰ or

479; *Baum v. Mullen*, 47 N. Y. 577; *McCready v. McCready*, 1 Tuck. (N. Y. Surrogate,) 374; *Fowler v. Chichester*, 26 Ohio St. 9, 14; *McQueen v. Fulgham*, 27 Tex. 463.

See INTERPRETATION; MARRIED WOMEN.

1. *Martin v. Robson*, 65 Ill. 129. Where a married woman under statute is "entitled to receive, use and possess her own earnings, and sue for the same in her own name, free from the interference of her husband." 16 Am. Rep. 578.

2. *Morris v. Corkhill*, S. C. Kan., Oct. 9, 1884.

3. *McElfresh v. Kirkendall*, 36 Iowa 224, 227.

4-5. *Austin v. Cox and wife*, 118 Mass. 58. "Under the statute of 1871, ch. 312, which provides that any married woman may be sued in an action of tort as if she were *sole*, and that her husband shall not be liable to pay the judgment against her in any such suit, a husband is not liable in an action of tort for an interference by the wife with an easement which an adjoining owner has over the wife's land, unless he aids, abets or otherwise encourages the act." *Rowe v. Smith*, 45 N. Y. 230; *Baum v. Mullen*, 47 N. Y. 577; *Fiske v. Bailey*, 51 N. Y. 150.

6. *Nusser v. Lewis*, N. Y. Sup. Ct., June 26, 1884; 6 N. Y. Civ. Proc. R. 135.

7. *Gove v. The Farmers' Mutual Fire Insurance Co.*, 48 N. H. 41. "Where a husband of a wife, admitted to be insane, is the owner of buildings insured by the defendants, and where the care and custody of the wife for the time being is intrusted to her husband, and she burns the buildings

while thus insane, the defendants will be liable for the loss, unless they can show actual design or such degree of negligence and carelessness on the part of the husband as will evince a corrupt design or a fraudulent purpose on his part." In *Lombard v. Batchelder*, 58 Vt. 558 (1886) it was held that exemplary damages are recoverable against husband and wife for the wife's malicious trespass, although the husband is without blame.

8. *Hensly v. State*, 52 Ala. (1875) 10, 12. "An offence not *malum in se*, committed by a married woman, in the presence and with the knowledge of her husband, is presumed to have been committed by his authority, and he is punishable by indictment for it, if it be an indictable offence."

9. *State v. Potter and wife*, 42 Vt. (1870) 495. "Under an indictment charging a husband and wife jointly with having certain burglarious implements and tools in their possession with felonious intent to use them, it was held that possession by the wife while the husband was with her was *prima facie* innocent, as under the coercion of the husband, but for possession by her in the absence of the husband, though by his direction, she would be responsible." On page 504: "For her use would make her guilty of a burglary, while the fact that this use was by direction or procurement of the husband would make him guilty, not of the burglary, but of being accessory to it." *Reg. v. Manning*, 2 Car. & K. (Eng.) 903. See fully, *Desty Cr. L.*, §§ 15, 16, 17, and other works on criminal law.

10. *Com. v. Wood*, 97 Mass. (1867) 225, 228. "By the common law, the

jointly¹ with her. Nor have married women's statutes changed this common law liability of his.²

(1) If it appears only that a criminal act was done by the wife in the presence of her husband, she is deemed to have acted under his coercion, as she is under his power (*sub potestate viri*);³ and he is liable alone.⁴ She is in legal contemplation in his presence, though he is not in sight, if he is near by and she is acting under his supervision.⁵

(2) If it appears that a criminal act was done by the wife in the presence of her husband, but of her own free will, he is jointly liable with her,⁶ for it is his right and his duty to prevent her

husband's presence is coercion, and will excuse ordinary crimes committed by the wife, unless that presumption is rebutted." 1 Russ. on Crimes, 18.

1. Goldstein *et al.* v. State, 82 N. Y. (1880) 231, 233. "It follows that when the husband is guilty of the offence charged, and the wife also, and the coercion is shown not to exist, they may be jointly indicted and convicted; for in such a case the wife acts in her own capacity as one able to commit crime of her own accord and intent, as much so as an unmarried person, and to that effect I think, are the authorities." King v. Chedwick, 1 Keble (Eng. Car. II) 585; King v. Thomas and wife, Cases temp. Hardwicke, p. 278; Rex v. Cross and wife, 1 Raymond (Eng. Car. II) 711; Rex v. Stapleton and wife, 1 Crawford and Dix's C. R. 163; The State v. John Bentz and wife, 11 Mo. 27; King v. Morris and wife, 2 Leach (Eng. Geo. II) 1006; Rex v. Inghram, 1 Salkeld (Eng. Will. III) 384; 1 Russ. on Crimes, p. 20.

2. In Com. v. Pratt, 126 Mass. (1879) 462, a married woman was carrying on business in her own name under Mass. Statute. "If a married woman keeps intoxicating liquors for sale in violation of law in a hotel hired by her, and her husband aids her in such keeping, or if, without actually and actively aiding her, he is present and has knowledge of the fact and of her intent, the presumption of law is that she is acting under his coercion, and he can be convicted of such illegal keeping." Com. v. Wood, 97 Mass. 225, 229; Com. v. Barry, 115 Mass. 146; 2 Green Cr. R. 285, 287.

3. Heasley v. State, 52 Ala. 10; 1 Am. Cr. R. 465. See Desty Cr. L., § 16 a.; Rex v. Hamilton, 1 Leach 348; Edwards v. State, 27 Ark. 493; State v. Banks, 48 Ind. 197; Marshall v. Oakes, 51 Me.

308; Nolan v. Traber, 49 Md. 460; 33 Am. Rep. 277; Com. v. Neal, 10 Mass. 152; 1 Lead. Cr. C. 91; 6 Am. Dec. 105; Com. v. Barry, 115 Mass. 146; 2 Green Cr. R. 285; State v. Bentz, 11 Mo. 27; Haines v. State, 35 N. H. 207; Goldstein v. People, 82 N. Y. 231; State v. Williams, 65 N. Car. 399; Davis v. State, 15 Ohio 721; 45 Am. Dec. 559; City v. Van Roven, 2 McCord (S. Car.) 465; Uhl v. Com. 6 Gratt. (Va.) 706; State v. Potter, 42 Vt. 495; Miller v. State, 25 Wis. 384.

4. See note 10, p. 826.⁷ State v. Cleaves, 59 Me. 298; 8 Am. Rep. 422; Heasley v. State, 52 Ala. 10; 1 Am. Cr. R. 465; Edwards v. State, 27 Ark. 493; 1 Green Cr. R. 741.

In Com. v. Flaherty, 140 Mass. 454 (1886), a married woman was on trial for keeping a liquor nuisance, and there was evidence of a sale made by her when her husband was in the yard outside. Held, that an unqualified instruction to the effect that a sale thus made was not made under constraint, was erroneous.

5. For this familiar principle of the criminal law see Com. v. Neal, 10 Mass. 152; 1 Lead. C. C. 91; Reg. v. Boober, 4 Cox C. C. (Eng. 1850) 272; Rex v. Archer, 1 Moody C. C. (Eng.) 143; State v. Nelson, 29 Me. 329; Com. v. Munsey, 112 Mass. 287; State v. Williams, 65 N. Car. 398; Davis v. State, 15 Ohio St. 72; State v. Parkerson, 1 Strob. (S. Car.) 169; Uhl v. Com., 6 Gratt. (Va.) 706.

6. See note 1, *ante*. Also State v. Cleaves, 59 Me. 298; 8 Am. Rep. 422; Reg. v. Ingram, 1 Salk. (Eng.) 384; Somerville v. Somerville, 1 And. (Eng.) 104; Phillips v. Phillips, 7 B. Mon. (Ky.) 268; State v. Nelson, 29 Me. 329; Com. v. Tryon, 99 Mass. 442; State v. Bentz, 11 Mo. 27; State v. Parkerson, 1 Strob. (S. Car.) 169.

from doing wrong, with force, if need be.¹ Probably his *bona fide* endeavors to prevent her from committing the crime would be a defence.² Of course, if he aids and abets her he is liable.³

(3) If it appears that a criminal act was committed by the wife out of the presence of her husband, but with his concurrence or assent, he is liable,⁴ just as anyone is liable for the acts of his agent.⁵

(4) If it appears that the criminal act was committed by the wife out of the presence of her husband, and without his knowledge or assent, he is not liable at all.⁶

But a husband cannot be guilty of conspiring with his wife, unless the conspiracy was consummated before their marriage,⁷ or there are other co-conspirators.⁸

12. Conjugal Rights and Liabilities as to Children.—See PARENT AND CHILD.

13. Conjugal Rights and Liabilities as to Property.—See CONJUGAL ESTATES, discussed below.

14. Conjugal Rights and Liabilities as to Suits.—The husband must, generally, except when some statute expressly authorizes the contrary, be joined in all suits to which his wife is a party.⁹ (See MARRIED WOMEN, SUITS OF). As has been seen, a husband is generally liable to be sued with his wife on her antenuptial contracts,¹⁰ and for her torts,¹¹ and to be prosecuted with her for her crimes;¹² he usually sues with her on her contracts,¹³

1. *Com. v. Wood*, 97 Mass. 225, 228. "How far he may exercise force in restraining her is not precisely settled. But there can be no doubt that he may exercise as much power as may be reasonably necessary to prevent her, as well as other inmates of the house, from making it a brothel." *Com. v. Barry*, 2 Green Cr. Rep. 285.

2. *King v. Stapleton*, Jebb C. C. (Eng. Crown Cases 1822-1840) 93.

3. Nothing could be clearer than this proposition. See note 4, above. Also *Reg. v. Manning*, 2 Car. & K. (Eng.) 903; *Rex v. Morris*, 2 Leach (Eng. Geo. II) 1096; *Ross v. Com.*, 2 B. Mon. (Ky.) 417; *State v. Brown*, 31 Me. 520; *Com. v. Nichols*, 10 Met. (Mass.) 259; *Schmidt v. State*, 14 Mo. 137; *State v. Dow*, 21 Vt. 484.

4-5. *State v. Colby*, 55 N. H. 73. "The evidence tended to show that a sale of liquor to Mrs. Cheney at the respondent's house, not by the respondent himself, but by his wife; and the remaining question in the case was, whether the respondent's wife acted under the authority of her husband as his agent and servant, in making the sale." The court held that the evidence showing the wife's agency was sufficient,

and upheld the verdict which found the husband guilty.

6. *State v. Baker*, 71 Mo. (1880) 475. "A husband is not criminally liable for the act of his wife in selling liquor without license, when the sale is made in his absence and contrary to his express instructions." *Com. v. Welch*, 97 Mass. 593; *Com. v. Musey*, 112 Mass. 287; *Handy v. Foley*, 121 Mass. 259; 23 Am. Rep. 270.

7. *Rex v. Robinson*, 1 Leach (Eng. Geo. II) 37; *People v. Mather*, 4 Wend. (N. Y.) 229; 21 Am. Dec. 122; *Com. v. Manson*, 2 Ashm. (Pa. 1st Dist.) 31.

8. *Rex v. Locker*, 5 Esp. (Eng. 1805) 107.

9. This is a necessary result of the merger of the wife in the husband. *Stewart H. & W.*, §§ 432, 433. In *Gillespie v. Smith*, 20 Neb. 455 (1887), it was held that a married woman, sued as surety on a note, must show by her answer that the contract did not concern her separate property, trade or business.

10. *Ante*, II., § 9.

11. *Ante*, II., § 10.

12. *Ante*, II., § 11.

13. The reasons which compel the husband to be sued with the wife in

(see *infra*, I., § 5), and for injuries to her,¹ (*infra*, I., § 20), in fact he is commonly joined with her in all her suits.² He is also liable alone *as husband* for her wrongs done in his presence,³ and he has the right to sue alone for any infringement of his conjugal rights to her services, society, affection and fidelity;⁴ and hence arise rights of action against one who injures his wife,⁵ or entices her away from him,⁶ or has sexual intercourse with her;⁷ and these rights of action will hereafter be separately discussed.

15. Suits for Restitution of Conjugal Rights.—If one spouse wrongfully left the other, the latter could formerly bring suit in the English ecclesiastical courts to compel cohabitation, and this was called a suit for restitution of conjugal rights.⁸ Such a suit may still be brought in England,⁹ but it is unknown in the United States,¹⁰ where cohabitation cannot be directly enforced.¹¹

16. Suits for Divorce.—See DIVORCE.

17. Suits for Maintenance.—A husband is bound to support his wife,¹² unless she has forfeited her right,¹³ or waived¹⁴ it, and unless she can support herself;¹⁵ when he is so bound and is able to support her, but refuses to do so, and lives separate from her, she may, in most States, sue him for maintenance or alimony.¹⁶ In some States there are special statutes authorizing a wife who, without fault on her part, is left without means of support, to sue her husband for maintenance.¹⁷ In some States, courts of

§ 17, apply to him when his wife is plaintiff.

1. Craddock v. Goodwin, 54 Tex. 581. See *post*, IV., § 5.

2. See note c. p. 828; II., §§ 9, 10, 11. Also Hawes, Parties, § 63.

3. *Ante*, II., §§ 9, 11.

4. *Ante*, II., §§ 2, 8.

5-6-7. See *post* II., §§ 20, 21, 22, etc.

8. Orme, 2 Add. Ec. R. (Eng.) 382; 2 Eng. Ec. R. 354; Stewart M. & D., § 175; 1 Bish. M. & D., §§ 171, 172. *Ante* II., § 3.

9. Firebrace v. Firebrace, L. R., 4 P. D. (Eng.) 63.

10. Westlake v. Westlake, 34 Ohio St. 621, 628; discussed cases collected in Stewart M. & D., § 175.

11. Baugh v. Baugh, 37 Mich. (1877) 62. "But no court in this country has any power to compel discordant husbands and wives to live together."

12. See II., § 7, *ante*. Also Litson v. Brown, 26 Ind. 489; Garland v. Garland, 50 Miss. 694.

13-14-15. See II., § 7, *ante*.

16. Glover v. Glover, 16 Ala. 440. "Where a husband abandons his wife without just cause, and casts her upon society destitute of the means of subsistence, a court of chancery, as an original ground of equity, will enter-

tain a bill filed against him for alimony."

2 Story's Equity Jurisp., § 1423. "In America a broader jurisdiction in cases of alimony has been asserted in some of our courts of equity, and it has been held that if a husband abandons his wife and separates himself from her without providing any reasonable support, a court of equity may, in all such cases, decree her a suitable maintenance and support out of his estate, upon the very ground that there is no adequate or sufficient remedy at law in such a case." See, also, Almond v. Almond, 4 Rand. (Va. 1825) 662; Garland v. Garland, 50 Miss. 694; Butler v. Butler, 4 Litt. (Ky.) 201. But there are cases which hold the contrary. See Trotter v. Trotter, 77 Ill. 510, and other cases in Stewart M. & D., § 179.

In Platner v. Platner, 66 Iowa 378 (1886): If a husband, by his extreme cruelty, renders it justifiable for his wife to live apart from him, she may maintain an action against him for a suitable separate support, without applying for a divorce.

17. Thus it is in *Canada* (Severn v. Severn, 3 U. C. Chan. 431); *Illinois* (R. S. 1880, p. 594, § 23); *Indiana* (R. S. 1882, §§ 5132-5141; Stanbore v. Stan-

equity, in the exercise of their ordinary equity powers, grant alimony without divorce.¹ To sustain her action, the wife must be living apart from her husband without fault, and must be without support.² She cannot maintain her suit when she is in fault.³

The procedure, etc., in general, is like that in suits for alimony with divorce.⁴ The suit must be instituted during the husband's life, and abates on his death.⁵

18. Suits for Necessaries.—Inasmuch as a husband is bound to support his wife, unless she has forfeited or waived this right, or has adequate means of her own,⁶ when he neglects to support her,⁷ whether they are living together or apart,⁸ she may pledge his credit for necessities;⁹ he is bound to reimburse anyone supplying her with such.¹⁰ In such cases the husband's liability is due to the fact of his marriage,¹¹ and he cannot relieve himself thereof by prohibiting his wife from pledging his credit,¹² or by a general newspaper advertisement that he will not be liable for

bore, 60 Ind. 275); *Maryland* (Rev. Code 1878, art. 51, § 17, p. 481; Keerl v. Keerl, 34 Md. 21); *New Jersey* (Rev. S. 1877, p. 318; Van Arsdelen v. Van Arsdelen, 30 N. J. Eq. 359); *Rhode Island* (Battey v. Battey, 1 R. I. 212); *Tennessee* (Nicely v. Nicely, 3 Head 184).

1. Thus it is in *Alabama* (see note 5, above); *California* (Galland v. Galland, 38 Cal. 265); *Iowa* (Graves v. Graves, 36 Iowa 310); *Kentucky* (Gaines v. Gaines, 9 B. Mon. 295); *Mississippi* (Garland v. Garland, 50 Miss. 694); *North Carolina* (Spiller v. Spiller, 1 Hayw. 482); *Ohio* (Bascom v. Bascom, Wright 632); *South Carolina* (Converse v. Converse, 9 Rich. Eq. 535); *Virginia* (Almond v. Almond, 4 Rand. 662); perhaps in *Maryland* (Wallingsford v. Wallingsford, 6 Har. & J. 485; *supra*, note 6); perhaps in *Texas* (Stringfellow v. Stringfellow, 30 Tex. 570).

2-3. See II., § 7, *ante*.

4. See Stewart, M. & D., § 367. It all depends upon statutes and the rules of court.

5. The marriage relations have then ceased. If a divorce suit is regarded as a suit *in rem*, the *res* is the marriage status, and is completely destroyed by death; if it is regarded as a personal suit, it is one which the injured husband or wife alone can prosecute. See Stewart M. & D., § 329.

6. See II., § 7, *ante*.

7. Norcross v. Rodgers, 30 Vt. 588; Boulton v. Prentice, 2 Strange (Eng.) 1214.

8. Debenham v. Mellon, L. R., 5 Q.

B. Div. 394; Pearson v. Darrington, 32 Ala. 227.

9. Heney v. Sargent, 54 Cal. (1880) 397. "We think there was sufficient evidence of authority to sustain the finding. The husband, according to his own testimony, was making some provision for his wife and son, viz.: renting a house; they could not have lived there very comfortably without furniture; and when the tradesman furnished her with these goods, he did so on the implied authority which the wife carries with her." Debenham v. Mellon, L. R., 6 App. C. 24; L. R., 5 Q. B. Div. 394, (1880) leading case; Kenyon v. Farris, 47 Conn. 510; Schunckle v. Bierman, 89 Ill. 454; Litson v. Brown, 26 Ind. 489; Mahew v. Thayer, 8 Gray (Mass.) 172; Crittenden v. Schermerhorn, 39 Mich. 661; Throne v. Kathan, 51 Vt. 520; Spaum v. Mercer, 8 Neb. 357.

10. Kenyon v. Farris, 47 Conn. (1880) 510. "Where a person has advanced money to a wife deserted by her husband, for the purchase of necessities, and the money has been so applied, he can maintain a bill in equity against the husband for the recovery of the money so advanced." Zeigler v. David, 23 Ala. 127; 36 Am. Rep. 86.

11. Jacobs v. Scott, 53 Cal. (1878) 76. "If she was authorized by reason of her relation to her husband, the nature and character of the goods, and the husband's circumstances, to purchase them, the goods were in law sold to defendant (husband), and the averment should have been to that effect."

12. Harrison v. Grady, 17 Week. R.

her debts,¹ or by special notice to the party who supplies her not to give her credit.²

A husband is not thus liable by the fact of his marriage if the wife has sufficient means of her own,³ or is provided for in any other manner.⁴ By a bare deed of separation, a wife does not waive this right,⁵ but only by agreeing upon an adequate allowance which is duly paid.⁶ She forfeits her right if she commits adultery,⁷ or by wrongfully leaving him against his will.⁸ Necessaries in this connection are articles *bona fide* purchased for use and not for ornament, which are really needed, and which are consistent with the social position and condition in life in which the party moves.⁹ An enumeration of what may be necessities will be found in the notes.¹⁰ Money loaned to the wife, even if

139; *Forristall v. Lawson*, 34 L. T. (N. S.) 903.

1. *Harris v. Morris*, 4 Esp. (Eng.)

41. "The next defence is, that he advertised her in the newspaper, and forbid persons to trust her; that cannot avail him; for if he put her out of doors, though he advertised her, and cautioned all persons not to trust her; or if he even gave particular notice to individuals not to give her credit, still he would be liable for necessities furnished to her; for the law has said that when a man turns his wife out of doors he sends with her credit for her reasonable expenses."

2. See note 1, above. Also *Dixon v. Harrell*, 8 Car. & P. (Eng.) 717; *Boulton v. Prentice*, 2 Strange (Eng.) 1214.

3. See II., § 7, *ante*.

4. For example, if supported by some one else. *Liddow v. Wilmot*, 2 Stark. (Eng. George II) 86. Or if he duly pays her an adequate allowance. *Reeve v. Conyngham*, 2 Car. & K. (Eng.) 444.

5-6. *Dixon v. Harrell*, 8 Car. & P. (Eng.) 718. "If the defendant has allowed his wife any reasonable sum for her maintenance, he can show that. If these parties separated by mutual consent, the husband is liable for reasonable maintenance for his wife, unless she has a competent provision either from him, or from some fund of her own; and a tradesman cannot in general know whether the wife has such a provision or not." *Hindley v. Westmeath*, 6 Barn. & C. (Eng.) 200; *Pearson v. Darrington*, 32 Ala. 227; *Ozard v. Darnford*, 1 Selw. N. P. 229; *Mallalieu v. Lyon*, 1 Post. & F. (Eng. 1856) 431; *Biffin v. Bignell*, 7 Hurl. & N. (Eng. 1856) 877; *Johnson v. Sumner*, 27 L. J. Ex. 341; *Heney v. Sargent*, 54 Cal. 396.

7. *Dixon v. Harrell*, 8 Car. & P.

(Eng.) 719. "If a wife elopes with an adulterer, or even if she elopes from her husband without cause, the husband is not liable upon her contracts." *Ozard v. Darnford*, 1 Selw. N. P. (Eng.) 229; *Atkins v. Pearce*, 2 Com. B. N. S. 763.

8. *Schunckle v. Bierman*, 89 Ill. (1878) 455. "In the absence of any special promise of the husband to pay for the board and lodging of his wife, living apart from him, to a third person, he will not be responsible therefor, unless she was living separate from him by his consent, or his conduct was such as to justify her in leaving his bed and board." *Hindley v. Westmeath*, 6 Barn. & C. (Eng.) 200, 213; *Thorne v. Kathan*, 51 Vt. 520.

9. *Peters v. Fleming*, 6 Mees. & W. (Eng.) 42; *Debenham v. Mellon*, L. R., 5 Q. B. Div. 394; *Zeigler v. David*, 23 Ala. 227; *Huff v. Bournell*, 48 Ga. 338; *Bevier v. Galloway*, 71 Ill. 517; *Smith v. Davis*, 45 N. H. 566; *Black v. Bryan*, 18 Tex. 453. In *St. John's Parish v. Bronson*, 40 Conn. 75, a husband was held not liable for the rent of a church pew hired and occupied by his wife without his assent, and it was decided that "religious instruction does not belong to the class of necessities as that term is used in the common law."

10. Necessaries may consist of food, (*Walker v. Simpson*, 7 Watts & S. Pa. 1843 83), clothing (*Freestone v. Butcher*, 9 Car. & P. (Eng.) 643, lodging (*Rotch v. Miles*, 2 Conn. 638), furniture (*Heney v. Sargent*, 54 Cal. 396), medical services (*Harrison v. Grady*, 14 Week. R. 139; *Cothran v. Lee*, 24 Ala. 380; *Bevier v. Galloway*, 71 Ill. 517), legal services (*Wilson v. Ford*, 37 L. J. Ex. 60; *Baylis v. Watkins*, 10 Jur. N. S. (Eng.) 114; *Williams v. Fowler*, *McClell. & Y. 269*).

used for necessities, is not regarded as a necessary.¹ For his wife's funeral expenses a husband is always liable,² though at the time of her death she lived apart from him by her fault.³

The wife's right to pledge her husband's credit, which is based upon his marital duty to support her, must be distinguished from her analogous right, which is based on his holding her out as his agent. In the latter case his liability is a mere question of fact,³ and he cannot be held responsible, unless he has expressly or impliedly, by prior mandate or subsequent ratification, authorized her to pledge his credit, or has so conducted himself as to estop him from denying his authority; in such cases he is liable not only for necessities, but for any purchases.

19. Suits for Protection.—Under the common law, on the application of a wife who showed herself to be in danger from her husband, a court of equity would grant her a writ, called a writ of *supplicavit*, requiring her husband to give security to treat her properly.⁴ This writ is unknown in the United States,⁵ where an ordinary bond to keep the peace serves all its purposes.⁶

20. Suits for Injury to Spouse.—A wife has no right of action for injuries to her husband,⁷ unless under some such statute as a civil damage act.⁸ Perhaps she has a right of action against one who entices him away.⁹ Two actions may arise in favor of the husband out of an injury to the wife,¹⁰ one in the right of the wife,¹¹ in which the husband and wife sue jointly for the direct injuries to her,¹² the other in the right of the husband in which

1. *Carle v. Peale*, Salk. 386; *Paule v. Goding*, 2 Fost. & F. 585; *Gilbert v. Plant*, 18 Ind. 308; *Walker v. Simpson*, 7 Watts & S. (Pa.) 83.

2. *Patterson v. Patterson*, 59 N. Y. 574, 583. "The husband surviving is bound to bury the corpse of his wife." See, also, *Jenkins v. Tucker*, 1 Black. H. 90; *Bradshaw v. Beard*, 12 Com. B. N. S. 344.

3. See *post*, III., § 3.

4. *King v. Lee*, 2 Lev. (Eng. Car. II) 128; *Head v. Head*, 2 Atk. (Eng.) 547; *Clavering v. Clavering*, 2 P. Wms. (Eng.) 102; 2 Bish. M. & D., § 352.

5-6. *Adams v. Adams*, 100 Mass. 365, 369. "No writ of *supplicavit* has ever issued from this court. The novelty of the application makes it necessary to examine into the origin and character of the process . . . In *Codd v. Codd*, 2 Johns. Ch. (N. Y.) 141, CHANCELLOR KENT doubted his power to grant the writ, even in a proper case, and asked why the party should not apply to a justice of the peace to bind the other to his good behavior. The only case cited in which it appears to have been granted in this country is *Prather v. Prather*, 4 Desaus. (S. Car.) 33."

7. *Carey v. Bershire R. R. Co.*, 55 Mass. 478. "For we find it adjudged in *Baker v. Bolton*, 1 Campb. 493, that the death of a human being is not the ground of an action for damages." *Logan v. Logan*, 77 Ind. 538; *Woods v. Coenan*, 44 Iowa 19.

8. *Post*, II., § 23.

9. *Post*, II., § 21.

10. *Brockbank v. Whitehaven*, 7 Hurl. & N. 834; *Pollard v. N. J.*, 101 U. S. 223; *Fuller v. Naugatank*, 21 Conn. 557; *Long v. Morrison*, 14 Ind. 595; *Lewis v. Babcock*, 18 Johns. (N. Y.) 443; *Meese v. Fond du Lac*, 48 Wis. 323.

11. *Reeder et al. v. Purdy et ux.*; *Same v. Erastus S. Purdy*, 41 Ill. 279, 282. "Two actions of trespass have been brought, one by Purdy alone, and one by Purdy and wife jointly. The declaration in the suit brought by Purdy contains, etc." *Michigan v. Coleman*, 28 Mich. 440.

12. *Laughlin v. Eaton*, 54 Me. 158. "The well known general doctrine of the common law is, that where a wrong is committed against the person of the wife during coverture, as by beating her, slandering her reputation, or by malicious prosecution, she cannot sue alone.

the husband sues alone for consequential damages to himself.¹

Since these suits are in different rights, they cannot be joined.² Recovery in one suit is conclusive (see *RES ADJUDICATA*) as to the right to recover in the other,³ but no damages can be allowed in the one which are allowable in the other. Illustrations, giving cases, are in the notes.⁴

21. Suits for Enticing and Harboring.—A husband is entitled to his wife's society,⁵ as well as her services, and against anyone who, by abducting her or inducing her to leave him, or keeping her separate from him, deprives him of her society and services, he has a right of action.⁶ A parent is liable in the same manner as a stranger.⁶ There are numerous cases, in which the action of the persons bringing about the loss of the wife's society to the husband is justifiable.⁷ Harboring a wife may be justifiable

For injuries to the wife occasioning to the husband a deprivation of the society of his wife or of her assistance in his domestic affairs, or by which he is put to expense, he may have his separate action, as where a violent battery has caused a long continued illness of the wife or expense in her cure. But if the action is brought for *her* personal suffering and injury the husband and wife must join, and care should be taken not to include in the declaration a statement of any cause of action for which the husband alone would be entitled to recover." When the husband is a nominal party only to an action brought by him and his wife, the jury should be clearly instructed that her damages only are recoverable. *Brown v. Hannibal & St. Jo. R. R.*, 23 Mo. App. 209 (1887).

1. See notes 11 and 12, p. 832. Also *Fillebrown v. Hoar*, 124 Mass. 580; *Berger v. Jacobs*, 21 Mich. 215; *Filer v. N. Y.*, 49 N. Y. 47; *Lindsey v. Danville*, 46 Vt. 144; *Hunt v. Winfield*, 36 Wis. 154; 17 Am Rep. 482.

2. See note 12, p. 832. Also *Brockbank v. Whitehaven*, 7 Hurl. & N. (Eng.) 834; *Fuller v. Naugatank*, 21 Conn. 557; *Lewis v. Babcock*, 18 Johns. (N. Y.) 443.

3. *Lindsey v. Danville*, 46 Vt. 144. "Husband and wife having recovered final judgment in a joint action against defendant for personal injuries to wife occasioned by reason of the insufficiency of a highway in said town, the defendant is estopped, in an action by the husband to recover damages for the loss of the wife's service and for the expense of medical attendance, to deny facts put in issue and found against it in the former action."

4. Thus in the joint suit no recovery
9 C. of L.—53

can be had for special damage to the husband or for loss of services which were the husband's. *Mewhirter v. Halten*, 42 Iowa 288; *Tuttle v. Chicago*, 42 Iowa 518. In the sole suit no recovery can be had for the pain and suffering of the wife. *King v. Thompson*, 87 Pa. St. 365. *Supra*, notes 10, 11 and 12, p. 832.

5. See II., §§ 3, 6, *ante*.

Hadley v. Heywood, 121 Mass. (1876) 236. "In an action for enticing away the plaintiff's wife, the jury were instructed that if the conduct of the defendant was the controlling cause inducing the wife without which she would not have left her husband, the action could be maintained, although there were other causes contributing thereto; and refused to instruct the jury that if the cruelty of the plaintiff contributed in causing her to leave, the action could not be maintained. *Held*, that the defendant had no ground of exception." *Wood v. Matthews*, 47 Iowa 409; *White v. Ross*, 47 Mich. 172; *Modisett v. McPike*, 74 Mo. 636; *Barnes v. Allen*, 30 Barb. (N.Y.) 663; *Rabe v. Hanna*, 5 Ohio 530.

6. *Hutcheson v. Peck*, 5 Johns. (N.Y.) 196.

7. If the wife has a ground for divorce against her husband, and a stranger being consulted by her, or a parent, advises her to leave him and get a divorce, and acting on such advice she does so, the husband has no right of action. *White v. Ross*, 47 Mich. 172; *Modisett v. McPike*, 74 Mo. 636. Parents are justified in opening their daughter's eyes to the bad character of her husband, if they use no misrepresentation, etc. *Bennett v. Smith*, 21 Barb. (N.Y.) 439; *White v. Ross*, 47 Mich. 172, 176.

when causing a separation would not be.¹ The motives of the harbinger are important, and must not be to separate husband and wife;² those of a parent are presumed good.³ The motives are shown in such acts, in addition to giving shelter, as concealing the wife,⁴ or denial of access to the husband.⁵ The husband must, in the case of mere detainer, show demand and refusal.⁶ A wife is entitled to the society of her husband,⁷ and when she may sue without her husband for injuries to her,⁸ she may sue one who separates her husband from her.⁹ Damages awarded in this action should cover the value to the plaintiff¹⁰ of the spouse whose society has been lost,¹¹ as well as actual pecuniary loss, if any.¹²

22. Suits for Criminal Conversation.—Inasmuch as the husband has the exclusive right of sexual intercourse with his wife,¹³ necessarily he has a right of action against anyone who commits adultery with her.¹⁴

1. The action is either trespass or case;¹⁵ but under statute it may form a part of a divorce suit for adultery, the complaining husband making his wife's paramour co-respondent with her, and

1. *Barnes v. Allen*, 30 Barb. (N. Y.) 663, 668.

2. *Hutcheson v. Peck*, 5 Johns. (N. Y.) 106; *Fried v. Thompson*, *Wright* (Ohio) 636.

3. *Burnett v. Burkhead and wife*, 21 Ark. 79. "Nor is the guilty agency of the defendant to be inferred from the fact that the plaintiff's wife, on separating from him, went to the house of the defendants and remained with them. It was her former home; they were her parents. . . . As remarked by MR. JUSTICE VAN NESS, in the case above referred to, the conduct of parents in such cases is to be liberally construed, and worthy motives are to be presumed."

4-5. *Turner v. Estes*, 3 Mass. 317; *Bennett v. Smith*, 21 Barb. (N. Y.) 439.

6. *Winsmore v. Greenbank*, *Willes* 577; *Barbee v. Armstead*, 10 Ired. (N. Car.) 530; 51 Am. Dec. 404.

7. See note 5, p. 833.

8-9. *Nancy Van Arnam v. Ayers*, 67 Barb. (N. Y.) 544: "An action cannot be maintained by a married woman against a defendant for having, by his wrongful acts, advice and persuasion, induced her husband to abandon and become separate from her, whereby she is deprived of his society, support, maintenance and help.

At common law, a wife could not maintain such an action; and when the facts set forth in the complaint do not bring the case within either of the

classes enumerated in § 114 of the Code and § 7 of the act of 1862, the provisions of those statutes cannot be held to give her any right to maintain an action for the matters alleged in such complaint." *Westlake v. Westlake*, 34 Ohio St. 621.

10-11-12. See *post*, II., § 22.

In *Jones v. Utica & Black River R. Co.*, 40 Hun (N. Y.) 349 (1886), it was decided that a husband, who, by a carrier's negligence, is deprived of his wife's society, is entitled to have that considered as an element of damages.

13. See II., § 3, *ante*.

14. *Winter v. Henn*, 4 Car. & P. (Eng.) 408. "I apprehend the law to be that the plaintiff will be entitled to recover, unless he has, in some degree, been a party to his own dishonor, either by giving a general license to his wife to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with this defendant, or by having totally and permanently given up all the advantage to be derived from her society." *Peters v. Lake*, 66 Ill. 206; *Coleman v. White*, 59 Ind. 548; *Wood v. Matthews*, 47 Iowa 409; *Hadley v. Heywood*, 121 Mass. 236; *Johnston v. Disbrow*, 47 Mich. 59; *Sherwood v. Titman*, 55 Pa. St. 77; *Shattuck v. Hammond*, 46 Vt. 466.

15. *Chamberlain v. Hazlewood*, 5 Mees. & W. 515; *Yundt v. Hartranft*, 41 Ill. 9.

asking for damages from him.¹ It is in the nature of a personal suit.²

2. In the declaration, the adultery need not be so specifically alleged as in divorce cases;³ counts for loss of services, and for loss of society may be joined, but proof of neither is necessary to support the suit.⁴ The sole defence seems to be that the plaintiff consented to his wife's adultery with the defendant,⁵ or consented to her living as a prostitute;⁶ numerous other defences have been attempted.⁷

The adultery is proved as in divorce cases. The wife cannot, generally, testify at all, etc.⁸

The damages allowed in suits for criminal conversation are penal rather than compensatory, for the plaintiff is entitled to substantial damages though he prove no resulting expense or loss of society or services.⁹ They are often exemplary or punitive.¹⁰ The jury considers the value of the wife, and, in that connection, how much he saw of her and cared for her,¹¹ her easy fall, and how far it was caused by the plaintiff's disregard of his marriage obligations.¹² The dishonor of his bed, the doubts cast on the pedigree of his children, the loss of his wife's comfort and assistance.¹³ The defendant's wealth, if he used it to seduce

1. See *Conradi v. Conradi*, L. R., 1 Pro. & D. 63; 35 Law J., M. C. 49; West, Law R., 2 Pro. & D. 196; Underhill, Torts, rule 32.

2. *Garrison v. Burden*, 40 Ala. 513.

3. 15 Am. Law Reg. (N. S.) 449; *Stewart M. & D.*, § 244.

4. The gist of the action is the adultery or criminal conversation. *Wilton v. Webster*, 7 Car. & P. (Eng.) 198; *Yundt v. Hartranft*, 41 Ill. 9; *Bigaonette v. Paulet*, 134 Mass. 123.

5-6. See note 14, p. 834.

7. It is no defence that the plaintiff was living apart from his wife before the adultery complained of (*Yundt v. Hartranft*, 41 Ill. 10, 17; *Michel v. Dunkle*, 84 Ind. 544), or continued living with her thereafter (*Wilton v. Webster*, 7 Car. & P. (Eng.) 198), and after he knew of it (*Verholf v. Van How*, 21 Iowa 429). See *Stewart H. & W.*, § 79.

8. See I., § 8, ante.

9-10. *Yundt v. Hartranft*, 41 Ill. 10. "In an action of this character, where loss of service of the wife is alleged in aggravation of damages, there should be no recovery on that ground unless such loss of service is proved."

"An instruction which informs the jury that if plaintiff placed his business in the hands of the defendant before he left, and defendant took advantage of the position thus given him to seduce

plaintiff's wife, and did so, then they might give exemplary damages, is not erroneous, in a case of this character, when damages may be recovered beyond the actual loss in money or service." *Sturam v. Hummel*, 39 Iowa 478; *Wilton v. Webster*, 7 Car. & P. 198.

Peters v. Lake, 66 Ill. 206. "In an action on the case for criminal conversation with the plaintiff's wife, exemplary damages being recoverable, evidence of the pecuniary circumstances of the parties is proper; but where such a case is tried several years after the injury complained of, it is error to admit proof of the plaintiff's bankruptcy at the time of the trial."

11. *Colcraft v. Harborough*, 4 Car. & P. (Eng.) 499; *Bromley v. Wallace*, 4 Esp. (Eng.) 237; *Harter v. Crill*, 33 Barb. (N. Y.) 283. But see *Dallas v. Sellers*, 17 Ind. 479.

12. *Coleman v. White*, 43 Ind. 429. "In an action for the seduction of the plaintiff's wife, it is competent for the defendant to prove, under an answer of general denial in mitigation of damages, that, owing to the wicked and depraved disposition of the plaintiff, he and his wife, before the alleged improper intimacy, lived unhappily together, etc."

13. *Yundt v. Hartranft*, 41 Ill. 17. "This action does not proceed upon the

the wife, to enhance damages,¹ but not his poverty, to diminish them.² The jury cannot consider the injury to the honor, reputation and happiness of the plaintiff's family.³

23. Suits Under Civil Damage Acts.—There are statutes in many States which give a right of action to anyone who is injured in person, property or means of support,⁴ by the drunkenness of another against the liquor seller who supplies such other with drink; and under such statutes a husband has a right of action for loss of the wife's services,⁵ and a wife for loss of the husband's support,⁶ caused by intoxication, and may recover actual,⁷ and in certain cases exemplary damages.⁸ Such suits are unknown independently of statute.⁹

III. THE CONJUGAL AGENCY OF HUSBAND AND WIFE.—1. Agency in Law and Fact.—An agent is a person whose act on behalf of another, called the principal, is duly authorized.¹⁰ Such authority may be derived from the law, and an agency in law is thus created; or from the principal in which case an agency in fact is constituted.¹¹ All acts which one spouse may do for the other because they are husband and wife are done by virtue of an agency in law; for all other acts which one spouse may do for the other there must exist such other's prior mandate, contemporaneous assent or subsequent ratification—an agency in fact.¹²

a. IN LAW.—A logical application of the common law fiction that husband and wife are one,¹³ would make all the acts of one in law the acts of the other; but as the wife's normal status is one of lost identity¹⁴ and legal disability,¹⁵ her acts are not legally

theory of the loss of services of the wife. It is for the injury the husband sustains by the dishonor of his bed; the alienation of his wife's affections; the destruction of his domestic comfort, and the suspicion cast upon the legitimacy of her offspring."

1. See notes 9, 10, p. 835.

2. *James v. Biddington*, 6 Car. & P. (Eng.) 589.

3. *Ferguson v. Smethers*, 70 Ind. (1880) 520. "An instruction to the jury, on the trial of such cause, that in determining the question of damages they might consider the injury to the happiness, reputation and honor of the plaintiff's 'family,' was erroneous."

4-5. **Civil Damage Acts.**—*Moran v. Goodwin*, 130 Mass. (1881) 158. "A husband may maintain an action under the St. of 1879, ch. 297, for injury to his 'means of support' by the intoxication of his wife, caused by intoxicating liquors sold to her by the defendant." *Kellerman v. Arnold*, 71 Ill. 632; *Jackson v. Noble*, 54 Iowa 641; *Mead v. Stratton*, 87 N. Y. 443; 41 Am. Rep. 386.

6. *Schroeder v. Crawford*, 94 Ill. 357. "Where an intoxicated person, in going

to his home in the night, has to cross a railroad, and next morning is found on the track, killed by being run over by a train of cars, the intoxication will be held the proximate cause of his death, and the party furnishing him the liquor, and the owner of the premises where the liquor is furnished to him, will be liable to his widow, under the statute for injury to her means of support." *Schaefer v. Smith*, 63 Ind. 226; *Loan v. Hiney*, 53 Iowa 89; *Steele v. Thompson*, 39 Mich. 733; *Beam v. Green*, 33 Ohio St. 444; *Hill v. Berry*, 75 N. Y. 225.

7. *Schaefer v. Smith*, 63 Ind. 226; *Roose v. Perkins*, 9 Neb. 304.

8. *Kellerman v. Arnold*, 71 Ill. 632; *Richmond v. Shickler*, 57 Iowa 486; *Davis v. Standish*, 26 Hun (N. Y.) 608.

9. *Woods v. Coenan*, 44 Iowa 19.

10. *Ewell's Evans Agency*, p. 1. See AGENCY; PRINCIPAL AND AGENT.

11. See works on AGENCY, and cases cited below.

12. See III., § 2, below.

13. *Ante*, I., § 1.

14-15. *Ante*, I., § 1. *Stewart H. & W.* §§, 330-339.

acts at all, and bind no one; only when the husband's disregard of his conjugal obligations renders her condition abnormal, has she authority in law to act for him—as when he refuses to support her and she pledges his credit.¹ On the other hand, the husband does, at common law, cover and stand in the place of his wife.² Examples of this will be found in the notes.³ Besides this common law agency of the husband, statutes in some States give him some authority to deal with his wife's separate property.⁴

b. IN FACT.—There is nothing in the marriage relation to prevent one spouse from being agent for the other,⁵ though the unity of husband and wife may render void a contract between them for compensation;⁶ and, therefore, whatever a husband can do through any agent, he can do through his wife,⁶ and a wife who may act by agent at all may act by her husband as her agent.⁷

2. Agency of Husband for Wife.—This section deals mainly with agency in fact of the husband, his agency in law is discussed under his marriage rights over her person and property.⁸ His authority is co-determined with these rights.⁹ Thus, he may sue for her earnings, because he is entitled to them by law;¹⁰ and for the same reason, at common law, his receipt for a legacy to her was valid.¹¹

As her agent in fact, he must have her prior authority, contemporaneous assent or subsequent ratification;¹² his agency may be revoked,¹³ and is revoked by her death.¹⁴ Whatever a married woman can do through an agent she can do through her husband.¹⁵ Her authority may be given in the usual modes, by

1. *Ante*, II., §§ 7, 18.

2. *Ante*, I., § 1. He may for example, release an ante-nuptial debt due to her. *Mobley v. Leophart*, 47 Ala. 257. Notice to him may be notice to her. *Railroad v. Brooks*, 81 Ill. 293.

3. *Baker v. Flournoy*, 58 Ala. 650; *O'Brine v. Foreman*, 46 Cal. 80; *Lawrence v. Sinnamon*, 24 Iowa 80; *Holman v. Gillette*, 24 Mich. 414; *Clopton v. Matheney*, 48 Miss. 498.

4. *Glover v. Alcott*, 11 Mich. 470, 492. "If any agent is to be employed, it will certainly conduce more to harmony and domestic peace to allow the husband to act as such agent, if the wife sees fit to select him. There is certainly no recognized rule of law to prevent it."

5. *Abbey v. Deyo*, 44 Barb. (N. Y.) 374; *ante*, I., § 2.

6. *Post*, III., § 3.

7. See note 4 above. Also *Wells v. Smith*, 54 Ga. 262; *post*, III., § 2.

8. *Post*, IV., §§ 1-5.

9. *Post*, IV., §§ 1-5. He may accept a deed for her. *McGehee v. White*, 31 Miss. 41. Or elect for her. *Chadbourn v. Rockcliff*, 30 Me. 354.

10. Discussed fully in II., § 8, *ante*.

11. *Post*, IV., § 5; *Mobley v. Leophart*, 47 Ala. 257.

12. *McLaren v. Hall*, 26 Iowa 305. "The husband may act as agent for the wife. In order to bind her, however, he must be previously authorized to act as her agent, or she must subsequently, with express or implied knowledge of his act, ratify it. The evidence necessary to establish a ratification by the wife of a contract made by her husband as her agent must be of a stronger and more satisfactory character than that required to establish a ratification by the husband of the act of the wife as his agent," etc. In *Benedict v. Pearce*, 53 Conn. 496 (1886), a husband, without the knowledge of his wife, submitted to arbitration a question as to a boundary line of her land. It was held that she could not be affected by the award.

13. *Lyon v. Green*, 42 Wis. 548, 554.

14. *Cunningham*, Myr. Prob. 76.

15. *Wells v. Smith*, 54 Ga. (1875) 262. "A married woman who has a separate estate may engage her husband to act as her agent in the transaction of any

power of attorney,¹ by parol,² or by conduct.³ Whether it was given is a mere question of fact.⁴ If she allows her husband to use her property as his own, she is bound by his dealing with it,⁵ but not if he holds it wrongfully.⁶ Most difficulty is found where the wife, by her conduct, appoints her husband agent. Examples of this will be found in the notes.⁶

The purposes for which a wife may employ her husband as agent are innumerable.⁷ A wife cannot ratify what she could not have authorized.⁸ In all cases of the husband's agency, the wife is entitled to the benefits,⁹ and bound for the liabilities¹⁰ resulting from his acts.

As her agent in law, the husband has no power to act for his wife in her separate existence,¹¹ therefore, notice to him in respect

business she may have, and if she do so, his acts as such agent stand as to her and the world as do the acts of other agents." *Vorhes v. Bonesteel*, 16 Wall. (U. S. S. Ct.) 16, 31; *Walker v. Carrington*, 74 Ill. 446; *Owen v. Cawley*, 36 N. Y. 600; *Miller v. Peck*, 18 W. Va. 75.

1. *Woodman v. Neal*, 48 Me. 268. See I., § 2, *ante*.

2. *Merrill v. Parker*, 112 Mass. 250.

3. *McLaren v. Hall*, 26 Iowa 297, 305.

4. *Yazel v. Palmer*, 81 Ill. 82, 85.

"Whether the husband was the agent of plaintiff to receive payments from defendant on the bond to her, is a question of fact, to be found as any other fact in the case," etc. *Toolidge v. Smith*, 129 Mass. 554; *Hill v. Chambers*, 30 Mich. 428; *Early v. Rolfe*, 95 Pa. St. 58; *Hamilton v. Brooks*, 51 Tex. 142.

5. *Yazel v. Palmer*, 81 Ill. (1876) 82. "When a husband receives payments of money on an obligation to his wife, the possession of the obligation is evidence tending to prove he has authority to receive the money for his wife, but is by no means conclusive of that fact." On p. 85: "He may have obtained possession of the bond surreptitiously, and, hence, with no warrant to receive payments for her."

6. If, without objecting, she sees her rents paid to him, or sees him sell her chattels, she is bound by estoppel. *Mann v. Mann*, 50 Pa. St. 375; *Levy v. Gray*, 56 Miss. 318. But she cannot be bound by estoppel where she could not have been bound directly. *Wood v. Terry*, 30 Ark. 385.

7. She may employ him as her clerk. *Cubberly v. Scott*, 98 Ill. 38, 40; the master of her vessel, *Reiman v. Hamilton*, 111 Mass. 245; the cultivator of her farm, *Bennett v. Stout*, 98 Ill. 47.

8. *Chappell v. Boyd*, 61 Ga. 663. "The wife, having no power to consent to the application of her money to her husband's debts, has no power to ratify such application, even on compensation being made to her by her husband in property, without the allowance or approval of a court of chancery, or of the superior court of the county of her domicile."

9. *Myers v. King*, 42 Md. 70. "This proposition is based on a hypothesis of facts which entirely excludes the evidence of the agency of the husband. . . . Agreements of this kind between husband and wife, where the latter has a separate estate, are valid and binding upon both parties; and if *bona fide* and consummated, the property purchased by such agency becomes the goods of the *feme covert*." *Wells v. Smith*, 34 Ga. 262; *Cooper v. Ham*, 49 Ind. 493; *Buckley v. Wells*, 33 N. Y. 518; *Spooner v. Reynolds*, 50 Vt. 437; *Miller v. Peck*, 18 W. Va. 95.

10. *Coolidge v. Smith*, 129 Mass. 554. "A deed containing a recital that the land therein described was subject to a mortgage, 'which the grantee assumes and agrees to pay,' was executed to a woman as grantee. On p. 557: 'The negotiation was conducted by her husband in her absence, and it was by his direction that her name was inserted in the deed as the grantee. . . . It was impossible, therefore, for the defendant to accept the deed, and claim title under it, and to allow so long a time to elapse before any repudiation of it, without at the same time accepting the terms of the deed and the nature of the title which it purported to give.'" *Wells v. Thornton*, 37 Conn. 318; *Owen v. Cawley*, 36 N. Y. 600.

11. Because he has no rights in her separate estate. *Atwater v. Underhill*,

to the wife's separate property is not notice to her.¹

As her agent in fact, the husband's powers are measured by the scope of authority conferred.² If he exceeds his authority, he is personally liable.³ His agency is proved as that of a stranger's,⁴ though the fact that he is husband is relevant,⁵ as in most cases the husband is the fittest person to be his wife's agent.⁶

There is no implied contract that a wife will pay her husband for his services,⁷ for in helping to make her property productive, he is but discharging his duty to support his family.⁷

Contracts between husband and wife are in most States void,⁸ and, therefore, there is usually no express contract by a wife to pay her husband for his services.⁹ Many cases arise where the husband, for the purpose of evading his creditors, pretends to be acting as his wife's agent, when he is conducting a business of his own.¹⁰

3. Agency of Wife for Husband.—A wife has no authority in law to act for her husband except for the purpose of realizing her right to support;¹¹ in all other cases she must be his agent in fact.¹²

If a man places his wife at the head of the household, or in charge of his business, he confers upon her such powers as persons in these positions usually exercise.¹³ By ratifying her acts

22 N. J. Eq. 599; McLaren v. Hall, 26 Iowa 297.

1. Treadwell v. Hernden, 41 Miss. 46; Pringle v. Dunn, 37 Wis. 449; 19 Am. Rep. 772.

2. Cahill v. Lee, 55 Md. 319, 325. "By the written agreement, Cahill agreed to surrender his lease, not to Mrs. Lee, but to J. Boykin Lee in his own right, and not as agent of his wife. . . . He was simply her agent to collect the rent. This is all the authority he was intrusted with by her, and we are all clearly of opinion that this agency did not carry with it the power to make such agreements as these."

Merrick v. Plumley, 99 Miss. 566; Baker v. Roberts, 14 Ind. 552.

3. Wilder v. Abernethy, 54 Ala. 644; Glover v. Alcott, 12 Mich. 470.

4. Yazel v. Palmer, 81 Ill. 85. "Whether the husband was the agent of plaintiff is a question of fact to be found as any other fact in the case," etc. Hill v. Chambers, 30 Mich. 428; Hamilton v. Brooks, 51 Tex. 142; Coolidge v. Smith, 129 Mass. 554.

5. Early v. Rolfe, 95 Pa. St. 58, 60.

6. Bennett v. Stout, 98 Ill. 47, 52.

7. Lewis v. Johns, 24 Cal. 98. "In the absence of an express agreement to that effect there is no implied obligation on the part of the wife to compensate

the husband for his supervision of and labor bestowed upon her separate property." Cooper v. Ham, 49 Ind. 393, 416; Abbey v. Deyo, 44 N. Y. 343; ante, II., § 7.

8. Ante I., § 2.

9. Gage v. Dauchy, 34 N. Y. 293.

10. Hurlbut v. Jones, 25 Cal. 225; Wortman v. Price, 47 Ill. 22; Laing v. Cunningham, 17 Iowa 510.

11. See II., §§ 7, 18, ante.

12. Benjamin v. Benjamin, 15 Conn. 347, 354. "A wife, as such, has no original or inherent power to make any contract which is obligatory on her husband. No such right arises from the marital relation between them. If, therefore, she possess a power in any case to bind him by her contracts made on his behalf, it must be by virtue of an authority derived from him, and founded on his assent, although such assent may be precedent or subsequent, and express or implied; and this is the light in which such contracts are universally viewed." Sawyer v. Cutting, 23 Vt. 486; Debenham v. Mellon, Law R., 5 Q. B. Div. 394, 402; Leeds v. Vail, 15 Pa. St. 185; Butts v. Newton, 29 Wis. 632.

13. Benjamin v. Benjamin, 15 Conn. 356. "As applicable to the case before us, the plaintiff's wife, on the ordinary

on one occasion he may constitute her his agent for future acts of the same kind.¹ In certain cases he is estopped from denying her authority.²

If his wife, without authority, has done some act for him, and he subsequently, with full knowledge of the facts, recognizes it as his, he ratifies her act and makes it his.³ He does not, by resuming cohabitation with his wife, ratify her acts done during a separation.⁴

If a husband is absent from home and has left his wife in charge of his house, his business or his property, she has, as his agent, such powers with respect thereto as persons in such positions of trust usually exercise.⁵ If he has left her in charge of his affairs, his private directions do not limit her authority to act for him.⁶ Illustrations of her power during her husband's absence will be found in the notes.⁷ There seems to be a presumption, rebuttable, of course, that if a business is carried on in the house where they live together, she is his agent,⁸ and a jury is justified in finding her agency for him from the fact that she was seen twice in his store in charge of it.⁹ The wife cannot testify as to the fact of her agency,¹⁰ though the fact being proved, her declarations as his agent bind him.¹¹

IV. THE CONJUGAL ESTATES OF HUSBAND AND WIFE.—1. General Effect of Marriage upon the Property of the Parties.—Since, by mar-

principle of agency, would have power to do whatever is necessary and proper, in the care and management of the farm entrusted to her, such as keeping in order the buildings, fences and implements of husbandry, cultivating the land and preserving the crops . . . and the usual course of such an employment might be shown in order to ascertain what was thus necessary and proper," etc. *Felker v. Emerson*, 16 Vt. 653; *Savage v. Davis*, 18 Wis. 608; *Jenkins v. Flinn*, 37 Ind. 349.

1. *Filmer v. Lynn*, 4 Nev. & M. (Eng. Will. IV) 559; *Bray v. Beard*, 5 Mo. App. 584.

2. Thus, if he sees her selling his property without asserting his rights, he cannot afterwards deny her right to sell. *Delano v. Blanchard*, 52 Vt. 578. So if he suffers her to collect debts which in law are his. *Thrasher v. Tuttle*, 22 Me. 335.

3. See AGENCY. *Mickleberry v. Harvey*, 58 Ind. 523; *Sawyer v. Cutting*, 23 Vt. 486.

4. *Oinson v. Heritage*, 45 Ind. 75. "But the point of charge seems to be that the husband, by receiving back his wife and living with her as such, becomes liable for necessities furnished her during her separation from him, when he would not have been but for

having thus received her back. But such, we think, is not the law," etc. But see *Rennick v. Ficklin*, 5 B. Mon. (Ky.) 166.

5. See note 13, p. 839.

6. *Debenham v. Mellon*, Law R., 6 App. C. 24, 33; *Huff v. Price*, 50 Mo. 228; *Delano v. Blanchard*, 52 Vt. 578; *Reakert v. Sanford*, 5 Watts & S. (Pa.) 164.

7. During her husband's absence the wife is the head of the family, and may do all things relating to the family and family home which wives usually do. *Felker v. Emerson*, 16 Vt. 653. She may employ counsel to protect his rights. *Rotch v. Miles*, 2 Conn. 464.

8. *McKinley v. McGregor*, 3 Whart. (Pa.) 369.

9. *Plummer v. Sills*, 3 Nev. & M. (Eng.) 422.

10. *Ante*, I., § 8. *Barr v. Armstrong*, 56 Mo. 577, 585. "And the facts necessary to constitute her his agent would of course have to be proved by other evidence, because until it was shown that she was the agent of her husband in the transaction, she would be incompetent to testify in reference thereto."

11. *Singleton v. Mann*, 3 Mo. 326, 329. "Declarations of the wife as agent of the husband are admissible just as those of any other agent are."

riage, the parties, at common law, become one person, and the wife's identity is merged in that of her husband, he naturally stands in her place, and while he is husband, has possession and control of all property which would have otherwise come into her possession and control; but she has, during coverture, no estate in his property. So that all the profits of the lands they occupy, or of the money or chattels that come into their possession, belong to the husband.

But courts of equity very soon recognized the wife's separate existence, and preserved for her sole and separate use, all property settled on her for this purpose; and statutes have now been passed almost everywhere, destroying wholly or partially the husband's rights over his wife's property during coverture. (See MARRIED WOMEN).

2. Husband's Estate in His Own Property.—After marriage the husband holds his own property substantially as before. During his life his wife has no present estate, but on his death she has dower or other share of his realty, and thirds or other share of his personalty, which estates or shares of hers he cannot defeat by deed or will.¹

3. Husband's Estate in His Wife's Realty.—In his wife's *estates of inheritance*, a husband has, during coverture, a freehold estate jointly with his wife, with absolute ownership of the rents and profits;² this estate may be the estate of *curtesy initiate*, or simply the husband's estate during coverture *jure uxoris*. Curtesy is discussed in a separate article. The estate during coverture *jure uxoris* differs from curtesy initiate, in that it is a vested estate in possession,³ while curtesy initiate is a contingent future estate, and it is independent of birth of issue,⁴ it is held in right

1. See DOWER; WILLS. Stewart H. & W., § 268; Stewart M. & D., § 462. A deed made or a judgment confessed on the day of the marriage is, unless proved to have been made or entered before the marriage, deemed inferior to dower. Stewart v. Stewart, 3 Marsh. J. J. (Ky.) 48; 23 Am. Dec. 396; Ingram v. Morris, 4 Har. Del. 111.

2. Husband's Estate in Wife's Realty.—Shaw, Admr. v. Partridge, 17 Vt. 626. "The rents, which accrue from the wife's real estate during coverture, are the absolute property of the husband, and, in case of his decease, do not survive to the wife, but are assets in the hands of the husband's administrator, and must be collected by him." Harcourt v. Wyman, 3 Ex. (Eng.) 817; Beaver v. Lane, 2 Mod. (Eng.) 217; Nunn v. Givhan, 45 Ala. 370; Chancey v. Strong, 2 Root (Conn.) 369; Haralson v. Bridges, 14 Ill. 37; Bailey v. Duncan, 4 Mon. (Ky.) 260; Edrington v.

Harper, 3 Marsh. J. J. (Ky.) 360; Babb v. Perley, 1 Me. 6; Barber v. Root, 10 Mass. 260; Burleigh v. Coffin, 22 N. H. 118; Van Note v. Downey, 28 N. J. L. 210; Decker v. Livingston, 15 Johns. (N. Y.) 479; Lucas v. Rickerich, 1 Lea (Tenn.) 726.

3. 16 Pick. (Mass.) 161; Melvin v. Proprietors, etc. "By marriage the husband and wife become jointly seized of her real estate in fee, in her right, and must so state their title in pleading. If a stranger enters and ousts them, it is a disseizin of both, and a right of entry immediately accrues to both or either of them." Moore v. Vinter, 12 Sim. (Eng.) 161; Nicholls v. O'Neill, 10 N. J. Eq. 88; Battle v. Mitchell, 7 Watts (Pa.) 113; Gulon v. Anderson, 8 Humph. (Tenn.) 298; Weisinger v. Murphy, 2 Head (Tenn.) 674; Stroebe v. Fehl, 22 Wis. 337.

4. See note 3, above. And Wright v. Wright, 2 Md. 429, 454.

of the wife,¹ and is not added to or diminished when curtesy initiate arises.²

A husband has this estate in all his wife's common law estates of inheritance in possession; and he has a joint seizin with his wife in all her estates of which she is seized, whether of inheritance³ or for life,⁴ and whether several⁵ or joint.⁶ But settlements and statutes have been chiefly occupied in destroying this estate, so that, as a general rule, a husband has no such estate in his wife's equitable, separate or statutory separate property.

In this estate he is seized jointly with his wife,⁷ and while he can himself claim the rents and profits and severed personalty,⁸ he can sue in ejectment only with her.⁹ He can convey his interest,¹⁰ and the same is liable for his debts;¹¹ but on his death the property passes to her again clear and free from all acts of his.¹²

1. *Wright v. Wright*, 2 Md. 453. "In vol. 1, ch. 1, p. 3, of Roper on Husband and Wife, it is said: 'By intermarriage the husband acquires a freehold interest during the joint lives of himself and wife, in all such freehold property of inheritance as she was seized of at that time, or may become so during coverture.' This is undoubtedly true, if the author is to be understood as meaning that he becomes so entitled *in right of the wife* so long as the coverture lasts; but if he is to be understood as asserting that by virtue of the marriage alone he acquires a freehold estate in *his own right* for the joint lives of himself and wife, regardless of the cessation of the coverture, we do not concur with him, nor do the authorities upon which he relies sustain him," etc.

2. *Kirbie v. Williams*, 58 Ill. 31. "The only difference between this case and that of *Shortall v. Hinckley*, 31 Ill. 225, is, that in this, the husband held an estate *jure uxoris*, while in that, the husband held an estate by the *curtesy initiate*. They are both freehold estates (2 Kent's Com. 130) and are subject to the same incidents, and must be *held* to be governed by the statute of limitations in the same manner and to the same extent. No reason is perceived for any distinction in the law of the two cases." *Winne v. Winne*, Lans. (N. Y.) 21.

3-4. *Barber v. Root*, 10 Mass. 260; *Van Note v. Downey*, 28 N. J. L. 219.

5. *Bishop v. Blair*, 36 Ala. 80. "The husband acquires, by the marriage, the right to use and occupy, during coverture, lands belonging to the wife, whether her title be governed by the 'woman's law' or not." *Royston v. Royston*, 21 Ga. 161.

6. See *Stewart H. & W.*, §§ 144, 148.

7. See note 1, *ante*.

8. See note 2, p. 841. Also *Fairchild v. Chaustelleux*, 8 Watts (Pa.) 412; *Decker v. Livingston*, 15 Johns. (N. Y.) 479; *Dold v. Geiger*, 2 Gratt. (Va.) 98, 116.

9. *Weller v. Baker*, 2 Wils. 414, 423; *Battle v. Mitchell*, 7 Watts (Pa.) 113.

10-11. *Allen v. Hooper*, 50 Me. 371, 373. "So by the common law, if the wife, at the time of marriage, was seized of an estate of inheritance, the husband, upon marriage, becomes seized of the freehold *jure uxoris*, and takes the rents and profits during their joint lives. . . . The husband's life estate in his wife's land may be levied upon . . . The husband by marriage becomes entitled to a freehold estate in the lands owned by the wife, and that estate he can convey by deed." In *Schley v. Pullman Palace Car Co.*, 25 Fed. Rep. 890 (1886), it was decided that a statute requiring a husband to join his wife in the execution of a deed does not necessarily require that his name should appear in the granting clause, if he signs, seals and acknowledges it.

12. *Stroebe v. Fehl*, 22 Wis. (1867) 337, 342. "The next objection is, that the complaint is defective in not averring that Nelson Burst and his wife are still alive, or if the wife be dead, that the husband survives, and has become tenant by the curtesy. The reason of this objection is, that, as the estate of the husband in the land of the wife is an estate for their joint lives only, unless the husband survives the wife under such circumstances as to become a tenant by the curtesy, and then only for his life, and as all interest in or title to

In his wife's *life estates* a husband has practically the same estate during coverture as he has in her estates of inheritance.¹ If her estate were for her life, it terminated on her death, and he took nothing but emblements;² if her estate were *per autre vie*, he took, probably as special occupant;³ but in no case could he have curtesy.⁴ If, before marriage, she had demised her life estate for the term of her life, her interest is simply a chose in action.⁵

In his wife's *chattels real*, as, for example, lands leased to her before or after marriage,⁶ the husband has, at common law, an almost absolute estate,⁷ with powers of sale, mortgage, disposition,⁸ but without any power to will them.⁹ If he survive his wife, his ownership is absolute, just as his ownership of her personalty is;¹⁰ if she survives she takes them much as she does her choses in action not reduced to possession.¹¹ His rights in such estate may, of course, be excluded by an equitable or statutory settlement.

4. Husband's Estate in Wife's Personalty in Possession.—At common law, all the wife's personalty in possession vests in her husband absolutely,¹² and he may reduce her personalty not in possession

the estate acquired under the husband ceases absolutely upon the determination of his estate," etc.

1. *Barber v. Root*, 10 Mass. 260, 263. "The interest of the husband in the real estate of his wife, that is, in any lands or tenements wherein she has an estate of freehold, whether of inheritance or for life, is a title to the rents and profits during the coverture." *Gray v. Mathias*, 7 Jones (N. Car.) 502.

2. *Bennett v. Bennett*, 34 Ala. 53; *Spencer v. Lewis*, 1 Houst. (Del.) 223.

3. 2 Kent Com. 134; 1 Bright H. & W. 112; *Schoul. H. & W.*, § 417.

4. *Stead v. Platt*, 18 Beav. (Eng.) 50, 57; *Gray v. Mathias*, 7 Jones (N. Car.) 504. See *Stewart H. & W.*, § 157.

5. *Daniels v. Richardson*, 39 Mass. 565, 569. "It appears by the facts in the present case that the plaintiff, whilst *sole*, having a life estate only, demised that estate for the term of her life, reserving an annual rent, without any clause of re-entry. The husband, therefore, did not become seized of the estate *jure uxoris*, so as to make the rents and profits his own. Nothing remained to the lessor but the rent, which was a chose in action."

6. 2 Black Com. 386; *Baxter v. Smith*, 6 Binn. (Pa.) 427, 429.

7-8. *Allen v. Hooper*, 50 Me. 374. "The husband upon marriage becomes possessed of the chattels real of the wife, which he may sell, assign, mortgage or

otherwise dispose of, as he pleases without her consent, by any act in his lifetime. Her chattels real may be sold for his debts. The personal property of the wife in her possession at the time of the marriage vests absolutely and immediately in the husband, who could dispose of them as he pleases, and on his death they go to his representatives." *Meriwether v. Broker*, 5 Litt. (Ky.) 254; *Bates v. Dandy*, 2 Atk. (Eng.) 207; *Clark v. Burgh*, 9 Jur. 679. 9. *Roberts v. Polgrean*, 1 Black. H. 535.

10. *Young v. Radford*, Hob. 3; *Mason v. Morgan*, 2 Ad. & E. (Eng.) 30; *Stewart M. & D.*, § 463. See *post*, IV., § 4.

11. That is, if the husband has not appropriated them to his separate use, or disposed of them, and his creditors have not had them sold for his debts.

12. *Allen v. Hooper*, 50 Me. 374. "The personal property of the wife in her possession at the time of the marriage vests absolutely and immediately in the husband, who could dispose of them as he pleases, and on his death they go to his representatives."

Thus, he owns absolutely money in her possession at the time of her marriage. *Cox v. Scott*, 9 Baxt. (Tenn.) 305. Or personalty bought by her, given her, collected by her. *Lamphir v. Creed*, 8 Ves. (Eng.) 599; *Frierson v. Frierson*, 21 Ala. 549; *Polk v. Allen*, 19 Mo. 467; *Turton v. Turton*, 6 Md. 375.

(her choses in action) to possession, and thus make them his absolutely.¹

In equity, unless the personalty is settled to the wife's sole and separate use, the husband has the same rights to his wife's personalty as at law,² except that she may claim her equity to a settlement³ out of such of her choses in action as he comes into equity to reduce to possession.

Under statutes, the husband's right in his wife's personalty is frequently destroyed. But a statute relieving a wife's property from her husband's debts has not this result.⁴ Statutes do not affect existing rights in property in possession,⁵ and they are generally construed not to affect existing rights in choses in action;⁶ but they can destroy the husband's right to reduce his wife's choses in action to possession.⁷

Personalty in possession of the wife is in the possession of the husband,⁸ unless she holds it in a representative capacity.⁹

In *Hamill v. Henry*, 69 Iowa 752 (1887), it was decided that personal property in the possession of a married woman is presumed to belong to her husband. If the fact is otherwise, it must be so shown.

1. See *post*, IV., § 5.

2. *Vanderveer v. Alston*, 16 Ala. 494. "Where a wife is the sole distributee of an estate, and the husband pays all the debts and takes possession of the assets without administration, claiming them as his absolute property by virtue of his marital rights, although the legal title is not thereby vested in him, yet he acquires such an equitable interest in the property as a court of chancery will protect as against those who, after the death of the wife, may seek distribution thereof as the next surviving kin of the intestate." *Pope v. Tucker*, 23 Ga. 484; *Beall v. Darden*, 4 Ired. Eq. (N. Car.) 76; *McDonald v. Crockett*, 2 McCord Ch. (S. Car.) 130; *Riddlehoover v. Kinard*, 1 Hill Ch. (S. Car.) 376; *Eaves v. Gillespie*, 1 Swan (Tenn.) 128.

3. See *post*, IV., § 5.

4. *Weems v. Weems*, 19 Md. 334, 344. "This power of a husband over money to which the wife might become entitled by bequest, does not appear to have been restricted in this State by any legislative act, until it was suspended by the 2nd section of article 45 of the Code, which provides that property bequeathed to a wife shall be held for her separate use. The provisions of the act of 1853, ch. 245, operated to protect the property of a wife thus acquired from the creditors of the husband, but did not affect the husband's marital rights or power over it."

5. *Farrell v. Patterson*, 43 Ill. 52; *Sharp v. Maxwell*, 30 Miss. 589; *Westervelt v. Gregg*, 12 N. Y. 202; *Rider v. Hulse*, 33 Barb. (N. Y.) 264; *Hawkins v. Lee*, 22 Tex. 544. For such rights are vested and cannot be destroyed.

6. *Stearns v. Weathers*, 30 Ala. 712; *Farrell v. Patterson*, 43 Ill. 52, 58.

7. *Clark v. McCreary*, 20 Miss. 347. "Choses in action, and personal property of the wife not in her possession at the time of marriage, do not at marriage, by the common law, vest absolutely in the husband; but he has a conditional and qualified right to them dependent on his reducing them to possession during coverture; the statute of 1839, therefore, for the benefit of married women, under which a wife's choses in action, and personalty not then reduced to the husband's possession, inure to the separate use of the wife, is not retrospective in violating any vested right." *Henry v. Dilley*, 25 N. J. L. 302; *Goodyear v. Rumbaugh*, 13 Pa. St. 480; *Mellinger v. Bausman*, 45 Pa. St. 522; *McVaugh v. McVaugh*, 10 Phila. 457; 2 *Bishop M. W.*, §§ 45, 46. But there are authorities to the contrary. See *Jackson v. Sublett*, 10 B. Mon. (Ky.) 467; *Dunn v. Sargeant*, 101 Mass. 336; *Rider v. Hulse*, 24 N. Y. 372; *O'Connor v. Harris*, 81 N. Car. 279.

8. *Bell v. Bell*, 37 Ala. 536, 542. See note above.

9. *Farrington v. Edgerley*, 13 Allen (Mass.) 454. "The only question before the court upon this bill of exception is, whether an officer who has attached personal property may employ the wife of the defendant as a keeper,

Personalty in possession of the husband may still not be in his possession as owner;¹ he may hold her separate personalty as trustee for the wife, or as her agent, and in such cases the personalty so held by him does not fall into the class of personalty in possession.²

The wife's personalty in possession of her agent, trustee, guardian, tenant in common, or anyone not holding adversely, is constructively in possession of her husband.³ But some difficulties arise in deciding when a person holds adversely.⁴

All such personalty the husband owns absolutely and unqualifiedly.⁵

5. Husband's Estate in His Wife's Choses in Action.—The husband's only right over his wife's choses in action is to reduce them to possession,⁶ when so reduced they are personalty in possession,

and commit to her charge, as his bailee, the property of her husband under attachment. . . . For we find nothing in the relation of husband and wife, and no principle of public policy, to prevent a married woman from keeping goods, the special property of which is in the officer, because the general property is in her husband. The objection cannot prevail unless a delivery to the defendant's wife, like one to the defendant himself, is an abandonment of the officer's possession and a dissolution of the attachment. This we cannot hold." See *Standiford v. Devol*, 21 Ind. 404.

1. *Wall v. Tomlinson*, 16 Ves. (Eng.) 413; *Scarpellini v. Acheson*, 7 Q. B. 864; *Baker v. Hall*, 12 Ves. Jr. 499; *Price v. Sessions*, 3 How. (U. S. Supreme Ct.) 624; *Mayfield v. Clifton*, 3 Stewart 375; *Lockhart v. Cameron*, 29 Ala. 355; *Lowe v. Cody*, 29 Ga. 117; *Standiford v. Devol*, 21 Ind. 404; *State v. Reigart*, 1 Gill (Md.) 1, 26; 39 Am. Dec. 628; *Walker v. Walker*, 25 Mo. 367; *Dunn v. Sargeant*, 101 Mass. 336; *Vreeland v. Vreeland*, 15 N. J. Eq. 512; *Caswell v. Hill*, 47 N. H. 407; *Pierson v. Smith*, 9 Ohio St. 554; *Timbers v. Katz*, 6 Watts & S. (Pa.) 290; *Moyer v. Moyer*, 77 Pa. St. 482; *McC Campbell v. McC Campbell*, 2 Lea (Tenn.) 661; *Cox v. Scott*, 9 Baxt. (Tenn.) 305; *Barron v. Barron*, 24 Vt. 376.

2. See *supra*, IV., § 5, and *Stewart H. & W.*, § 172.

3. *Turton, Exrs. v. Turton*, 6 Md. 381. "But it is asserted that Duffieff and Fowler were not the agents of the husband, but were in fact the agents of the wife. If this were true, the payment to them would be regarded as pay-

ment to her. We cannot perceive that this view would vary the case in any material particular. If a debtor of a married woman pays to her during coverture the debt due, the payment inures to the benefit of the husband and the money becomes absolutely his. And in like manner the husband is entitled absolutely to all sums of money which may be received by a third person on her account during the marriage." *Magee v. Toland*, 8 Port. (Ala.) 36, 37; *Gwynn v. Hamilton*, 29 Ala. 23; *Armstrong v. Simonton*, 2 Murph. (N. Car.) 351; *Pettijohn v. Beasley*, 4 Dev. (N. Car.) 512; *Pope v. Tucker*, 23 Ga. 484; *Sallie v. Arnold*, 32 Mo. 532; *Davis v. Davis*, 60 Pa. St. 118; *Guerrant v. Hocker*, 7 Leigh (Va.) 366.

4. *Bridget Hawkins v. Providence R. R.*, 119 Mass. 596. "Personal apparel furnished by a husband to his wife, or purchased by the wife, with the consent of her husband, with money given her by him from a fund formed by their joint earnings, remains the property of the husband, and the wife cannot maintain an action against a carrier for the loss thereof." See *Fleet v. Perrins*, 4 Q. B. 500; *Walker v. Walker*, 41 Ala. 353; *Brown v. Fitz*, 13 N. H. 283; *Wallace v. Burden*, 17 Tex. 467; *Hooper v. Howell*, 50 Ga. 165.

5. See *Stewart H. & W.*, § 170; note 12, p. 843.

6. *Stewart H. & W.*, §§ 176-183. Therefore a husband cannot dispose of them by will. *Grebill v. Grebill*, 87 Pa. St. 105. And his right to assign, release, exchange them, etc., exists only as a part of his right to reduce them to possession. *Needles v. Needles*, 7 Ohio St. 432; *Dold v. Geiger*, 2 Gratt. (Va.) 98, 110.

and vest absolutely in him.¹ This right must be exercised during coverture.² It ceases with the death of either party,³ or with absolute divorce.⁴ Usually it is said that choses in action differ from choses in possession, in that the former survive to the wife.⁵ More correctly, if a husband dies before reducing to possession his wife's choses in action, they survive to her in her own right.⁶ Though choses in action are property,⁷ they are not so far the husband's property as to pass under an assignment of all his personal property.⁸ Even though the husband get possession of her property, it is a question of intent whether it is or is not reduced to his possession.⁹

Grebill's Appeal, 87 Pa. St. (1878) 105, 108. "At common law a husband had a naked power over the choses in action of his wife, but it was one which he was not obliged to exercise, even for the benefit of creditors. *Dennison v. Nigh*, 2 Watts. 90. Nothing has been shown even tending to prove that during his lifetime Mr. Grebill ever claimed his wife's money as his own, and the assertion of title to it by a bequest in his will could not affect rights which she had been permitted to retain."

Therefore, a husband's right to assign, release, exchange them, etc., exists only as a part of his right to reduce them to possession. See §§ 180, 181, 182, *Stewart H. & W.* Also *Needles v. Needles*, 7 Ohio St. 432; *Dold v. Gieger*, 2 Gratt. (Va.) 98, 110.

1. See *ante*, IV., § 4.

2-3-4. *Legg v. Legg*, 8 Mass. 99, 101. "By our law marriage is an absolute gift to the husband of all the wife's personal chattels in possession; and so it is also of choses in action, if he reduces them into possession by receiving or recovering them at law. But on the dissolution of the marriage, either by the death of the husband or by a divorce *a vinculo*, choses in action not reduced to possession during the coverture remain the property of the wife."

5. *Chappelle v. Olney*, 1 Sawy. (U. S.) 401; *Rice v. McReynolds*, 8 Lea (Tenn.) 39; *Ware v. Ware*, 28 Gratt. (Va.) 670; *Stewart M. & D.*, §§ 460, 465.

6. Notes 2, 3, 4, above. *Bond v. Conway*, 11 Md. 515. "In reference to choses in action belonging to the wife when married, it is well settled that they do not vest in the husband absolutely. By the marriage he only acquires an inchoate or conditional right; he may reduce them into possession and apply the proceeds

to his own purposes; but if the wife is the survivor, and the choses in action remain not reduced into possession, she is entitled to them and they do not pass to his representatives." *Scawen v. Blunt*, 7 Ves. (Eng.) 294; *Fleet v. Perrins*, Law R., 3 Q. B. 536; *Chappell v. Causey*, 11 Ga. 25; *Hayward v. Hayward*, 20 Pick. (Mass.) 517; *Burleigh v. Burleigh*, 22 N. H. 118; *Curry v. Fulkinson*, 14 Ohio 100; *Tritt v. Colwell*, 31 Pa. St. 228. In *Cummings v. Cummings*, 143 Mass. 340 (1887), a husband took in his own name a certificate of bank stock purchased with his wife's money, but gave her the certificates to keep, and a paper stating the facts. Subsequently, on the bank becoming a national bank, he took out a new certificate in his own name and collected dividends. *Held*, that he had reduced the stock to his possession.

7. *Barton v. Barton*, 32 Md. 212, 224; *Stewart H. & W.*, §§ 229, 230.

8. *Sherrington v. Yates*, 12 Mees. & W. (Eng.) 855, 864. "And as the assignment in bankruptcy has not the effect of reducing into possession a chose in action belonging to the wife, so as to destroy her rights of survivorship (*Mitford v. Mitford*, 9 Ves. Jun. 87), and again, as the bankrupt laws do not profess to vest any property in the assignees, other than that which was the property of the bankrupt himself, the case of reputed ownership excepted, it would follow that the assignees cannot deprive the wife of any interest which she has in a chose in action."

9. *Barron v. Barron*, 24 Vt. 375, 392. "If the husband has obtained the possession of the property without suit, and it still remains in his hands, he will, in many cases, be adjudged the trustee of the wife." He may get possession as administrator, agent or trustee, but to reduce he must take possession as husband. *Mathem v.*

6. Wife's Estate in Her Own Property, Generally.—(See MARRIED WOMEN). The individuality of the wife, by the common law, is merged in that of her husband,¹ and during coverture, she could not hold property or exercise property rights.² Through marriage, by operation of law, all her personalty in possession passed absolutely to her husband,³ he acquired a right to reduce her choses in action to possession, and thus make them his own;⁴ of her chattels real he became practically absolute owner,⁵ and he was entitled to all the rents and profits of her real estate.⁶ She could not acquire property without his consent.⁷ But from the earliest times, courts of equity encroached on this simple and savage system,⁸ and statutes have now more or less abolished it in every State where the common law has been in force.⁹

The husband's allowance to his wife for her dress and personal expense is known as pin money.¹⁰ It takes various forms.¹¹

A wife's *equity to a settlement* is her right, enforceable in equity, to have a settlement for the benefit of herself and her children out of her equitable choses in action.¹² Some incidents of this right will be found in the notes.¹³

Machem, 28 Ala. 374; Standiford v. Devol, 21 Ind. 404.

1. *Ante*, I., § 1.

2. *Ante*, I., § 1.

3. *Ante*, IV., § 4.

4. *Ante*, IV., § 5.

5. § 145 Stewart H. & W.; Allen v. Hooper, 50 Me. 371.

6. See incidents of husband's estate during coverture, *jure uxoris*, *ante*, IV., § 3.

7. *Ante*, I., § 1. Patterson v. Robinson, 25 Pa. St. 81.

8. 2 Story Eq. Jur., § 1378; 1 Fonb. B. C. 1, ch. 2.

9. For summary, see 6 South. Law Review, p. 633. See MARRIED WOMEN.

10. Jodrell v. Jodrell, 9 Beav. (Eng.) 45, 54. "The income was £4,000, of which £300 is called pin money, and the remaining £3,700 was to be applied in a particular manner. Both these sums were subject to a duty as to their application; the £300 was not, as I think it was pretended to be, a sum which the wife might do what she pleased with, but there was annexed to the possession of that pin money the duty of applying it for her own personal dress, decoration and ornament." Howard v. Digby, 2 Clark & Fin. (Eng. H. of Lords) 634.

11. Sometimes it takes the form of a gift to the wife of her savings out of the household expenses. Slanning v. Style, 3 P. Wms. (Eng.) 337. Or the profits of a dairy or hennery.

12. Wiles v. Wiles, 3 Md. 1, 8. "There

is no doubt of the general proposition that where a husband, or his assignee, asks the intervention of a court of equity to obtain the possession of a wife's personal property the court will require him to do what is equitable, by making a suitable provision out of it for her maintenance and that of her children, and if the fund be under the control of the court she may proceed by original bill. . . . Speaking of the wife's equity, CHANCELLOR KENT, in vol. 2, p. 141, of his Commentaries, says: 'It does not, according to the adjudged cases, attach except upon that part of her personal property in action which the husband cannot acquire without the assistance of a court of equity,' and that 'if the husband can acquire possession without a suit at law, or in equity, or by a suit at law, without the aid of a court of chancery (except, perhaps, as to legacies and portions by will or inheritance) the husband will not be disturbed in the exercise of the right.' Jewson v. Moulson, 2 Atk. (Eng.) 417; Sturgis v. Champneys, 5 Mylne & C. (Eng. H. C. of Chan. 1840) 92, 101; 56 Am. Dec. 733; Durr v. Boyer, 2 McCord (S. Car.) 368. It is hard to define, as it depends very much on the practice of the courts. Kenny v. Udall, 5 Johns. (N. Y.) Ch. 463, 474; 2 Perry Trusts, § 627.

13. This settlement may be made (1) by a court of equity, (2) *sua sponte*, or on application of a trustee, or of the husband, or of the wife. Elibank v. Mon-

A married woman's *equitable separate property*¹ is property which is so settled upon her that courts of equity recognize it during her coverture as her own, unaffected by her husband's marital rights.²

In order that this estate of the wife may exist, the sole requisite is that the terms of the settlement show that it was intended by the settler that in the property in question the husband in question should have no marriage rights.³ No technical words are necessary to show this intent.⁴ It is not now necessary to name a trustee.⁵ With reference to the wife's powers over her equitable separate estate, two views have prevailed. (1) That she has all the powers of a *feme sole*, save those denied her by the terms of the settlement.⁶ (2) That she has no powers save those

tolieu, 5 Ves. (Eng.) 737; 1 White & T. Lead. Cas. 424, 623, 628. (3) Out of any fund over which it has jurisdiction (p. 847, note 12.) Whether a settlement shall be made seems to be determined by the practice of the particular court, and to be within its discretion. *Giacometti v. Producers*, Law R., 14 Eq. 253; *Scott v. Spashett*, 16 Jur. 157 (Eng.); *Coster v. Coster*, 9 Sim. (Eng.) 597; *Brett v. Greenwell*, 3 Younge & C. (Eng.) 230. The amount depends on the special circumstances of each particular case. *Barron v. Barron*, 24 Vt. 375; *Hall v. Hall*, 4 Md. Ch. 283; *Beeman v. Cowser* 22 Ark. 429; 20 Am. Dec. 402; *Pearce v. Crutchfield*, 14 Ves. (Eng.) 206; *Bagshaw v. Winter*, 5 De Gex & S. (Eng.) 466; *White v. Gouldin*, 27 Gratt. (Va.) 491. The children have not by themselves any right to a settlement. *Scriver v. Tapley*, Amb. (Eng.) 509; 2 Eden (Eng. 1760) 337; *Greer v. Boone*, 5 B. Mon. (Ky.) 554.

1. See MARRIED WOMEN. *Clarke v. Windham*, 12 Ala. 798; 2 Perry Trusts, § 646.

2. *Pollard v. Merrill*, 15 Ala. 169, 173. "In *Cook v. Kennedy*, 12 Ala. 42, 'it is said to be an inseparable incident to a separate estate in the wife that the husband has no control or dominion over it,' and the cases all agree, that while no particular form of words is necessary to the creation of a separate estate, yet there must appear upon the face of the instrument a clear and manifest intention to exclude the marital rights of the husband. . . . A trust for the separate use of the wife may be declared, either in express terms, or it may be inferred from the manner in which the property is to be enjoyed, or the directions given concerning its management." *Hill on Trustees* 420.

In the wife's ordinary equitable estates all the marital rights of the husband exist. *Banks v. Green*, 35 Ark. 84, 88.

3. See note 2, *ante*. Also *Brant v. Mickle*, 28 Md. 436; *Paul v. Leavett*, 53 Mo. 595; *Pond v. Skeen*, 2 Lea (Tenn.) 126, 131; *Buck v. Wroten*, 24 Gratt. (Va.) 250; *Ray v. Ray*, 1 Madd. (Eng. 1821) 199, 207.

4. *Brandt v. Mickle*, 28 Md. 437. "Technical words, it is true, are not necessary to create a separate estate in the wife, but adequate language must be used, in making the gift, to manifest a decided intention to transfer a separate interest." *Prout v. Roby*, 15 Wall. (U. S. Supr. Ct.) 471; *Street v. Kissam*, 2 Barb. (N. Y.) 494; *Nixon v. Rose*, 12 Gratt. (Va.) 425; *Porter v. Bank*, 19 Vt. 410, 419; *Morrison v. Thistle*, 67 Mo. 596; *Heathman v. Hall*, 3 Ired. (N. Car.) Eq. 414.

5. *Wood v. Wood*, 83 N. Y. (1881) 579. "The language of the deed to the plaintiff in the case in hand, 'only as and for her own separate estate, free from the control of her husband,' is sufficient to create a separate estate in her, as any language will effect that end where from the nature of the transaction, or from the whole context of the instrument that intent appears. Nor need there have been a trustee named in the instrument." *Tullett v. Armstrong*, 1 Beav. (Eng.) 1; *Phillips v. Grayson*, 23 Ark. 769; *Roberts v. West*, 15 Ga. 123.

6. Discussed in *Hulme v. Tenant*, 1 White & T. Lead. Cas. 481; *Swift v. Castle*, 23 Ill. 200; *Jaques v. Methodist*, 3 Johns. (N. Y.) Ch. 77; overruled 17 Johns. (N. Y.) Ch. 548, 578; *Radford v. Carwile*, 13 W. Va. 573. This rule prevails in *England, Alabama, Arkansas, California, Connecticut, Illinois, Kentucky, Maryland, Missouri, New*

given her by the terms of the settlement.¹

7. **Wife's Estate in Her Husband's Realty.**—(See DOWER).

8. **Wife's Estate in Her Husband's Personality.**—In some States, by statute,² a wife has dower in leasehold property and other personality, but at common law the wife has, during coverture, no right in her husband's personality,³ except her right to have maintenance⁴ or alimony⁵ out of it, in a proper case, and her right to dispose of it if abandoned.⁶ He may give it away and do with it as he pleases, if his act takes effect during coverture.⁷ But in most States he cannot leave it all away from her by will; she has her thirds.⁸

By an agreement before marriage, husband and wife may vary or wholly waive their rights in each other's property.⁹

9. **Estates of Husband and Wife in Property of Both.**—When two tenants in common, or two joint tenants, marry, the character of the estate held by them is not changed,¹⁰ though each has, in the interest of the other, the same estate as he or she would if the other were a tenant in common, or a joint tenant with some third party, instead of with him or her.¹¹

Since, at common law, any personality of the wife belonged to her husband if he reduced it to his possession during coverture,¹² there is no reason why this should not apply to property in which he is partly interested. And yet a bequest to husband and wife and a third party equally gave husband and wife only one share, a moiety;¹³ and any chose in action standing in their joint names went absolutely to the survivor.¹⁴

Jersey, New York, Tennessee, Texas, Virginia, West Virginia, Wisconsin.

1. This rule prevails in *Florida, Mississippi, North Carolina, Pennsylvania, Rhode Island, South Carolina.*

2. Ark. Dig. 1874, § 2230; Mo. R. S. 1879, § 2187.

3. *Padfield v. Padfield*, 78 Ill. (1875) 16. "Any disposition of personal property and credits by a husband in good faith, where no right or interest is reserved to him either present or ultimate, though made to defeat the rights of his wife, will be good against her." *Hays v. Henry*, 1 Md. Ch. 337.

4. See II., §§ 7, 17, *ante*.

5. See DIVORCE. *Stewart M. & D.*, §§ 383-397.

6. See II., § 18, *ante*.

7. *Padfield v. Padfield*, 78 Ill. 18, 19, 10. "And the common law has always recognized the right of a father to advance his children when and as he might choose, without limit as to time and amount. . . . To hold that a *feme covert* has a vested interest in her husband's personal estate, that he is

unable to divest in his lifetime, would be disastrous in the extreme to trade and commerce."

8. "By the early common law a husband could not by will deprive his wife and children of their reasonable shares in his personal estate; if he died childless the law, in spite of his will, allowed his widow one-half of his personality, and if he left a child, one-third. This was called the widow's thirds. This law was held to be in force in Maryland, where a husband cannot by will deprive his widow of her thirds, but where she takes one-third or one-half, as the case may be, of his personality after the payment of his debts and funeral expenses. *Coomes v. Clements*, 4 Har. & J. (Md.) 480, 483; *Stewart M. & D.*, § 462.

9. See DOWER.

10. 1 Wash. Real Prop. 424; *Bevine v. Cline*, 21 Ind. 37; *Den v. Hardenbergh*, 10 N. J. L. 42; *Ames v. Norman*, 4 Sneed (Tenn.) 696.

11. §§ 148, 157, 254, *Stewart H. & W.*

12. See IV., §§ 4, 5.

13-14. See notes, IV., § 10, *post*.

10. Tenancy by Entireties.—Husband and wife are, at common law, one person,¹ so that when realty² or personalty³ vests in them both equally with a third party, they together take but one share a moiety, and the third party takes the other moiety.⁴ That moiety, or in case the whole property vests in them alone, the whole, they take as one person,⁵ they take but one estate as a corporation would take.⁶ In the case of realty, they are seized, not *per my et per tout*, as joint tenants are,⁷ but simply *per tout*;⁸ both are seized of the whole, and each being thus seized of the entirety, they are called tenants by the entirety, and the estate is an estate by entireties.⁹ In the case of personalty, there is strictly no tenancy by the entirety,¹⁰ because personal property is not subject to estates at common law,¹¹ and the husband has the

1. See I., § 1, *ante*.

2. *Shaw v. Hearsay*, 5 Mass. 321. A tenancy by entireties may exist in an estate in fee, in tail, for life, or for years or other chattels real. It may exist in an estate in possession, remainder or reversion, in legal or equitable estates. *Stewart H. & W.*, § 305.

3. *Bricker v. Whalley*, 1 Vern. (Eng. Ct. of Chan. 1718) 233.

4. *Chandler v. Cheney*, 37 Ind. 391, 396. "It was a well settled rule at common law, that the same form of words which, if the grantees were unmarried, would have constituted them joint tenants will, they being husband and wife, make them tenants by the entirety. The rule has been changed by our statute above quoted. It requires that the intention to create a joint tenancy shall either be expressly declared, or it must manifestly appear from the tenor of the instrument. But a conveyance to a man and woman who are then husband and wife creates an estate by entirety. The same difference which existed at common law between joint tenants and tenants by entireties continues to exist under our statute. In both, the title and estate are joint, and each has the quality of survivorship, but the marked difference between the two consists in this, that in a joint tenancy, either tenant may convey his share to a co-tenant, or even to a stranger, who thereby becomes tenant in common with the other co-tenant, while neither tenant by the entirety can convey his or her interest so as to affect their joint use of the property during their joint lives, or to defeat the rights of survivorship upon the death of either of the co-tenants; and there may be a partition between joint tenants, while there can be none between tenants by entireties." See cases in next note.

5. *Den v. Hardenbergh*, 10 N. J. L. 42, 45. "The very name joint tenants implies a plurality of persons. It cannot then aptly describe husband and wife, nor correctly apply to the estate vested in them, for in contemplation of law they are one person. . . . Of husband and wife, both have not an undivided moiety, but the entirety. They take and hold, not by moieties, but each the entirety. Each is not seized of an undivided moiety, but both are and each is seized of the whole. They are seized, not *per my et per tout*, but solely and simply *per tout*. . . . In a granty, to a husband and wife and a third person, the husband and wife take one half and the other person takes the other half; and if there be two other persons, the husband and wife take one third, and each of the others one third." *Bricker v. Whalley*, 1 Vern. (Eng.) 233; *Wylde v. Wylde*, 2 De Gex, M. & G. (Eng.) 724; *Atcheson v. Atcheson*, 11 Beav. (Eng.) 485, 491; *Doe v. Wilson*, 4 Barn. & Ald. (Eng.) 303; *Shaw v. Hearsay*, 5 Mass. 521; *Barker v. Harris*, 15 Wend. (N. Y.) 615; *Paine v. Wagner*, 12 Sim. (Eng.) 184.

6. *Paul v. Campbell*, 7 Yerg. (Tenn. 1830) 319; 27 Am. Dec. 508.

7-8. See note 5, above, and *Chandler v. Cheney*, 37 Ind. 391.

9. See notes 4, 5, *ante*, and *Ins. Co. v. Nelson*, 103 U. S. 544; *Robinson v. Eagle*, 29 Ark. 202; *Boggs v. Boggs*, 54 Ga. 95; *Almond v. Bonnell*, 76 Ill. 536. In *Bennet v. Mettingly*, 9 Western Rep. (Ind. 1887) 282, where a husband and wife hold lands as tenants by entirety, and the wife unites with the husband in a mortgage on the land to secure his debts, such mortgage is a contract of suretyship on her part and is void as to her.

10-11. *Wait v. Boree*, 35 Mich. (1877)

HUSBAND AND WIFE—HUSBANDRY.

absolute right to the wife's chattels,¹ which right his part ownership of the chattels would not interfere with.² But entireties are said to exist in chattels real, etc.³ In some States statutes have changed this estate.⁴

Estates by entireties may be created by will,⁵ by instrument of gift or purchase,⁶ and even by inheritance.⁷ Each tenant is seized of the whole,⁸ the estate is inseverable—cannot be partitioned;⁹ neither husband nor wife can alone affect the inheritance, the survivor's right to the whole.¹⁰ It is the better view that married women's separate property acts do not destroy estates by entireties.¹¹ But the contrary has been held in England and elsewhere.¹² An absolute divorce renders husband and wife tenants in common in their estates.¹³

HUSBANDRY.—See note 14.

425. "Where husband and wife, being each possessed of means, have made investments jointly, each supplying half, and have taken the securities in their joint names, it is *held* that the wife, on the decease of the husband during her lifetime, does not take the whole by the right of survivorship; the rule which prevails as to the right of survivorship, in the case of united holdings of real estate by husband and wife, is not applicable to personalty." See IV., § 9, *ante*. Stewart H. & W., § 311 and § 136.

1-2. Discussed in IV., §§ 4, 5, *ante*. See *Atcheson v. Atcheson*, 11 Beav. 485; *Polk v. Allen*, 19 Mo. 467.

3. 2 Preston on Abstracts 30; *Wiscot v. Wiscot*, 2 Co. 605; *Bac. Abr.* 244; *Downing v. Seymour*, Cro. Eliz. 912.

4. In *Kentucky* estates by entireties have been expressly abolished by statute (*Elliott v. Nicholls*, 4 Bush (Ky.) 502), and though the general rule is that such estates continue to exist unless expressly abolished (*Marburg v. Cole*, 49 Md. 402, 413), in some States they have been *held* to be abolished by statutes referring to joint estates (*Hoffman v. Stigers*, 28 Iowa 302, 307), and by married women's separate property acts. *Clark v. Clark*, 56 N. H. 105, 110, *But contra*, see *Gillan v. Dixon*, 65 Pa. St. 399.

In *Ohio* and *Connecticut* this estate has never been recognized. *Penn v. Cox*, 16 Ohio 30; *Taylor v. Knapp*, 25 Conn. 513.

5. 1 Preston Estates 131.

6. 3 Blackst. Com. 182.

7. *Gillan's Executors v. Dixon*, 65 Pa. St. 395, 399.

8-9. See notes 4, 5, p. 850.

10. See note 4, p. 850. Also *Hemingsway v. Scales*, 46 Miss. 1, 17; *Farmers*

v. Gregory, 49 Barb. (N. Y.) 155; *Bennett v. Child*, 19 Wis. 362.

11-12. In *Arkansas, Indiana, Maryland, Michigan, Mississippi, Missouri, New York, Pennsylvania, Wisconsin, and elsewhere* it is *held* that separate property acts do not destroy estates by entireties. But in England, Alabama, Illinois, Iowa and New Hampshire it is, on the other hand, *held* that estates by entireties depend upon the unity of husband and wife, and that the separate property acts have destroyed this unity as far as property is concerned, and that with the existence of this unity estates by entireties have ceased to exist.

13. *Harrer v. Wallner*, 80 Ill. 197. "Where a husband and wife, who are seized of an estate by the entirety are divorced, the estate by the entirety is destroyed, and they become tenants in common." See *Stewart M. & D.*, § 441.

14. **Implements of Husbandry.**—A steam engine used exclusively for working a threshing machine, though capable of being used for other purposes, when passing a turnpike gate at the same time as the machine, which belonged to the same owner, is exempt from toll as an implement of husbandry, under a statutory exemption. *Reg. v. Maltby*, 8 E. & B. 712.

Servant in Husbandry.—A person employed to keep the general accounts of a farm, to weigh out food for cattle, to set the men to work, and to lend a hand to anything if wanted, a sort of bailiff or superintendent, is not a servant in husbandry, within the meaning of an act providing for a summary conviction of such for misconduct or misdemeanor in the execution of the contract of service. *Davies v. Berwick* 3 E. & E. 549.

HYPOTHECATION—ICE AND ICE COMPANIES.

HYPOTHECATION.—(See BOTTOMRY, CHATTEL MORTGAGES, MARITIME LIENS, RESPONDENTIA BONDS). The right which a creditor has in a thing of another, which consists in the power to cause that thing to be sold, in order to have the debt paid out of the price.¹ It differs from a pledge, in that the possession remains with the debtor.² Charge.³

ICE AND ICE COMPANIES.

1. Definition, 853.
2. Kind of Property, 853.
 - (a) *Real Estate*, 853.
 - (b) *Personalty*, 856.
3. Rights In and To, 857.
 - (a) *Navigable Waters*, 857.
 - (b) *Non-navigable Waters*, 857.
 - (c) *Canals*, 859.
 - (d) *Public Ponds*, 859.
 - (e) *Private Ponds*, 859.
- (f) *Artificial Ponds*, 859.
4. Gatherer of on Public Waters, 861.
 - (a) *Rights*, 861.
 - (b) *Duties and Liabilities*, 861.
5. Rights of Traveller Over, 861.
6. Measure of Damages, 862.
7. Owner of Easement in Water, 862.
8. Eminent Domain, 862.
9. Ice on Streets, 862.

1. Pothier's definition quoted in the *Young Mechanic*, 2 Curt. (C. C.) 404, and there adopted by CURTIS, J., as "an accurate description of a maritime lien." 4 L. Q. R. 381; *Taylor v. Hudgins*, 42 Tex. 244.

2. Story on Bailments, §§ 7, 286. "In hypothecation, the thing hypothecated might remain in possession of the owner. The creditor might require neither the property nor the possession of it. Thus he had no *jus in re*, but he had a *jus ad rem*; a right or interest in or to the thing hypothecated, a *privilegium* or, as we call it, a lien, which could be enforced for the payment of his debt." 1 Parsons Mar. L. 118.

The *hypotheca* was well recognized at the Roman law as a distinct class of bailments. *MacLachlan's L. of Merch. Shpg.* 61. It does not, in its strict sense, exist in our law, the nearest approaches to it being bottomry bonds, maritime liens, and certain cases of chattel mortgages. Story on Bailments, § 288. "Our commercial law speaks of 'hypothecating' ships and vessels, rather than 'pledging' or 'mortgaging' them; and this (naturalizing civil rules and civil terms together) because a bottomry bond makes the ship's keel or bottom a creditor's security, without requiring a bailment transfer and re-transfer or visible and tangible possession, which would be troublesome, even if practicable in such a case." *Schouler on Bailments* 166.

"The contract of hypothecation is distinguishable from a mortgage at common law, and from a pledge or pawn, in this, that while the mortgage

transfers the property in the subject thereof, and the pledge gives a lien which is void without actual possession of the chattel, hypothecation confers only a right to be enforced against the subject of it through the medium of legal process.

"It is not to be confounded with respondentia. That word properly applies only to a loan of money secured upon the merchandise laden, or to be laden, on board a ship, payment thereof, with maritime interest, being made contingent on the arrival of the cargo at the port of destination," etc. *MacLachlan's L. of Merch. Shpg.* 47. *Abbott on Shipping* 112.

3. "In modern times attempts have been made to introduce 'hypothecation' from the Roman law, as a general term, equivalent to 'charge,' the proper English term. In this use of the word, to hypothecate property is to charge it with the payment of a sum of money or the performance of an obligation, giving the person in whose favor it exists neither the right to the possession of the property, nor the right to sell it, but merely the right of realization by judicial process, in case of non-payment or non-performance at the proper time." *Repalje & L. L. Dict.*

Where an agent with power "to mortgage, hypothecate, or create a lien" on land of his principal, borrowed money, for which he gave a note secured by a deed of trust, the principal is liable upon the note, it being one transaction with the deed of trust, upon which alone judgment could have been obtained. *Taylor v. Hudgins*, 42 Tex. 244.

1. **Definition.**—Ice is water or fluid congealed; a solid, transparent, brittle substance formed by the congelation of the fluid, by means of the abstraction of the heat necessary to preserve its fluidity, or, to use common language, congealed by cold.¹

2. **Kind of Property.**—(a) *Real Estate.*—It has been held that ice forming upon private waters is real estate, and that it is the property of the owner of the soil over which it is formed,² and that it is an indictable offence to remove it without the consent of the owner of the land over which it is found.³

1. Webster's Dict.

Ice is the solid crystalline form which water assumes when exposed to a sufficiently low temperature. It is sometimes precipitated from the air as hoarfrost, snow or hail; and in the glaciers and snows of lofty mountain systems, or of regions of high latitude, it exists on a gigantic scale. Also in various parts of the world, especially in France and Italy, great quantities of ice form in caves, which, by virtue of their depth below the earth's surface, their height above the sea level or their exposure to suitable winds, or two or more of these conditions in combination, are unaffected by ordinary climatic changes, so that the mean annual temperature is sufficiently low to insure the permanency of ice. 12 Ency. Brit. 611.

The idea of trading in ice first occurred to a Boston merchant named Tudor, who first shipped ice to Martinique, in 1805. In 1833 American ice began to be imported into Calcutta.

It is estimated that in America 2,000,000 tons of ice are cut and annually stored by companies supplying New York and the Middle States. New York city alone consumes 500,000 tons per annum. 12 Ency. Brit. 614.

2. *Washington Ice Co. v. Shortall*, 101 Ill. 46; s. c., 12 Am. Law Reg. 313. *State v. Pottmeyer*, 33 Ind. 402; s. c., 5 Am. Rep. 224.

3. *State v. Pottmeyer*, 33 Ind. 402; s. c., 5 Am. Rep. 224, is a leading and important case. The court observes: "This case was heretofore before this court, and the indictment, charging that the appellee did then and there unlawfully cut, saw and remove from land belonging to one Daniel P. Baldwin, in the county of Cass, one hundred cubic feet of ice, of the value of \$10, being then and there the property of said Daniel P. Baldwin, without a license, etc., was held good." 30 Ind. 287. Upon the trial of the case the proof was that the appellee removed the ice, which

was of a specified value as an article of commerce, by cutting from a pool formed by a dam in a stream not navigable, and from the portion of the pool over the land of said Baldwin, the appellee owning the land opposite to the place where the ice was removed.

The court instructed the jury as follows: "2. If the ice in controversy was formed in the waters of a flowing stream running in its natural channel over, on and across a part of the land of Baldwin, it is no part of the land, and it is not fairly included in other valuable articles, as used in § 14, p. 463, 2 G. & H.

"7. The fact that the ice was cut in the backwater of a mill-dam, where the current of the stream is checked, commonly known as a mill-pond, will make no difference, if it was a flowing stream, as above described." The instructions were excepted to and there was a finding for the appellee. The statute, under which the indictment was found, declares that any person who, without a license so to do from competent authority, shall remove from the lands of another any tree, stone, timber or other valuable article, shall be deemed guilty of a trespass. RAY, C. J. (after stating the case): "Upon the former consideration of this case, where the present question was somewhat discussed by counsel but not decided by this court, the entire absence of direct authority to aid in its decision was observed. Since then neither the research of counsel nor the attention of the court has been rewarded; and we must, therefore, look to analogies and the application of elementary principles. That there can be property in ice, formed upon an artificial pond, on one's own estate, was there decided, and that it constituted, under such circumstances, part of the realty, resulted as a necessary conclusion, or an indictment under this action of the statutes could not have been sustained." *Bates v. State*, 31 Ind. 72.

"Indeed, that the water is included in

the term land is taught by the text writers. 'Land, *terra*, in its legal signification, comprehendeth any ground, soil, or earth whatsoever, as meadows, pastures, woods, moores, waters, marishes, furses and heath;" and lastly, "the earth hath in law a great extent upward not only of water, as hath been said, but ayre and all other things even up to heaven; for *cujus est solum ejus est usque ad calum*, as is holden, 14 H. 8. So 12; 22 Hen. 6, 59; 10 E. 4, 14 Registrum origin, and in other bookes." Co. Litt. 4 a. Blackstone says the word land includes not only the face of the earth, but everything under it or over it. 2 Bl. Com. 18; Bouv. Law Dict.; 1 Greenl. Cruise 46. So it was held in Greyes' Case, Owen 20, that fish in a pond passed, not to the executor, but to the heir; the court giving judgment, that he who had the water should have the fish. And they are held as part of the realty. 2 Bouv. Law Dict., title POND.

"WASHBURN says: 'It may be added, in general terms, that every easement or servitude in lands being an interest therein, can be acquired only by grant, or what is deemed to be evidence of an original only by grant. And in this are embraced right in one man to take away the soil or profits of the soil of another, called *profit a prendre*, if such right be of a freehold or inheritable character. In the matter of water, the owner of a stream may grant a certain quantity of water to be taken out of it or a certain amount of water-power measured and ascertained. But a man may grant trees growing on his own land, corn, on the ground or fruit upon trees, without deed. So of the timber, stone or other materials of a house then standing upon his estate; and the donee in such case may take it away after the donor's death. The law regards these things as so much of the character of chattels as not to require the formality of a deed to pass property in them.' Washb. Real Prop., b. 3, ch. 4, 3; Brace v. Yale, 10 Allen (Mass.) 441.

"HILLARD states that 'a water-course is regarded in law as a part of the land over which it flows. Upon this principle it will pass with the latter by deed or patent, unless expressly reserved. So the right to a water-course is a freehold interest, of which the owner cannot be deprived but by the lawful judgment of his peers, or due process of law.' 2 Hilliard Real Prop. 203.

"But while it must be admitted that water in a pool upon a man's own estate is his property and part of his real estate, it is denied that he has any property in the water of a stream which passes over his soil, but a simple usufruct while it passes along. 3 Kent's Com. 439, 445. This use, it is admitted, however, authorized the actual taking of a reasonable quantity of the water for domestic, agricultural and manufacturing purposes. 3 Kent's Com. 439, 445.

"In *Elliott v. Fitchburg R. R. Co.*, 10 Cush. (Mass.) 191, SHAW, C. J., says: 'The right to flowing water is now well settled to be a right incident to property in the land; it is a right, *publici juris*, of such character that while it is common and equal to all through whose and it runs, and no one can obstruct or divert it, yet as one of the beneficial gifts of Providence, each proprietor has a right to a just and a reasonable use of it, as it passes through his land; and so long as it is not wholly obstructed or diverted or a larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question, depending on various circumstances. . . . It is, therefore, to a considerable extent, a question of degree; still the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes.' *Gould v. Boston Dock Co.*, 13 Gray (Mass.) 442; *Brown v. Bowen*, 30 N. Y. 519; *Merritt v. Brinkerhoff*, 17 Johns. (N. Y.) 306; *Pattent v. Marden*, 14 Wis. 437; *Tyler v. Wilkinson*, 4 Mason (U. S.) 397; *Evans v. Merriweather*, 3 Scam. (Ill.) 492.

"The general rule, as a rule of common law of England, was long since laid down as unquestioned by LORD HOLT, who says, in the case of *R. v. Wharton*, Holt 499, that a river of common right belongs to the proprietors of the land between which it runs, to each that part nearest his land. This has been frequently, if not uniformly, adopted as the established rule. Bac. Ab., tit. PREROGATIVE; Sir John Davis R. 155; Trustees of Hopkins Academy v. Dickinson, 9 Cush. (Mass.) 544. The uses of the waters of private streams belonging to the owners of the lands over which they flow. Cooper

v. Williams, 4 Ohio 253. They are as much individual property as the stones scattered over the soil. *Buckingham v. Smith*, 10 Ohio 288. This 'property,' however, in the water should be limited to a reasonable use or consumption, as against the rights of other riparian proprietors.

"But the entire ground upon which any property in water, as water flowing in a stream, is denied, in distinction from the admitted property in its impetus, is in that, as BLACKSTONE states, 'it is a movable, wandering thing, and of necessity must continue, by the law of nature.' 2 Bl. Com. 18. In *Sury v. Pigot*, Popham 166, it is quaintly said, that an ejection *firma* will not lie for water, 'because it is not *firma*, sed *currit*.' But when this 'movable, wandering thing' has congealed and become attached to the soil, does it not, like any other accession thereto, become a part of the realty? Wherein does it differ from alluvion, or accretion? which is but the imperceptible deposit or additions of earth, sand, gravel, and others matters made by rivers, flood or other causes, upon land. Angell on Water-courses, § 53. It is the adhering of property to something else, by which the owner of the thing becomes possessed of the right of another. Webster's Dictionary, where is cited the sentence from RICHARD COBDEN, 'The golden alluvions are there (in California and Australia) spread over a far wider space; they are found, not only on the banks of rivers and in their beds, but are scattered over the surface of vast plains.' This addition is alluvion, whether arising from natural or artificial causes. 2 Hilliard Real Prop. 195, note a; Bouv. Law Dict. It has been held, 'the seaweed thus thrown up by the sea may be considered as one of those marine increases arising by slow degrees; and, according to the rule of the common law, it belongs to the owner of the soil.' *Emans v. Turnbull*, 2 Johns. (N. Y.) 313.

"In *Blewett v. Tregonning*, 3 Al. & El. 554 (30 E. C. L. 151), which was an action for trespass for taking away sand from the plaintiff's close, it was pleaded that the close was contiguous to the seashore; that the sand had, from time to time, drifted and been carried by the wind from the seashore upon the close, and had been there deposited. PATTERSON, J., said, 'I am, however, of opinion that when anything in the nature of soil is blown or lodged

upon a man's close, it is part of the close, and he has a right to it against all the world.' If water in a pool upon one's land be part of the realty, because fixed and stationary, why is it not, when congealed over the bed of the stream to the thread of which his title extends? True, nature will in time, if it be not removed, again change the ice to fluid, and it will pass away from possession; but not more certainly than the changing winds and the rising tide will sweep away the shifting sands.

"But the supreme court of Massachusetts has discussed this subject in a case where it was held that the owner of a mill-pond on a water-course cannot maintain a bill in equity to restrain a riparian proprietor above from the cutting of ice on the same stream until the rights of the parties have been determined at law. SHAW, C. J., says: 'In a case between the owners of a mill with the privilege of a mill stream and the riparian owner of the land, on a large pond, supplying such mill stream, the nearest analogy perhaps, and that is apparently a strong one, is to the riparian proprietors, on a running stream,' which is the exact case now in judgment. He proceeds: 'As between these we think it is now well settled that the upper proprietor has a right to make any use of the stream which is beneficial to his estate and himself, which is reasonable, and does not either wholly take away the right of the lower proprietor, or does not practically and in a perceptible and substantial degree diminish and impair the equal and common right of the lower proprietor.' The court then questioned the right of the mill-owners to claim any participation in this right to cut ice enjoyed by the riparian proprietors. 'But,' the chief justice continues, 'there are other considerations. It is quite doubtful, considering the complainants' claim as a claim for actual and substantial damage to their mill, whether the cutting and carrying away of the ice would diminish the volume of water which would come to the complainants' mills, and of which they could avail themselves in driving their mills. Ice must be cut in winter. It usually melts in the latter part of the winter or early part of spring, together with the ice and snows of the surrounding country; and these, together with the rains which cause and promote them, constitute what are usually called spring floods, which commonly cause a

(b) *Personal Property*.—In *Michigan* it has been held that, as the ephemeral character of ice renders it incapable of any permanent or beneficial use as part of the soil, it is unlike crops or emblements, and that any sale of ice actually formed is a sale of personalty.¹ Of course, where it is cut and removed from the

great surplus of water in small mill streams, not only not available for any useful purpose to mills, but often injurious. And it may well be doubted, as to any quantity of ice cut from such a pond, whether, after spring floods have subsided, and the useless surplus of water passed away, and long before the approach of any dry season, the water in the pond would not be as full and copious for all mill purposes as if no ice had been cut.' *Cummings v. Barrett*, 10 Cush. (Mass.) 186.

"Here the right of the riparian proprietor to cut the ice formed over his land is conceded, provided it does not deprive someone entitled to the use of the water, to a substantial degree, of his rights to such use. In the case before us, no such limitation is involved. If Baldwin has not the right himself to cut the ice (which right it seems to us he possesses), still he has a right to prevent its severance from his land. And this right in him of removal can only be controlled by proof that such act would work a substantial injury to some right possessed by the riparian proprietor opposite, or to some proprietor below, on the stream. And in neither case could it deprive him of his property in the ice, but simply control him in its disposition. Indeed this right in the owner of the fee to remove ice from the stream, subject to a proper enjoyment of the water by others entitled to its use, was decided to exist in *Edgerton v. Huff*, 26 Ind. 35."

"In *Mill River Mfg. Co. v. Smith*, 34 Conn. 462, where the company owned an artificial mill-pond, it was held that it also owned the ice formed upon the pond, and that it was entitled to have the ice remain where it was; and action of trespass *quare clausum fregit* was maintained against the riparian proprietors, who owned the bed of the original stream, but did not in that case own the artificial mill-pond, for removing the ice. Clearly, such an action could be maintained by Baldwin, who owned, not only the bed of the stream, but the ice itself; and it follows, of course, that the instructions given by the court were erroneous."

1. *Higgins v. Kusterer*, 41 Mich. 318; s. c., 32 Am. Rep. 160. In this case Higgins below recovered a judgment against Kusterer for the value of a quantity of ice. Kusterer claims that the title never passed to Higgins, and that the property was lawfully acquired by himself, from one Loder, who cut it on a pond belonging to one Coats and sold it to defendant. The facts stated are briefly these: The ice in question was formed upon water which had spread over a spot of low ground, partly belonging to Hendrick Coats, forming the basin, the land being dry in the summer, and the rest of the year overflowed from a small brook leading into it. After the ice had been formed, and in Feb., 1878, Coats, by a parol bargain, sold all the ice in his part of the basin for fifty cents. The parties at the time stood near by in view of the ice, and the quantity sold was pointed out and the money paid. The ice was then all uncut. About two weeks thereafter John Loder, knowing that Higgins had purchased and claimed the ice, and having been warned thereof by Coats, offered Coats five dollars for the ice, which Coats accepted, and Loder cut it, and sold it to Kusterer, who had made a previous verbal contract for it. Higgins was present when the ice was loaded on Kusterer's sleigh, and forbade the loading and removal on the ground that he had purchased it from Coats. Kusterer referred the matter to Coats, who said he had sold it to Loder. The only question presented is, whether Higgins was the owner of the ice. The case was fully and ably argued, and the whole subject of the nature of ice, as property, was discussed in all its bearings. We do not, however, propose to consider any question not arising in the case. There are no conflicting purchasers in good faith without notice. Loder and Kusterer had full notice of the claim of Higgins before they expended any money. The sale to Higgins was not a sale of such ice as might, from time to time, be formed on the pond, but of ice which was there already, and which, if not cut, would disappear with the coming of mild weather, and

place where it is formed, it will always be considered as personal property.¹

3. Rights in and to.—(a) Navigable Waters.—The owners of land bordering upon navigable streams, in those States where they are held to be public property, have no title to the ice which forms on such streams, as an incident to their ownership of the banks, but the ice belongs to the first appropriator.² An appro-

have no further existence. It was not, like crops of fruit, connected with the soil by roots, or trees through which they gained nourishment before maturity. It was only the product of running water, a portion of which became fixed by freezing, and if not removed in that condition would lose its identity by melting. In its frozen condition it drew nothing from the land, and got no more support from it than a log floating on the water would have had. Its only value consisted in its disposable quality as capable of removal from the water while solid, and of storage when it might be kept in its solid state, which could not be preserved without such removal. If left where it was formed, it would disappear altogether.

While we think there can be no doubt that the original title to ice must be in the possessor of the water where it is formed, and while it would pass with that possession, yet it seems absurd to hold that a product which can have no use or value, except as it is taken away from the water, and which may at any time be removed from the freehold by the moving of the water, or lose existence entirely by the melting, should be classed as realty instead of personalty, when the owner of the freehold chooses to sell it by itself. When once severed no skill can join it to the realty. It has no more organic connection with the estate than anything else that floats upon the water. Any breakage may sweep it down the stream, and thus cut off the property of the freeholder. It has less permanence than any crop that is raised upon the land, and its detention in any particular spot is liable to be broken by many accidents. It must be gathered while fixed in place or not at all, and can only be kept in existence by cold weather. In the present case the peculiar situation of the pond rendered it likely that the ice could not float away until nearly destroyed, but could not be preserved from the other risks and accidents of its precarious existence. Any storm or shock might, at any moment, convert it into floating

masses, which no ingenuity of black-letter metaphysics could annex to the freehold. It does not seem to us that it would be profitable to attempt to determine such a case as the present by applying the inconsistent and sometimes almost whimsical rules that have been devised concerning the legal character of crops and emblements. Ice has not been much dealt with as property until a very recent date, and no settled body of legal rules has been agreed upon concerning it. So far as the principles of the common law go, they usually, if not universally, treat nothing movable as realty unless either permanently or organically connected with the land. The tendency of modern authority, especially in regard to fixtures, has been to treat such property according to its purposes and uses, as far as possible.

The ephemeral character of ice renders it incapable of any permanent or beneficial use as part of the soil, and it is only valuable or beneficial when removed from its original place. Its connection—If its position in the water can be called a connection—is neither organic nor lasting. Its removal or disappearance can take nothing from the land. It can only be used and sold as personalty, and its only use tends to immediate destruction. We think that it should be dealt with in law according to its uses in fact, and that any sale of ice ready formed, as a distinct commodity, should be *held* a sale of personalty, whether in or out of the water. C. J. CAMPBELL, in *Higgins v. Kusterer*, 41 Mich. 318.

In *Ward v. People*, 6 Hill (N. Y.) 140, it was *held* that ice packed in an ice-house was the subject of larceny, but the court remarked that it would not be such "when it constituted a part of the river or pond from whence it was originally taken."

1. *Ward v. People*, 6 Hill (N. Y.) 140.

2. *Gould on Waters*, p. 535; *Wood v. Fowler*, 26 Kan. 682; *Hickey v. Hazard*, 3 Mo. App. 480; *Hittinger v. Ames*, 121 Mass. 539.

priation of ice on these streams is made by surveying, marking, and staking off the ice, if unappropriated by others, and expending money to preserve it, and by these acts a sufficient possession is acquired to support an action of trespass.¹ But where the bed of a fresh water navigable stream belongs to the riparian proprietor, the ice forming therein belongs to him, and a person who appropriates it for his own use cannot justify the trespass on the ground that its removal was advantageous to navigation.²

(b) *Non-navigable Waters*.—Ice forming upon private fresh water streams belongs exclusively to the riparian proprietors, who may prevent its removal by others, or maintain trespass against those who cut it without license.³

By the common law, the limit of exclusive private ownership on waters, where the tide ebb and flowed, was high water mark; and except as modified by statute or custom, such appears to be the rule in the United States. Croley on Torts 321.

As to rivers above the ebb and flow of the tide, but navigable in fact, such as the Mississippi and other large rivers, there is some difference of opinion.

By the common law, the title of the riparian owner of a stream above the tidewater *prima facie* extended to the center of the stream; and this rule has been held in this country to apply to such rivers as the Mississippi, Detroit, Delaware, Connecticut, the Milwaukee, Sault St. Marie, Saginaw, Sandusky, etc.

Lorman v. Benson, 8 Mich. 18; Rundle v. Delaware, 1 Wall. Jr. (U. S.) 204; Hatt v. Hill, 1 Wharton (Pa.) 124; Adams v. Pease, 2 Conn. 481; Morgan v. Reading, 11 Miss. 366; Magnolia v. Marshall, 39 Miss. 110; Schurmyer v. St. Paul, 10 Minn. 82; Houck v. Yates, 82 Ill. 179; Arnold v. Elmore, 16 Wis. 509; Ryan v. Brown, 18 Mich. 106; Bay City, etc. v. Ind. Works, 28 Mich. 182; Gavit v. Chambers, 3 Ohio 496; Chicago v. Laftin, 49 Ill. 172.

In Iowa, North Carolina, Missouri, Pennsylvania, and perhaps other States, it has been held that the soil under navigable rivers in fact, though not subject to the ebb and flow of the tide, does not belong to the riparian proprietor, but to the State.

McManus v. Carmichael, 3 Iowa 1; Tomlin v. Dubuque, 32 Iowa 106; Houghton v. Chicago, etc., 47 Iowa 370; State v. Glen, 7 Jones (N. Car.) 321; Wilson v. Forbes, 2 Dev. (N. Car.) 30; Benson v. Morrow, 61 Mo.

30; Shrank v. Schuylkill, 14 S. & R. (Pa.) 71; Carson v. Blazer, 2 Binn. (Pa.) 475.

The same rule has been laid down in the United States supreme court. Barney v. Keokuk, 94 U. S. 324; R. R. v. Shurmeir, 7 Wall. (U. S.) 272.

In those States where the title of the riparian owner extends to the center of the stream, in running out the side lines of his property they are to be extended to the center of the stream from their respective termini on the shore, at right angles with the general course of the river, unless otherwise established by the terms of the grant or conveyance under which he holds.

Knight v. Wilder, 2 Cush. (Mass.) 198; Clark v. Campau, 19 Mich. 325.

And the boundary lines of water lots fronting on a river in such a manner that their side lines strike the shore at a right angle with the middle thread of the stream, but at a different angle with the shore at that joint, extend into the river, without reference to the shape of the shore. Bay City, etc. v. Industrial, etc., 28 Mich. 182.

1. Wood v. Fowler, 26 Kan. 682; Hickey v. Hazard, 3 Mo. App. 480.

2. Washington Ice Co. v. Shortall, 101 Ill. 46; 214 Am. Law Reg. 313.

3. State v. Pottmeyer, 30 Ind. 287; s. c. 33 Ind. 402; Lorman v. Benson, 8 Mich. 18; Mill River, etc. v. Smith, 34 Conn. 462.

But ice formed in water over the land of a private proprietor, and not within the limits of a great pond, may, like the water in which it is formed, be taken and carried away by him, unless others have acquired paramount rights by agreement with him, or by authority of law. Paine v. Woods, 108 Mass. 160; Higgins v. Kusterer, 41 Mich. 318.

(c) *Canals*.—When the State appropriates the fee of the land for the construction of canals, the former owner has no right to take ice therefrom;¹ but if the canal is simply a servitude, the owner of the fee is entitled to take the ice, when its removal does not interfere with navigation or the use of water for hydraulic purposes.²

(d) *Public Ponds*.—The privilege of gathering ice upon public ponds or other public waters is a common right.³ And, in *Massachusetts*, it has been held that the remedy for an unreasonable or excessive use of the liberty of cutting ice on the great ponds of that State was by indictment;⁴ and although the owner or lessee of an ice-house and land upon the shore of such pond has the same right as others to cut and take ice, which is the natural product of the ponds, he cannot, to the exclusion of other public uses, occupy any part of the pond.⁵

(e) *Private Ponds*.—The right in the ice formed on private

1. Indianapolis, etc. v. Burkhart, 41 Ind. 364; Cromie v. Board, etc., 71 Ind. 208. See Card v. McCaleb, 69 Ill. 314.

2. Edgerton v. Hoff, 26 Ind. 35.

3. Hittinger v. Ames, 121 Mass. 539; Cummings v. Barrett, 10 Cush. (Mass.) 186; West Roxbury v. Stoddard, 7 Allen (Mass.) 158; Paine v. Woods, 108 Mass. 160; Com. v. Vincent, 108 Mass. 441; Fay v. Salem, 111 Mass. 27; Gage v. Steinkrauss, 131 Mass. 222.

In Cummings v. Barrett, 10 Cush. (Mass.) 168, the court observes: "By the Colony Ordinance of 1641, Ancient Charters 148, 149, all great ponds, which are defined to be ponds of over ten acres, are declared public; and, though lying within the town, shall not be appropriated to any particular person or persons. We are not aware that this ancient law has ever been altered. What the rights are of adjacent or riparian owners of land bordering on such a pond has, we believe, never been the subject of adjudication or discussion. Some rights, we suppose, have always been exercised by such proprietors, such as a reasonable use of the water for domestic purposes, and for watering cattle. But in the advanced state of agriculture, manufactures and commerce, and with the increased value of land and all its incidents, there will probably be hereafter increased importance to the question, whether and to what extent such riparian proprietors have a right to the use of the waters for irrigating land, for steam engines, for manufactories which require a large consumption of water, and for the sup-

ply of their own ice-house for delivery to neighbors, and for more distant traffic.

We should hesitate to decide, in a case like this, that a mill owner on the outlet of such a pond can deprive any person of the right of cutting and carrying away ice, without showing actual damage to himself by diminishing the quantity of water to such a degree as to cause an actual perceptible and substantial damage to the use of the mill. The complainants, in their argument, do not claim that they have suffered much damage in this way, but they intimate that if the ice of this pond is to be cut up and sold at two dollars per ton, they desire to obtain their share of the profits. But a question, and, in fact, the main question, lies behind this, that is, whether they have any such right, as mill owners, as warrants them to claim any such participation in this profit. And it appears to us that this is a new and, at present, unsettled right, and not fit to be tried in a suit of equity until it has been tried and determined at law, especially in a suit like the present, brought by tenants for years, for a short term, whose term would be likely to expire before the suit could be brought to a close; and it is quite doubtful whether any decree in this suit would be conclusive of the right, as between the owners in fee of the mills and these respondents."

4. West Roxbury v. Stoddard, 7 Allen (Mass.) 158; Gould on Waters 335.

5. Hittinger v. Ames, 121 Mass. 539; Rowell v. Doyle, 131 Mass. 474.

ponds would be governed by the same law as that of non-navigable rivers.¹

(f) *Artificial Ponds*.—The owner of an artificial mill pond, who is entitled to the water of the pond, is also entitled, as against the riparian proprietors, to have the ice which forms thereon.² This right, probably, only exists when the taking of the ice would injure the water power, otherwise, the right to the ice would be in the riparian proprietor.³ And, if the mill owner maliciously and unnecessarily draws down the pond and destroys the ice, he is liable in damages to the riparian proprietor who owns the land under the pond.⁴

1. Gould on Waters 336.

2. Mill River, etc. v. Smith, 34 Conn. 462; Seeley v. Brush, 35 Conn. 419; Myers v. Whittaker, 55 How. Pr. (N. Y.) 376; Bates v. State, 31 Ind. 72.

3. In the case of Brookville & M., etc., Co. v. Butler, 91 Ind. 134, it was said: "We now come to the decisive question: is the owner of an easement to flow another's land entitled to the ice which forms on the water covering the land? There is some diversity of opinion upon this question, but our decisions declare that ice belongs to the owner of the servient estate. In State v. Pottmeyer, 33 Ind. 402; s. c., 5 Am. Rep. 224, the question was thoroughly examined, and it was held that the land owner might cut the ice, provided no injury was done to the rights of the owner of the dominant estate; and this was the decision in Edgerton v. Huff, 26 Ind. 35. This last case, it is true, has been overruled upon one point, but not upon this one. Again, in Julian v. Woodsmall, 82 Ind. 568, this question came before the court, and it was held that the right to overflow the land of another for mill purposes did not confer the right to cut the ice formed on the pond. The doctrine of these cases is consistent with long established principles, and is supported by analogous cases. The owner of the servient estate has the right to all the profits which may arise from the soil, and may make such a use of the soil as is not inconsistent with the easement. In the old case of Goodtitle v. Alker, 1 Burr. 133, it is said that 'The owner of the soil has a right to all above and under ground, except only the right of passage for the king and his people. This general doctrine applies to a private way. Gates may be erected across it, wells may be dug on it, water-ways may be constructed under it, sea-weed may be gathered off

of it, and herbage may be cropped from it. Bean v. Coleman, 44 N. H. 539; O'Linda v. Lothrop, 21 Pick. (Mass.) 292; Baker v. Frick, 45 Md. 337; Emans v. Turnbull, 2 Johns. (N. Y.) 313; s. c., 3 Am. Dec. 427. . . .

"There are well considered cases sustaining the view adopted by our decisions. In Dodge v. Berry, (N. Y.) 25, Alb. L. Journ. 303, it was held that a mill owner who has the right to flow the lands of another, does not own the ice which forms over the lands of such person, and that the latter may take the ice, unless he perceptibly injures the mill. The same conclusion was reached in Marshall v. Peters, 12 How. Pr. (N. Y.) 218."

4. Stevens v. Kelley, 78 Me. 445; s. c., 57 Am. Rep. 813. This right to take the ice is not a new one, though perhaps a greater importance has become attached to it within the last few years than formerly. It results from and grows out of the title to the bed of the stream, and such right to use of the water as results therefrom. This right is well settled by authority, as well as by principle. Gould Waters, § 191; Ham v. Salem, 100 Mass. 350; Paine v. Woods, 108 Mass. 172. The plaintiff's title to the ice must be the same in the water before it is congealed, and that is so well settled that it needs no further discussion. Elliot v. Fitchburg R. Co., 10 Cush. (Mass.) 191. The plaintiff therefore has the right to take the ice from the water resting upon his land, with the single qualification that it is not to be taken in such quantities as to appreciably diminish the head of the water at the dam below. Cummings v. Barrett, 10 Cush. (Mass.) 186. If this diminution could ever take place from such a cause, as is doubted in the last case cited (see pp. 189-190), there could be no such claim in the case in 78 Me., for the mill was not in use and the

4. **Gatherer of, in Public Waters.**—(a) *Rights.*—The right of taking ice off a public water is a common right, and the person who first takes possession is entitled to the enjoyment of the same without interference,¹ and if disturbed, the possessor can maintain trespass.²

(b) *Duties and Liabilities.*—It is the duty of those who appropriate to their use portions of a public river for ice fields, to so guard their fields after they have been cut into as not to expose to danger any persons who may innocently intrude upon them.³

5. **Right of Traveller Over.**—The right of travelling upon a navigable river is a common right, and belongs to the public at large. It was unknown to the old common law. If the traveller is injured by an unguarded cut ice hole, without negligence on his part, he can recover.⁴

water was not needed. Thus, at the time the water was drawn off, the title of the plaintiff to the ice was virtually absolute.

From this view of the right of the several parties, it would seem to follow as a self evident proposition that the defendant's interference with the plaintiff was unjustifiable, and that damage having resulted, they would be liable. But it is said that, having raised the water, it was their privilege to let it down. It may be true that they were under no obligation to keep up the dam any longer than their interest might dictate. But the dam was not removed nor abandoned. It was kept up, and by an affirmative act on the part of the defendants the water was drawn off when it was of no use to them, but a serious injury to the plaintiff. This cannot be said to be consistent with their qualified right to the use of the water and the reasonable care which they are legally bound to exercise in that use. It is rather a wanton use, a disregard of the rights of the others, which the law condemns, and which the writ alleges to be malicious and for the purpose of injuring the plaintiff. In *Phillips v. Sherman*, 64 Me. 171, it is said: "A wanton, or vexatious or unnecessary detention would render the mill owner so detaining liable in damages to those injured by such unlawful detention." If the owner of the dam has no right unreasonably to detain the water, for the same reason he would have no right wantonly to accelerate it to the injury of the owner above or below. In *Frye v. Moor*, 53 Me. 583, it was held that when water is accumulated wrongfully the party so doing in letting it out must do so at his peril. In this case, so far as

appears, the defendant had the right to flow the water for their mill only. It was not raised for that purpose, for the mill was not used. Nor does it appear for what purpose it was raised, except as alleged in the writ, to injure the plaintiff.

1. *Woodman v. Pitman*, 79 Me. 456; *Gould on Waters*, § 191; *Hittinger v. Eames*, 121 Mass. 539.

2. *Wood v. Fowler*, 26 Kan. 682; *Hickey v. Hazard*, 3 Mo. 480. Where a steamer was run back and forth unnecessarily near a boom enclosing a field of ice that was to be stored for the market, and the ice field was thereby destroyed, it was held that an action for damages would lie. *People's Ice Co. v. Steamer*, 44 Mich. 229.

"Besides, the ice fields, after they have been staked and fenced and scraped, and in some instances connecting fields extend across the river, have so far become the property of the appropriator, that an action would lie against one who disturbs his possession." *Woodman v. Pitman*, 79 Me. 456; and see *People's Ice Co. v. Excelsior*, 44 Mich. 229.

3. *Woodman v. Pitman*, 79 Me. 456. Assuming that the defendant has as good a right to the use of the water as the plaintiff, or the public generally had to the right of passage, the use of a common privilege should be such as may be most beneficial and least injurious to all who have occasion to avail themselves of it. *French v. Camp*, 18 Me. 433.

4. *Woodman v. Pitman*, 79 Me. 456; *French v. Camp*, 18 Me. 433. Frozen navigable rivers are public highways, and the traveller ordinarily has the paramount right of passage as neces-

6. Measure of Damages.—The measure of damages for cutting and removing ice is the value of the ice as soon as it exists as a chattel, that is, as soon as it has been scraped, ploughed, sawed, cut and severed, and is ready for removal.¹ The measure of damages for the wanton destruction of immature property, such as a field of forming ice, is the value of so much as would probably have been saved for the market, less the expense of storing it.²

7. Owner of Easement in Water.—The owner of an easement in water has no right to the ice formed on the water.³

8. Eminent Domain.—When riparian estates are taken by right of eminent domain, the value of ice privileges connected therewith may form an element of damages.⁴

9. Ice on Streets.—(See HIGHWAYS, MUNICIPAL CORPORATIONS, NEGLIGENCE, ETC.) A municipality is not liable for accidents occasioned upon its streets by mere slipperiness, caused by ice and snow, where it does not appear that there has been any negligence in allowing the ice and snow to collect or remain so as to be notoriously dangerous to passers by.⁵ But a

sarily incident to the reasonable enjoyment of his right, but it must be exercised in common with such uses as the frozen condition and surface of the river is adapted to. One such use is the harvesting of ice, a use that may impede travel. Both are common rights, and both may be lawfully exercised, but both cannot be enjoyed at the same spot at the same time, because the one may be destructive of the other, so that it may be reasonable for that use giving the largest public benefit to restrict other uses to a narrower compass, but it cannot monopolize the whole right, to the utter destruction of all other rights.

Ice gathering has become a remunerative and useful industry, and is of great benefit to the public. The nature of the business necessarily requires that it should not be subject to a paramount right of travel that may destroy its reasonable enjoyment. Both ice gatherers and travel that may be destroyed have a common right. Neither has such a paramount right as to permanently and entirely extinguish that of the other, but both may exercise their right reasonably under all the circumstances surrounding their conduct.

If the public has appropriated a particular portion of the ice of a stream or pond, and has worn a well-beaten track upon the same, would it be reasonable for the ice gatherer to interrupt such? So, if the ice gatherer has appropriated and marked his ice-field, leaving the

traveller room for passage, would it be reasonable for the traveller to go upon it and defile it? Both uses of the ice are lawful, but neither may wholly exclude the other. Both cannot have the possession and the use of the same ice for different purposes, although both have a common right to it so long as it remains unappropriated by either. The taker of the same from the stream may not interfere with the navigation of it, but the harvest of the ice obstructs the public highway at that place; so the one can no more take the whole ice and destroy the public highway than the other, without legislative authority, could divert the stream and leave its bed dry and unnavigable. Courts may declare the relative rights of persons, but they cannot extinguish them. *Woodman v. Pitman*, 79 Me. 456.

1. *Washington Ice Co. v. Shortall*, 101 Ill. 46; s. c., 21 Am. Law Reg. 313.

2. *People's Ice Co. v. Steamer "Excelsior"*, 44 Mich. 229.

3. *Brookville, etc. v. Butler*, 91 Ind. 134; s. c., 26 Am. Rep. 581.

Contra, *Mill River Woollen Manufac. Co. v. Smith*, 34 Conn. 462; *Myer v. Whittaker*, 55 How. Pr. (N. Y.) 376.

4. *Ham v. Salem*, 100 Mass. 350; *Paine v. Woods*, 108 Mass. 173. See *Indianapolis Water Works v. Burkhart*, 41 Ind. 364; *Cromie v. Board*, 71 Ind. 208; *Card v. McCaleb*, 69 Ill. 314.

5. *Stanton v. Springfield*, 12 Allen (Mass.) 566; *Nason v. Boston*, 14 Allen (Mass.) 501; *Stone v. Hubbardson*, 100

municipality is liable for failing to remove, within a reasonable time, all such accumulations of ice and snow as constitute an obstruction to its streets, and are dangerous to persons passing thereon.¹

IDEM SONANS.—See NAME.

IDENTITY.—(See ACCESSION, CONFUSION OF GOODS, BASTARDY, CRIMINAL LAW, EVIDENCE, HANDWRITING, HOMICIDE, MEDICAL JURISPRUDENCE, MONEY, MURDER, NAME, WRITINGS.)

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1. **Definition.**—The state or quality of being identical or the same; sameness. The condition of being the same with something described or asserted, or of possessing a character claimed.²

2. **Identity of Name Raises Presumption of Identity of Person.**—It will be considered *prima facie* evidence to show that a party bearing the same name as the party to the suit did the act with which it is sought to affect such party;³ but if there be several persons of the same name in a particular locality, or in the same business or society, or there are other facts which tend to raise a doubt as to the identity of the person, mere identity of name will not establish identity of person.⁴

Mass. 50; *Smythe v. Bangor*, 72 Me. 249; *Landolt v. Norwich*, 37 Conn. 161; *Borough, etc. v. Kline*, 100 Pa. St. 119; *Evans v. Utica*, 69 N. Y. 166; *Cook v. Milwaukee*, 24 Wis. 290; *Ward v. Jefferson*, 24 Wis. 342; *Chicago v. McGiven*, 78 Ill. 374; *Broburg v. Des Moines*, 63 Iowa 523; s. c., 4 Am. & Eng. Corp. Cas. 627; *Burford v. Grand Rapids*, 53 Mich. 98; s. c., 8 Am. & Eng. Corp. Cas. 549.

1. *Todd v. Troy*, 61 N. Y. 506; *Collins v. Council Bluff*, 32 Iowa 324; *Barton v. Montpelier*, 30 Vt. 650; *Savage v. Bangor*, 40 Me. 176; *Hall v. Manchester*, 40 N. H. 410; *Looker v. Inhabitants*, 13 Pick (Mass.) 343; *Whitman v. Groveland*, 131 Mass. 553. **Authorities.**—Gould on Waters (1883); Washburn on Easements (1885); Angell on Watercourses (1877).

2. Webster's Dict.
"Human identity, therefore, is an inference drawn from a series of facts, some of them veiled, it may be, by dis-

guise and all of them more or less varied by circumstances." Whart. Cr. Ev., § 13. See, also, Whart. Cr. Ev., § 803, n. 6.

As to Consciousness of Identity, see Whart. Cr. Ev., § 378 and notes.

"Recollecting how easily opinions as to identity are affected by prejudice, we must conclude, when we rest on the opinions of witnesses as our authority, that the two great constituents of reliability are (1) familiarity with the person in controversy, and (2) freedom from personal or party prejudice. Whart. Cr. Ev., § 807.

3. 2 Phill. Ev. 508.

4. *Goodell v. Hibbard*, 32 Mich. 48.

Hernsher v. Kline, 57 Pa. St. 403.

Gitt v. Watson, 18 Mo. 274; *State of Missouri v. Moon*, 61 Mo. 276; *People v. Rolfe*, 61 Cal. 541; *Aultman v. Timm*, 93 Ind. 158; *Hamber v. Roberts*, 7 M. G. & S. 860; 7 C. B. 860.

Identity of name is sufficient in the first instance as presumptive evidence

(a) *In Actions*.—Where the name, residence and profession of the party defending the action are the same, the burden is on him to disprove identity.¹

of identity, and it devolves upon him who denies the identity to overcome this presumption by proof. *Hoyt v. Davis*, (Mo.) 3 West Rep. 412; *Simpson v. Dinsmore*, 9 M. & W. 47.

But mere identity of name has been held not even *prima facie* evidence of identity where the transactions are remote. *Sitler v. Gehr*, 105 Pa. St. 577.

It is *prima facie* evidence of identity if a name is written up in an auction room, and the auctioneer is addressed by the bystanders by that name. *Collier v. Nokes*, 2 C. & K. 1012.

1. *Russell v. Smith*, 9 M. & W. 818; *Com. v. Costello*, 120 Mass. 369. But see *Giles v. Comfort*, 2 C. & K. 653.

Identity of name of witness with that contained in a record of a conviction of an offence creates a *prima facie* presumption of identity. *State v. McGuire*, 87 Mo. 642; *People v. Rolfe*, 61 Cal. 541.

Identity of name is *prima facie* evidence that a person sued in New York in 1857 is the same person who was sued by that name in Mississippi in 1841. *Hatcher v. Rochelaw*, 18 N. Y. 87.

But where a sheriff made return to a summons against May Louisa Ismon that he served Mary Louisa Ismon, it was held that the names indicated two distinct persons, and that there was no service on May Louisa Ismon. *Kennedy v. Merriam*, 70 Ill. 228. See *Rolston v. Thomas*, 55 Mo. 582. See NAME.

As to what proof is requisite to establish the identity of a party to a suit who is alleged to have died in a remote part of the world, see *Nicholas v. Lansdale*, Litt. Select Cases (Ky.) 21.

An action being brought against William Henderson for negligently navigating a vessel, and the circumstances under which the collision took place having been proved, it was objected that no evidence had been given that the defendant was the pilot in charge of the vessel, whereupon the plaintiff's counsel called out "Mr. Henderson," upon which a person in court answered "here!" and said, "I am the pilot." It was proved by one of the witnesses who had gone on board the vessel at the time of the accident that he had seen that person there acting as

pilot. Held, that this was sufficient evidence of the identity of the defendant with the pilot. *Smith v. Henderson*, 9 M. & S. 798; *Wilton v. Edwards*, 6 C. & P. 677; *Reynolds v. Staines*, 2 C. & K. 745.

Sewell v. Seal, 4 Adol. & El. (N. S.) 626; *Roden v. Ryde*, 3 G. & D. 604; *Murieta v. Wolfhagen*, 3 C. & K. 744; *Greenshield v. Crawford*, 9 M. & W. 314. See *Atchison v. McCulloch*, 5 Watts (Pa.) 13; *Moss v. Anderson*, 7 Mo. 337; *Russell v. Fenno*, 11 Rich. (S. Car.) 303; *Warren v. Anderson*, 8 Scott 385; *Harrington v. Fry*, Ry. & M. 90; *Douglass v. Libbey*, 46 Cal. 49; *Russell v. Smith*, 9 M. & W. 810; *Page v. Mann*, 1 Mood. & Malk. 79; *Fletcher v. Conly*, 2 Gr. (Iowa) 88; *Grindle v. Stone*, 78 Me. 176; *Wilbur v. Clark*, 22 Mo. 503; *Bell v. Brewster*, 44 Ohio St. 690; *Hamber v. Roberts*, 7 C. & B. 861.

But it has been held, that to prove the signature of a person, it is not enough to show that it is the same with the signature of a man bearing the same name, but it is requisite to give some evidence that it was written by the same person. *Kennig v. Flynn*, 2 Durfee (R. I.) 319; *Whitelock v. Musgrove*, 1 C. & M. 511; 3 Tyr. 541; *Nelson v. Whittall*, 1 A. & B. 10; *Jackson v. Christman*, 4 Wend. (N. Y.) 278. See HANDWRITING.

It has been held, that when the payor and payee of a note are of the same name, it must be presumed in behalf of an assignee of the note that they are different persons. *Cooper v. Poston*, 1 Duvall (Ky.) 92. But see *Curry v. Bank of Mobile*, 8 Port. (Ala.) 360.

Where the declaration described the note sued on as made by *Andrew A. Loudon*, and the general issue without oath was pleaded, it was held that the production of a note signed *A. A. Loudon* was admissible, but not sufficient, without further proof to identify it as the note sued on to authorize a judgment for the plaintiff. *Louden v. Walpole*, 1 Ind. 319. See, also, *Carpenter v. State*, 8 Mo. 291.

In an action by indorsee against maker of a promissory note, the defendant pleaded: (1) That he did not make the note; (2) that he made it for the accommodation of the plaintiff. There

(b) *In Written Instruments*.—To prove the execution by defendant of an instrument on which he is sued, if it be shown that such instrument is executed by a person bearing defendant's name, it is not necessary to give evidence strictly identifying the person, whose signature is proved, with the party on whom process has been served, unless facts appear which raise a doubt of the identity.

(c) *In Title to Lands*.—Parties in successive deeds constituting a chain of title are presumptively the same persons.¹

was an attesting witness to the note who, at the trial, swore that he saw the signature (Hugh Jones) to the note written by a party whose occupation and residence he described, but that he had had no communication with him since, and that this was a common name in the neighborhood where the note was made. *Held*, that there was no evidence to go to the jury of the identity of the defendant with the maker of the note, and that the second plea could not be called in aid for that purpose. *Jones v. Jones*, 9 M. & W. 75. See *Jackson v. Christmann*, 4 Wend. (N. Y.) 277; *Corfield v. Parsons*, 1 C. & M. 730; 3 Tyr. 856. But where, in an action on a note, the execution of which was admitted, but the statute of limitations pleaded, the plaintiff called one who testified that, acting as his attorney, he had addressed a letter through the postoffice to the defendant, with whom the witness was not personally acquainted, on the subject of the claim, to which he duly received a reply; and that shortly after this a person called at his office who introduced himself as the defendant, and in conversation made such a promise as would have taken the case out of the statute. The defendant's name was an unusual one, and no attempt was made to show a false personation; *held*, sufficient *prima facie* proof of identity to allow the evidence to go to the jury. *Kelly v. Valney*, 5 Clark (Pa.) 300; s. c., 2 Am. Law Reg. 499. See, also, *Moog v. Benedicks*, 49 Ala. 512.

It will be intended that the payee and indorsee of a promissory note is the same person when the only difference in the names is the insertion of the initial of a middle name in the indorsement. *Hunt v. Stewart*, 7 Ala. 525.

A party to an action is not entitled to write his signature in the presence of the jury for the purpose of being compared with a signature purporting to be his, the genuineness of which is denied.

Ring v. Donohue, 110 Mass. 155. See, as to genuineness, *Boyd v. Wyley*, 18 Fed. Rep. 355.

1. *Cross v. Martin*, 46 Vt. 14; *Chamblee v. Tarbox*, 27 Tex. 139. See *Heacock v. Dubaker*, 108 Ill. 641. Two certificates for lands under an act disposing of the vacant lands of the commonwealth, granted in the same name, will be taken as having been granted to the same person, unless the contrary is shown. *Cates v. Loftus*, 3 A. K. Marsh. (Ky.) 204. Where the name of a subsequent grantee of land is the same as that of a prior holder and grantor, he will be presumed to be the same person. *Brown v. Metz*, 33 Ill. 339; *Jackson v. King*, 5 Cow. (N. Y.) 237. "The first thing to be proved is, that the plaintiff is seized of the share he claims of the real estate. If his name is John Smith or John Jones, or any of the common and frequently recurring names, it would be at once apparent that to prove a John Smith to be entitled is but one step to prove the plaintiff's title; the next is to prove that he is the same person. In the nature of things, the same question must arise in every case. It is not often a matter of controversy whether the identity of the plaintiff is established, because the doubt, if any arises, can generally be readily removed. But if a question is made, a jury is not at liberty to presume that a person, even of so peculiar a name as Timothy Mooers, is the same person as the man of the same name who is shown to be entitled to a particular estate. As a case of some interest, in its time, the *Berkley Peerage Case*, 4 Camp. 401, a failure to establish the identity of the plaintiff's ancestor and a son of a deceased peer of the same name, was the only deficiency in the chain of the claimant's title. Beyond the identity of name, no evidence could be produced that the persons were the same." Per *BELL J.*, *Mooers v. Baker*, 29 N. H. 431. See, also, *Balber v. Donaldson*, 2 Grant

(d) *Family Name—Initials.*—It will not be assumed as a legal presumption that where the family name and initials are the same there is identity of persons.¹ Where there are two persons of the same name, the presumption is the elder is meant, but this may be explained otherwise according to fact.^{2,3}

3. *Proof of Identity.*—Identity of person may be proved by the concurrence of several characteristics. In a question of identity, it is admissible to show the name a person bore, his personal appearance and conversations, and the account he gave of him-

(Pa.) 459; *Jackson v. Goes*, 13 Johns. (N. Y.) 518; *Jackson v. Cody*, 9 Cow. (N. Y.) 140; *Brown v. Wales*, L. R., 15 Eq. 142. As to identity of a tract of land, see *Cochran v. Dodd*, 16 Ind. 476.

1. *Bennett v. Libhart*, 27 Mich. 489. See *Reed v. Gage*, 33 Mich. 179; *Houk v. Barthold*, 73 Ind. 22; *Jones v. Turnour*, 4 C. & P. 204.

2. *Bate v. Burr*, 4 Harr. (Del.) 130.

3. *Henry V. Libhart* is not entitled to recover in an action upon a judgment in favor of H. V. Libhart without any proof of his identity with the plaintiff in such judgment, and in the absence of any averment in his declaration that he was known by the latter name, or that the judgment was rendered in his favor by that name. *Bennett v. Libhart*, 27 Mich. 489. So it was error to submit to the jury without other proof the question whether "R. P. O'Neil," who executed a deed, was Rev. Patrick O'Neil, the owner of the land. *Burford v. McCue*, 53 Pa. St. 427; *McMinn v. Whelan*, 27 Cal. 300. So where a deed was made to one of two persons of the same name the one the father, the other his son, both living together and occupying the premises conveyed, it is erroneous to exclude from the consideration of the jury by instruction the character and circumstances of the occupancy, as bearing upon the question whether the deed was to the father or to the son. *Graves v. Colwell*, 90 Ill. 613.

When there are two persons of the same name, father and son, residing in the same town, and the latter uses a well known addition to his name, as "junior" or "younger," to designate him from his father, and he is usually known by such designation, an indictment, in order to allege any offence as committed with him or upon him, should connect with his name the ordinary addition which is, by himself and others, used to distinguish him from his father; and in the absence of such addi-

tion, the indictment must be understood to allege the offence with or upon the latter. *State v. Vittum*, 9 N. H. 521. But see *King v. Peace*, 3 B. & Ald. 579.

"If father and son are both called A. B., by naming A. B. the father *prima facie* shall be intended." Per *HOLT*, C. J. *Lepoit v. Browne*, 1 Salk. 239; *Sweeting v. Fowler*, 1 Stark. 106; *Jarmain the elder v. Hooper*, 6 M. G. & S. 827; but when, in *assumpsit* on a promissory note made by the defendant, payable to the order of J. H., and indorsed by J. H. to the plaintiff, it appeared that there were two persons of the same name, father and son, and there was no evidence to show to which of them the note had been given, but it appeared that the indorsement was in the handwriting of J. H., the son: *Held*, that although *prima facie*, the presumption would be that J. H., the father, was meant, that presumption was rebutted by the son's indorsement. *Stebbing v. Spicer*, 8 M. & G. 827; 8 C. B. 827.

Where Aaron I. Boge was named in the charter of Ringston as one of the proprietors, the name of the plaintiff's ancestor was Aaron Jordon Bogue, but at an early period in his life the surname was usually written Boge. In the proprietor's records, Aaron J. Boge in one instance, and Aaron Jordon Bogue in another, was mentioned as one of the proprietors. *Held*, that the names were *prima facie* to be regarded as identical, and as establishing *prima facie* the identity of the plaintiff's ancestor with the person named in the charter. *Bogue v. Bigelow*, 29 Vt. 179. See generally, *Inhabitants of Dennis v. Inhabitants of Brewster*, 7 Gray (Mass.) 301; *Rincaid v. Heme*, 10 Mass. 203; *State v. Vittum*, 9 N. H. 519; *Jones v. Parker*, 20 N. H. 31; *Brotherline v. Hammond*, 69 Pa. St. 128; *Clements v. State*, 21 Tex. App. 258; 2 Wharton on Evidence, § 701. § 1273.

self, his family connections and associations.¹

The question of identity is for the jury. The court cannot presume identity of persons.²

1. *Mullery v. Hamilton*, 71 Ga. 720; *Tichborne Case*, 3 Whart. & Stille's, Med. Juris., § 623.

2. *Ellsworth v. Moore*, 5 Iowa 486; *Chandler v. Shehan*, 7 Ala. 251. An *ex parte* affidavit is good evidence to prove the identity of a person, so far as it respects his marriage or pedigree. *Winder v. Little*, 1 Yeates (Pa.) 152.

Oral evidence is competent to show that a plaintiff is the same person as the defendant's principal. *Chandler v. Shehan*, 7 Ala. 251.

The fact that a person who committed a crime said before his commission that he was the defendant, was proper to be considered by the jury, in connection with other circumstances in evidence, in determining the question of identity. *State v. Kepper*, 65 Iowa 745.

Court Cannot Presume Identity of Person.—Whilst the supreme court (of Iowa) knows judicially the judges in the different judicial districts of the State, and will presume, in the absence of any showing to the contrary, that the courts of the district court are held by such judges, it cannot know that the attorney J. D. Thompson and the Hon. J. D. Thompson, judge of the 13th judicial district, are one and the same person. *Ellsworth v. Moore*, 5 Iowa 486.

Where the witnesses expressed the belief that the defendant was the person they had seen, but did not positively and beyond a doubt identify him, it was held that the evidence was sufficiently certain respecting the identity of the defendant to go to the jury, and it was for the jury to say what weight it was entitled to. *People v. Rolfe*, 61 Cal. 541.

A parish registry, showing the date of a child's baptism, is not competent evidence of his birth or his identity. *Morrissey v. Wiggins Ferry Co.*, 47 Mo. 521. But in *England* it has been held that certificates of births, baptisms, marriages or deaths are admissible as evidence, without proof of the identity of the persons mentioned in them with the persons as to whom the fact recorded by them is sought to be established. *Hubbard v. Lees*, L. R., 1 Exch. 255. See *Sayer v. Glossut*, 2 Exch. 409.

Where the records of a county court show that administration was granted

on the estate of a certain person "deceased," and it appeared in evidence that such person, who was the plaintiff in an action on trial, was a resident of the county a few years prior to the grant of administration, there is *prima facie* evidence of identity of the deceased person with the plaintiff. *Clark v. Pearson*, 53 Ga. 496. Suggestion of the death of a plaintiff in the record, and an order to make his devisees parties, is *prima facie* evidence of his death, for the purposes of the trial. *Stebbins v. Dungan*, 108 U. S. 32.

A child may be offered in evidence to identify the putative father by its likeness to him. *Stumm v. Hummel*, 39 Iowa 470. So in an action involving legitimacy. *Warlick v. White*, 76 N. Car. 176. But on a trial for seduction, the infant alleged to be the fruit thereof cannot be offered in evidence to corroborate the prosecutrix by reason of supposed resemblance between the child and defendant. *State v. Danforth*, 48 Iowa 43. See *State v. Woodruff* 76 N. Car. 89; *State v. Britt*, 78 N. Car. 439; *Keniston v. Rowe*, 16 Me. 38. Nor in prosecution for bastardy. *Risk v. State*, 19 Ind. 152. Compare, however, cases cited under *BASTARDY*, 2 Am. & Eng. Encyc. of Law 153.

3 Whart. & Stille Med. Jur., § 620.

Perhaps the most remarkable of the many cases involving the identity of an individual is the *Tichborne* case. For description of this case, see *Sergeant Ballantyne's Experiences*, chs. 41 & 42; 3 Whart. & Stille's Med. Jur., § 623. For other curious cases of doubtful and disputed identity, see 3 Whart. & Stille Med. Jur., § 620-626, § 649 *et seq.*

3 Whart. & Stille Med. Jur., § 666.

In an action for a personal injury, the wounded limb may be exhibited to a surgeon at the trial. *Mulhado v. Brooklyn City R. R. Co.*, 30 N. Y. 370.

Upon the trial of an indictment for burglary, evidence that an article not laid in the indictment as part of the property stolen was taken with the articles specified, and evidence tending to identify it with a similar article seen thereafter in the possession of the accused, is competent. *Foster v. People*, 63 N. Y. 619.

4. **Records of Birth, Marriage and Death** may, in some cases, be used in connection with other evidence to establish identity.

5. **Disputed or Doubtful Identity.**—"Many curious cases of doubtful or disputed identity might be cited to illustrate the singular fortuitous resemblance between individuals, not only in their general personal appearance, but also in accidental marks. Other cases might also be related in which long absence and various circumstances have so changed a person, that his nearest relatives have not been able to recognize him. Usually in cases of disputed identity, whether of the dead or living, a scar, a deformity, or some congenital or indelible mark, as *navus maternus*, or mother's mark, a mole, a tatooing, etc., has proved the only means of recognition."

6. **Inspection.**—"All instruments by which an offence is alleged to have been committed; all clothes of parties concerned, from which inferences may be drawn; all materials in any way part of the *res gestæ*, may be produced at the trial of the case. Injury to the person may also be proved by inspection."

7. **Identification by Voice.**—Positive recognition of the voice of a person who is familiar with it may sometimes suffice to prove his identity.¹

8. **Photographs.**—The courts judicially recognize photography as a proper means of producing correct likenesses, and photographs, when shown to be correct resemblances of the person or thing, may be given in evidence to establish identity of persons and places.²

1. *Davis v. State*, 15 Tex. App. 594; *Com. v. Hayes*, 138 Mass. 185. In *Com. v. Scott*, 123 Mass. 222, it appeared in evidence that on the night of January 27, 1876, the Northampton National Bank was broken into, and that a large quantity of valuable securities were stolen from it. It was also shown that Whittlesey, the cashier of the bank, was taken from his room and the combination of the safe lock on the vault of the bank extorted from him by two men, whom he claimed to identify as the defendants. Whittlesey undertook to identify the defendant, Scott, by the voice, but to the question whether there was any peculiarity about the voice, he could not answer. The defendant, Scott, was then asked to stand up and repeat something, which he did, and the witness said he was suppressing his voice. Scott was then told by his counsel "to speak it right out." The judge then said, I do not think this is competent. The counsel for defendant contended that he had a right to have the peculiarities of the defendant's voices pointed out by the witness, and

for this purpose the voices themselves were competent to be introduced. The judge ruled otherwise. See *Harrison Case*, 12 St. Tr. 850; *Regina v. Cheverton*, 2 F. & F. 832.

A prisoner confined in the jail with defendant, testified that he held a conversation with the defendant through the soil pipes, in which defendant confessed his guilt, and that the witness knew it was defendant from his voice. *Held*, that the testimony was admissible; its weight was for the jury. *Brown v. Com.*, 76 Ga. St. 319.

2. *Udderzook v. Com.*, 76 Pa. St. 340.

Luke v. Calhoun County, 52 Ala. 115; *Cowley v. People*, 83 N. Y. 464.

On an indictment for bigamy, a photographic likeness of the first husband may be shown the witnesses present at the first marriage, in order to prove his identity with the person mentioned in the marriage certificate. *Regina v. Tolson*, 4 F. & F. 103.

Photographs may be used on the trial for an obstruction to a highway, to show the nature of the *locus in quo*.

9. Evidence of Identity in Criminal Trials.—Although it is necessary, in a case of murder, that there should be evidence that the body found is the body of the murdered man, the circumstances may be sufficient evidence of identity.¹

Regina v. United Kingdom Electric Telegraph Company (limited), 3 F. & F. 73. So in an action of trespass for injuring plaintiff's building. *Cozzen v. Higgins*, 1 Abb. (N. Y.) App. 451.

And in actions to recover for injuries caused by a defect in a highway which a town is bound to keep in repair. *Blair v. Pelham*, 118 Mass. 420; *Church v. Milwaukee*, 31 Wis. 512.

A mutilated body, whose face was discolored and swollen, was found having been buried apparently for some days; the witness who found it had never seen the person before. He might testify that the face resembled a photograph of a person alleged to be the one found; the question whether the witness could identify it was for the jury. *Udderzook v. Com.*, 76 Pa. St. 340.

A photograph shown by the widow to be a good likeness of her husband, and an indorsement thereon in his handwriting of his name, date, and place of its execution, are admissible in evidence to show the identity of the husband and a murdered man, when offered in connection with the testimony of the photographer that it was the likeness of a man of the same name as the husband taken at the place, and at about the time indorsed on it, and the further evidence of a witness who saw deceased before and after death that it was a good likeness. *Luke v. Calhoun Co.*, 52 Ala. 115.

See generally, on question of proving identity or genuineness by means of photograph. *Marcy v. Barnes*, 16 Gray, (Mass.) 161; *Hollenbeck v. Rowley*, 8 Allen (Mass.) 473; *Schnible v. Ins. Co.*, 9 Phila. (Pa.) 36; 1 W. N. C. (Pa.) 369; *Beavers v. State*, 58 Ind. 530; *Taylor Will Cases*, 10 Abb. (N. Y.) Prac. Rep. 300; *Time v. Parkersburg Branch R. R. Co.*, 39 Mo. 36; *In re Foster's Will*, 34 Mich. 21; *Eborn v. Zippleman*, 47 Tex. 503; *Leathers v. Saloor Wrecking Co.*, 2 Woods (U. S. C. C.) 680; *Re Stephens, L. R.*, 9 C. P. 187.

For other means of identifying the living or dead, as by skeleton, bones, teeth, dress, marks, scars, tattooing, etc., see 3 Whart. & Stille Med. Jur., book 4, ch. 2.

1. *Regina v. Cheverton*, 2 F. & F. 833.

Where the death of a person alleged to have been murdered is *prima facie* established by the identification of a dead body as his, the burden of proof is upon the prisoner to show that such person is still alive. To establish a defence of this character, the same weight of evidence is necessary as that to sustain an *alibi* of the prisoner. *State v. Vincent*, 24 Iowa 570. But a witness cannot express his opinion that the body found was that of the murdered man. *People v. Wilson*, 3 Parker C. R. (N. Y.) 199.

To identify the body found as that of a person alleged to have been murdered, evidence of a similarity in the color of the hair and whiskers, of correspondence in the measure of the body and stature of the person, and of the dentist who had extracted teeth for him, of the absence of the same teeth from the jaw of the body found, and of similar marks upon others remaining to those he had noticed upon the teeth of C, is competent. *Lindsay v. People*, 63 N. Y. 143.

After evidence had been given tending to identify certain boards as those taken from the prisoner's sleigh, and that spots caused by the flow of blood from the dead body had been on them since the night of the alleged removal, there being no evidence that they had been tampered with since that time, or were in any different condition, save that hogs had been dressed upon them, evidence of an expert as to certain experiments determining that the spots upon the board were some of them human and some hog's blood, was held admissible. The facts that the boards had been a long time out of the possession of the prisoner and had been used by other people, while they affected the question as to the identity of the boards and of the blood spots, did not render such evidence inadmissible. *Lindsay v. People*, 63 N. Y. 144. See *Murphy v. People*, 63 N. Y. 590; *Com. v. Piper*, 120 Mass. 185.

In a trial for theft of a gelding, a State's witness could not recognize the prisoner as the man he had seen in possession of the animal, but stated that, as a witness in a previous trial, he had identified the person then accused as the man. The attorney for the State

10. Identity of Things.—Equity will follow a fund through any number of transmutations, and preserve it for the owner so long as it can be identified.¹

IDIOCY.—See **INSANE**.

IF.—See **ESTATES, LEGACIES AND DEVISES**.

IGNOMINY.—See note 2.

IGNORANCE.—(See **ACCORD AND SATISFACTION, ATTORNEYS, COMPROMISE, CRIMINAL LAW, EQUITY, INTENT, MISTAKE, SPECIFIC, PERFORMANCE, STATUTE OF LIMITATIONS.**)

I. Definition, 870.

(a) *Ignorance of Fact*, 871.

II. Division of the Subject, 871.

(b) *Ignorance of Law*, 873.

1. Definition.—Ignorance means want of knowledge.² It has

testified that the prisoner at the bar was the same person identified by the witness on the previous trial. *Held*, competent evidence, and sufficient to support the conviction. *Ruston v. State*, 4 Tex. App. 432. See, also, *Curry v. State*, 7 Tex. App. 267.

Where, in a trial for murder, evidence was given of the finding of the skeleton of a human being of the sex of the person charged to have been murdered, and corresponding to his size, it was *held* that this was sufficient evidence of the *corpus delicti* to justify the admission of circumstantial evidence to identify the skeleton as that of the murdered party, as well as to show the cause and manner of his death. *McCulloch v. State*, 48 Ind. 103.

An indictment for murder sufficiently alleged the name of the deceased as "one Chino, whose other name is to the grand jurors unknown." *De Olles v. State*, 20 Tex. App. 145.

See generally, on identity of person accused of crime. *People v. Williamson*, 29 Hun (N. Y.) 520; *White v. Com.*, 80 Ky. 280; *Hopper v. Com.*, 6 Gratt. (Va.) 684; *State v. McGuire*, (Mo.) 4 West. Rep. 417; *Hamby v. State*, 36 Tex. 523; *Com. v. Cunningham*, 104 Mass. 545; *Com. v. Webster*, 5 Cush. (Mass.) 295.

See generally, on identity of person. *Fanning v. Mulford*, 3 E. D. Smith (N. Y.) 206; 22 Cent. Law Jour. 227; *Kansas Pacific Rail'y Co. v. Miller*, 2 Col. Tr. 442; *Dupoyster v. Gagani*, 84 Ky. 403; *Rooker v. Rooker*, 12 W. R. 807; 3 S. & F. 526; *State v. Kingsbury*, 58 Me. 238; *American Express Co. v. Spellman*, 90 Ill. 455; *Ruloff v. People*, 45 N. Y. 213; 18 N. Y. 179.

1. *Farmers & Mechanics' Nat. Bank v. King*, 57 Pa. St. 202.

Earmark is only an index enabling a beneficial owner to follow his property. It is not indispensable to enable him to assert his right to the property, its product or substitute. Evidence of substantial identity may be attached to the thing itself or it may be extraneous. *F. & M. Nat. Bank v. King*, 57 Pa. St. 202.

Money.—For the equitable doctrines as to the earmarking of a particular fund, etc., see **MONEY**.

2. A statute of Iowa provides that "when the matter sought to be elicited" from a witness "would tend . . . to expose him to public ignominy, he is not compelled to answer." It was *held*, under this provision, that the plaintiff, in an action for seduction, might, as a witness, refuse to answer whether she had previously had intercourse with other men. Said the court: "This term 'ignominy' means shame, disgrace, dishonor. See Webster's Unabridged Dict. 'Public ignominy,' therefore, means public disgrace, public dishonor. The matter sought to be elicited by the question would, most clearly, tend to bring the witness into public disgrace." *Brown v. Kingsley*, 38 Iowa 220.

3. *Story's Equity Juris.*, vol. 1, pp. 108 to 148. "Ignorance is not a state of the mind in the sense that sanity and insanity are. When the mind is ignorant of a fact its state still remains sound; the power of thinking, of judging, of willing, is just as complete before communication as after; the essence of the mind remains unaffected. . . . Ignorance of a particular fact consists in this, that the mind, although sound and capable of healthy action, has never acted upon that subject because it has never been brought to the

been said to be equivalent to the term mistake,¹ but it is mistake and something more,² and the text books so distinguish it.³ It does not, however, differ in results.⁴

2. Division of the Subject.—Ignorance is usually treated under two heads, ignorance of fact and ignorance of law.⁵

(a) *Ignorance of Fact.*—*Ignorantia facti excusat*,⁶ is want of knowledge as to the fact in question.⁷

It is a settled principle of law that an act done or a contract made under a mistake or ignorance of a material fact, is voidable.⁸

notice of the perceptive faculties . . . Ignorance of a fact at a certain time raises no necessary presumption of ignorance of that fact at a subsequent time; nor does ignorance of a fact at a time long subsequent to its occurrence raise a necessary presumption that the mind never was acquainted with it." *Boylan v. Meeker*, 28 N. J. L. 280.

Ignorance Construed in a Statute.—But for a defendant bankrupt to delay an application to take an advantage of the acts in expectation that he would be relieved from custody in another way, is not "ignorance or mistake." 1 *Druce v. King*, 1 Dowl. & Ry. 540.

And in *Thackrah v. Haas et al.*, 119 U. S. 499, T brought a complaint in the nature of a bill of equity for the cancellation of an assignment for a large amount of stock for a grossly inadequate consideration. He alleged that he was intoxicated when it was made, and also that it was fraudulent. The court thought he was entitled to relief, but on the ground of fraud, though at the time the assignment was executed, T was in such a state of intoxication that he was ignorant of what he was doing.

And so when a contract is entered into where one party is under the influence of liquor, and on the want of understanding of the party, or his ignorance, it is set aside. *Bush v. Breinig*, 113 Pa. St. 310.

1. *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287; *Gwynn v. Hamilton*, 29 Ala. 233; *Juzan v. Toulmin*, 9 Ala. 662; *Campbell v. Carter*, 14 Ill. 286; *Gordere v. Downing*, 18 Ill. 492; *Atlantic, etc., Ins. Co. v. Wilson*, 5 R. I. 479; *Dow v. Kerr, Speers (S. Car.)* ch. 4:3.

2. 17 *Central Law J.* 22. That ignorance is not mistake, see *Penny v. Martin*, 4 Johns. Ch. (N. Y.) 567.

3. *Story's Equity Juris.*, vol. 1, pp. 108 to 148.

4. *Lindley on Jurisprudence*, Law Library, vol. 86, p. 35; *Champlin v. Laylin*, 18 Wend. (N. Y.) 407.

5. 2 Co. 3 a, *Manser's Case*; 1 Mackeld. Civ. Law 168, § 165.

6. *Broom's Legal Maxims* 255.*

7. *Canal Bank v. Albany Bank*, 1 Hill (N. Y.) 287; *Com. v. Thompson*, 11 Allen (Mass.) 23. As if a man marry a married woman supposing her unmarried (*supra*). Or a mistake in quantity of land be made by a surveyor. *Jenks v. Fritz*, 1 W. & S. (Pa.) 201.

8. *Story's Equity Juris.*, § 140. Whether or not a contract which can be legally or illegally performed, is void or not, depends upon the knowledge or ignorance of the parties thereto as to the law which would prevent its completion. *Pollock on Contracts* 347.* So in *Waugh v. Morris*, L. R., 8 R. B. 202, the court was of opinion that, though a contract to do a thing which cannot be performed without a violation of the law, is void; yet in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show a wicked intention to break the law, and if that be so, the knowledge of what the law is becomes of great importance.

But Ignorance of Fact is No Answer to a Plea of the Statute of Limitations.—Ignorance of facts will not take a case out of the statute of limitations, unless that ignorance is occasioned or brought about by some improper conduct on the part of the party pleading the statute.

Hoffman v. Parry, 23 Mo. App. 20; *Underhill v. Mobile Fire Ins. Co.*, 67 Ala. 45.

As the owner of land cannot defeat the plea of the statute of limitations by those adversely in possession by showing that he was ignorant of the claim or its effect. *Brownson v. Scanlan*, 59 Tex. 222.

But if knowledge of the facts is concealed, or the plaintiff remains in ignorance of such facts by reason of the representations or artifices of the defendant, the statute is no defence. *Kelley*

As, if money be paid under a mistake or ignorance of fact, it may be recovered back,¹ and the rule is the same, though the party paying the money had means of knowledge.²

v. Nealley, 76 Me. 71; *O'Dell v. Burnham*, 61 Wis. 562.

As where a director received certain bonds for advocating the assignment of the company's policies to another company, and for the reinsurance of the same in the latter company, it was *held* that the bonds so received belonged to the corporation, and that the statute of limitations did not commence to run until it had knowledge of the agreement and acquisition of the bonds. *Bent v. Priest*, 86 Mo. 475.

1. *Boston v. Capen*, 7 Cush. (Mass.) 116; *Higgins v. Strong*, 4 Blackf. (Ind.) 182; *Stedwill v. Anderson*, 21 Conn. 139; *Perkins v. Gay*, 3 S. & R. (Pa.) 327; *Culbreath v. Culbreath*, 7 Ga. 64; *Hopkins v. Mazyck*, 1 Hill Ch. (S. Car.) 242; *United States v. Badeau*, 33 Fed. Rep. 572.

In *Milnis v. Duncan*, 6 B. & C. 671, M in Ireland drew a bill on D in England, with a stamp less than was required in England. The bill did not show where it was drawn. The holder neglected to present it until after the acceptor became bankrupt, and demanded payment of the indorser. The holder then threatened suit, alleging that the bill had on no proper stamp. The indorser, inspecting the bill, finding the stamp improper for England, and not knowing that it was drawn in Ireland, paid the money. *Held*, that it was money paid in ignorance of fact and could be recovered back. The money is recovered in an action for money had and received. *Goddard v. Merchant's Bank*, 2 Sandf. (N. Y.) 247; *West v. Houston*, 4 Harr. (Del.) 170; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Logan v. Sumter*, 28 Ga. 242; *Goddard v. Putman*, 22 Me. 363; *Osgood v. Jones*, 23 Me. 312; *Chase v. Taylor*, 4 Har. & J. (Md.) 54; *Bond v. Hays*, 12 Mass. 34; *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Iron City Tool Works v. Long*, (Pa.) 7 Atl. Rep. 82; *Resboro v. Peck*, 48 Barb. (N. Y.) 92.

As where a note was delivered to a carrier with instructions to collect it in the ordinary way, and he deposited it in a bank for collection, that being one of his usual ways of collection, though it did not appear that his employer knew it: when the note fell due, the bank, not having placed it with their notes for

collection, supposed it had been paid, when in fact it had not, and paid the amount thereof to the carrier, who paid it to his employer. *Held*, that the holder was liable to the bank in an action for money had and received. *Appleton Bank v. McGilvray*, 4 Gray (Mass.) 518.

2. *Kelley v. Solari*, 9 M. & W. 54; *Leggett v. Waite*, 5 Cowen (N. Y.) 195.

In *Lyle v. Shinnebarger*, 17 Mo. App. 66, the son of the appellant, residing with his father at N, left that place and went to Y, where he met the respondent. After some time the respondent, who also had formerly lived at N, returned there, and so told the appellant that his son had agreed to trade him (the respondent) the crop of growing corn which the son of the appellant had left growing on leaving N and going to Y. The appellant accordingly, without inquiring of his son, paid the respondent the value of the corn crop belonging to his (appellant's) son. This payment the son refused to recognize. *Held*, the appellant was entitled to recover from the respondent the amount of money so paid. The court said: "We think that whether the money was paid without any fault or negligence of plaintiff or through his negligence, if it was through a mistake of facts, makes no difference, and does not alter the legal relations of the parties." *Komby v. Central National Bank*, 51 Mo. 275. In the case cited . . . the court, *WAGNER, J.*, says: "If the money is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying had been in omitting to use due diligence to inquire into the facts. The imputation of negligence would not bar the plaintiff's action."

If a party once has knowledge of the real fact, but at the time of transaction it slips from his mind and the matter is consummated under mistake, he can recover back. *Lewellen v. Garrett*, 58 Ind. 442; *Kelly v. Solari*, 9 M. & W. 54. In the latter case *LORD ABINGER, C. B.*, said: "There is a third case, and a most difficult one, where a party once had full knowledge of the facts but has since forgotten them. I certainly laid down the rule too widely to the jury

And the rule in equity is the same, that is to say, where a party has entered into a contract and refuses to perform it on account of an error of fact, equity will not enforce it on the one hand;¹ and where, on the other, it is sought to be conferred, equity will grant relief.²

(b) *Ignorance of Law.*—*Ignorantia juris haud excusat*, or *ignorantia juris neminem excusat*, as it is more commonly put, is a maxim of our law,³

when I told them that if the directors once knew the facts they must be taken still to know them, and could not recover by saying that they had since forgotten them. I think that knowledge of facts which disentitles a party from recovering must mean a knowledge existing in the mind at the time of payment."

Means of knowledge which the law requires, are such as the party may avail himself of as then present without calling to his aid other assistance. Norton v. Marden, 15 Me. 45. Nor will the rule be altered where the facts could have been obtained by the exercise of due diligence. McDaniels v. Bank of Rutland, 29 Vt. 230; Clark v. Dutcher, 9 Cow. (N. Y.) 674.

Ignorance as to the truth or falsehood of a material assertion which turns out to be untrue, must be treated as equivalent to knowledge of its untruth. There must be reasonable grounds for belief. Stone v. Denny, 4 Metc. (Mass.) 151; Hayard v. Irwin, 18 Pick. (Mass.) 95.

Willful ignorance and reckless ignorance may have the same consequences as fraud and entail all the liabilities of it. Pollock on Contracts 517.

1. Lawrence v. Beaubien, 2 Bailey (S. Car.) 623; Kay v. Dutton, 7 Man. & Gr. 807; Boston v. Capen, 7 Cush. (Mass.) 116.

And in Parret v. Shaubhut, 5 Minn. 323; s. c., 80 Am. Dec. 424, it was held that the equitable doctrine that a party may have relief from his acts when done in ignorance of facts, has no application to a question of priority of mortgage liens, or where the rights of third parties are affected.

But if the rights of third parties have intervened, then equity will enforce the contract as it is written; as where land was intended to be conveyed between the parties, but other land was granted by mistake, and the land intended to be conveyed is afterwards sold to a bona fide purchaser. Lowe Admr. v. Allen,

68 Ga. 225. See, also, Cass County v. Oldham, 75 Mo. 50; Hewitt et al. v. Powers, 84 Ind. 295.

2. Story's Eq. Juris., § 140; Miles v. Stevens, 3 Pa. St. 21; Ross v. Armstrong, 25 Tex. 354. As where a promissory note has been given for the balance of an account which has turned out to be wrongly stated, a court of equity will order a surrender of the note. Fitzmaurice v. Mosier, (Ind.) 16 N. E. Rep. 175. But equity will not grant relief where the means of knowledge are equal. Robertson v. Smith, 11 Tex. 211; Belt v. Mehen, 2 Cal. 159.

Nor where the ignorance of fact was an ignorance of which the party was aware. McDaniels v. Bank of Rutland, 29 Vt. 230.

In Fahie v. Pressey, 2 Oregon 23, the court refused to grant relief in equity where a party lost his remedy at law through mere ignorance of fact, the knowledge of which he might have obtained by due diligence, and where there was neither mistake, accident nor fraud. But in O'Connell v. Duke, 29 Tex. 299, a case of mistake in the quantity of land agreed to be sold, the court say equity will grant relief in cases of "innocent ignorance."

3. Broom's Legal Maxims, page 122*, and cases there cited. Arnold et al. v. Maynard, 2 Story (U. S. C. C. R.) 353.

Ignorance of Law by an Attorney.—An attorney cannot be excused for ignorance of the public statutes of the State, Est. A. B., Tucker's Surre. (N. Y.) 247, or for want of proper knowledge of all matters of law in common use, of such plain and obvious principles that every lawyer is presumed to know them. Morrill v. Graham, 27 Tex. 646. He is liable for such ignorance to his client. Wilson v. Russ, 20 Me. 421; Hart v. Frame et al., 6 Cl. & Fin., H. L., 197. As where an attorney's client suffers damages by reason of ignorance or unskillfulness in taking judgment on a defective service of process. Reilly v. Cavanaugh, 29 Ind. 435.

as it was of the Roman law.¹ It is ignorance of the laws of one's own country.² The word "jus" is used in this maxim in the sense of denoting general law, that is, the ordinary law of the country; but when the word "jus" is used in the sense of denoting private rights, that maxim has no application, as private ownership is a matter of fact. It may be the result also of matter of law; but, if the parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside, as having proceeded on a common mistake.³

1. Civil Law F., p. 226, 9.

2. *Haven v. Foster*, 9 Pick. (Mass.) 112. The LAWS OF FOREIGN COUNTRIES or of other States are facts. *Norton v. Marden*, 15 Me. 45. And so where a foreign corporation advanced money upon a draft issued by a banking institution of New York in violation of the statute of that State, it was held that the foreign corporation was in the same position as if money had been paid under a mistake of the material fact. *Bank of Chillicothe v. Dodge*, 8 Barb. (N. Y.) 233. And see *Sampson v. Mudge et al.*, 13 Fed. Rep. 260. But ignorance of a rule of court would seem to be ignorance of fact. *Gardiner v. Schermerhorn*, Clark Ch. (N. Y.) 101; *Allen et al. v. Galloway*, 30 Fed. Rep. 466.

A et al., plaintiffs, were cotton brokers at N. O. G & B, the defendants, were merchants at M. Plaintiffs owed defendants a balance on their shipping account, but G, one of the firm of G & B, owed a large amount individually to *A et al.* G & B becoming insolvent, C attached funds in the hands of the plaintiffs. Defendants' firm then wrote *A et al.* to transfer the debt due G & B to the individual debt of G. G & B then assigned. C denied the validity of the transfer of the debt, and while their attachment proceedings were pending the assignee of G & B offered to compromise at 33½ per cent., *A et al.*, being set down as the creditors of the firm for the sum remaining after the above mentioned transfer. This compromise C signed with the agreement: "Except that part of their debt which is considered secured." Plaintiffs also accepted compromise, and executed a receipt in full. C was successful in the attachment proceedings. The plaintiffs then sued G & B at law upon the balance of the account after crediting the compromise payment and eliminating the amount paid C, but took a nonsuit at

the trial, and then filed a bill to cancel the settlement, on the ground of mistake. HAMMOND, J.: "Whatever rule may prevail elsewhere, there can be in the equity courts of the United States no relief from a mistake of law. *Hunt v. Rousmaniere*, 1 Pet. (U. S.) 1, 15; *Bank of U. S. v. Daniel*, 12 Pet. (U. S.) 32, 55; *Railroad Co. v. Soutter*, 13 Wall. (U. S.) 517, 524; *Upton v. Tribilcock*, 91 U. S. 45, 50, 51; *Lamborn v. Co. Comr.*, 97 U. S. 181, 185; *Sned v. Insurance Co.*, 98 U. S. 85, 90, 92; *U. S. v. Ames*, 99 U. S. 35, 46, 47. But in this case . . . it is absolutely bare of any incident to take the case out of the category of a pure mistake of law, unmixd with any element or misrepresentation, accident, or fraud upon the part of anybody. It is said that it is a mistake of fact as to the true state of the account, but that is untenable. It is only another way of saying that A believed that he had the right to make the appropriation of the balance due G & B to the payment of the balance due from G individually. He relied with too much confidence upon that opinion of Caw, which was overthrown by the supreme court of Louisiana." Bill dismissed. *Allen v. Galloway*, 30 Fed. Rep. 466.

3. LORD WESTBURY, in *Cooper v. Phibbs*, 2 H. L. Cas. 149. The distinction is between an instrument which is what the parties agreed it to be, but the legal effect is unexpected, and a case where an instrument was designed to carry into effect an existing agreement but fails to do so. Equity will reform the latter, but will not the former. *Oliver v. Mutual Ins. Co.*, 1 Curt. (U. S.) 277; *Pitcher v. Hennessey*, 48 N. Y. 415. In *Ledyard v. Phillips*, 32 Mich. 13, JUDGE COOLEY seems to question the doctrine whether it is not competent to relieve against the consequences of a mistake at law, where the mistake is clearly made out.

This maxim is founded on the presumption that everyone who is competent to act for himself is bound to know the law.¹ It is as applicable to civil as to criminal jurisprudence.² That is, ignorance of the law is, as a rule, no excuse either as regards liabilities of a *quasi* criminal kind which arise under penal statutes,³

1. *Hart v. Roper et al.*, 6 Ired. Eq. (N. Car.) 349; 2 Co. 3 *b.*, *Manser's Case*; *Story's Eq. Jurs.*, § 116. In *Moreland v. Atchison*, 19 Tex. 303, *WHEELER J.*, said: "The general rule, it has been truly said, is justified by considerations of public policy, and yet so harsh a rule founded upon a presumption so arbitrary ought to be modified in its application by every exception which can be admitted without defeating its policy."

2. *State v. Paup*, 13 Ark. 129. As if one sets up as a defence to indictments for polygamy, belief in the Mormon church and ignorance of law of United States, it is no defence. *Reynolds v. U. S.*, 98 U. S. 145.

In *State v. Paup et al.*, 13 Ark. 129, a bill for an injunction was filed against the State to restrain suit on some notes given to the State in payment for lands. The legislature had directed the governor to sell and locate lands for certain purposes. At such a sale P bought the right to locate on 520 acres of land, gave the above notes in payment therefor. The United States land officers refused to allow or confirm P's rights. P then refused to pay the purchase money notes, and a suit being brought the court below granted an injunction, which was affirmed in the supreme court on the ground of surprise, and though the court said that *ignorantia juris non excusat* is as applicable to civil as to criminal jurisprudence, yet in the case of peculiar hardship there was a distinction between ignorance of the existence of a law and of its legal effect.

3. *Regina v. Woodrow*, 15 M. & W. 404, which was a case in which a retail dealer in tobacco was held liable to a penalty imposed by statute for having in his possession adulterated tobacco, although he had purchased it as genuine, and had no knowledge or cause to suspect that it was not so. To the same effect, see *Beckham v. Nacke*, 56 Mo. 546; *State v. Hartfiel*, 24 Wis. 60; *Thompson v. Thompson*, 114 Mass. 566; *Com. v. Emmons*, 98 Mass. 6.

As where one sells liquor to a minor

in ignorance of the infancy. *McCutcheon v. People*, 69 Ill. 601; *Com. v. Finnegan*, 124 Mass. 324; *Com. v. Has*, 22 Mass. 40.

Or where a woman, in contravention of the statute, votes at an election for representative in the congress of the United States, it is no defence that she believed she had a right to vote. *United States v. Anthony*, 11 Blatchf. (U. S.) 200. See, also, *Reynolds v. United States*, 98 U. S. 145; *State v. Goodenow et al.*, 65 Me. 30.

FOLGER, J., in *People v. Clute*, 50 N. Y. 463, speaking of the maxim *ignorantia juris excusat neminem*, said: "That maxim in its proper application goes to the length of denying to the offender against the criminal law a justification in his ignorance thereof, or to one liable for a breach of contract, or for civil tort, the excuse that he did not know of the rule which fixes his liability. It finds its proper application when it says to the elector who, ignorant of the law which disqualifies, has voted for a candidate ineligible, 'your ignorance will not excuse you and save your vote; the law must stand.' But it does not have a proper application when it is carried further and charges upon the elector such a presumption of knowledge of fact and law as finds him full of the intent to vote in the face of knowledge, and to so persist in casting his vote for one for whom he knows that it cannot be counted as to manifest a purpose to waste it. The maxim itself concedes that there may be a lack of actual knowledge of the law. For it is ignorance of it which shall not excuse. Then the knowledge of the law to which one is held is a theoretical knowledge."

But in *Stern v. Georgia*, 53 Ga. 229, on a charge of permitting a minor to play billiards without the consent of his parents, it was held error to convict simply on evidence that a person was a minor, without regard to the evidence going to show an honest mistake on the part of the defendant.

And the same principle was also laid down in *Brown v. State*, 24 Ind. 113; *Crabtree v. Ohio*, 30 Ohio St. 382.

or such as are purely civil.¹

The question how far courts of equity will grant relief for ignorance of law is in some doubt, but the better rule seems to be that the courts will hold the doctrine strictly that ignorance of law is no ground for relief in equity.² Yet this principle is not of universal application,³ and there are many exceptions to

And in *Reg. v. Moore*, 13 Cox's C. C. 544, it was held that an honest belief on the part of a woman in the death of her husband was a good defence to an indictment for bigamy.

1. Pollock on Contracts, p. 395.

It is as applicable in equity as at law. *Baker et al. v. Pool*, 56 Ala. 16; *Clark v. Hart*, 57 Ala. 394.

2. *Trimble v. Thorne*, 16 Johns. (N. Y.) 152; *Lyon v. Sanders et al.*, 23 Miss. 530; *McMurray v. St. Louis Oil Co.*, 33 Mo. 377; *Guyren v. Hamilton's Adm.*, 23 Ala. 233; *Glenn v. Statler et al.*, 42 Iowa 107; *Good v. Herr*, 7 W. & S. (Pa.) 253; *Pierson v. Armstrong*, 1 Iowa 282; *Ferguson v. Ferguson*, 1 Ga. Dec. 135; *Gross v. Leber*, 47 Pa. St. 520. In *State v. Paup*, 13 Ark. 129, MR. JUSTICE WALKER was of the opinion that any departure from the maxim, "under any circumstances, should be distinctly marked and so guarded as to leave the general rule unimpaired." See, also, *Martin v. Hamlin*, 18 Mich. 354.

It is said the cases where relief is granted in equity from mistakes of law should, if the terms were used with strict propriety, be called cases of ignorance of law. 1 Law Quarterly Review 302.

In *Zollman v. Moore*, 21 Gratt. (Va.) 320, STAPLES, J., said: "Wherever the question has turned upon a pure mistake of law, without the admixture of other elements, it is believed that few cases can be found, even in the English courts, in which relief has been afforded." In *Peters v. Florence*, 38 Pa. St. 194, a person paid a mortgage under a mistaken supposition that he was the owner of the property, or that as executor of his deceased wife he was bound to pay it, she having executed the mortgage in her lifetime. It was held that the erroneous supposition that he was liable to pay as executor of his wife, whatever might be said of the mistake. In regard to ownership, was ignorance of law, against which equity will not relieve. In *Jacobs v. Morange*, 47 N. Y. 57, J sued M in the marine court and a verdict was had against the plaintiff. The common pleas reversed, and

the defendant voluntarily paid the costs. The court of appeals decided within a year thereafter that the common pleas had no jurisdiction. The defendant then issued an execution in the marine court, and the plaintiff instituted this suit in equity to stay proceedings. PECKHAM, J.: "This presents the question, Can a court of equity grant relief in a case of this character, upon the sole ground of a mistake of law? There is no circumstance of any description that adds anything within ground of relief. *Ignorantia legis neminem excusat*, and kindred maxims, are old law. If they are true, this judgment is erroneous. The whole basis for this relief is founded upon the fact that an inferior court made an erroneous decision upon a question of law. What a flood of litigation would such a rule open? Almost every case reversed by this court would form a basis for such 'surprise,' especially where courts of last resort reverse or modify their own decisions."

In *State v. McIntire*, 1 Jones (N. Car.) 1, a defendant set up his ignorance of the effect of an appeal as a defence to the right of the court to further sentence him after a conditional pardon, but it was held of no avail. So in *Rochester v. Bank*, 13 Wis. 432, it was held that the maxim, "Ignorance of law excuses no one," was applicable to the purchasers of bonds, void for some defect which was a matter of law unmixed with matter of fact. And so if the drawer of a bill of exchange, knowing that time had been given by the holder to the acceptor, but apprehending that he was still liable after it was due, said, if the acceptor did not pay it he (the drawer) would. It was held he was bound by the promise. *Stevens v. Lynch*, 12 East 38.

3. *Onions v. Tyrer*, 1 P. Wms. 344; *Evarts v. Strobe*, 11 Ohio 480; *Cumberland Coal Co. v. Sherman*, 20 Md. 117; *Mortimer v. Pritchard*, 1 Bailey Ch. (S. Car.) 505; *Gordere v. Downing*, 18 Ill. 492; *Conover v. Wardell*, 20 N. J. Eq. 266.

But the "equities ought to be clear and strong that would warrant the set-

it.¹ In all cases, however, there must be a full knowledge of all the facts.²

ting aside a sale of lands on the ground of misapprehension of his rights, or a mistake of law by a purchaser. *Mellish v. Robertson*, 25 Vt. 603.

In *Lowndes v. Chisolm*, 2 McCord's Ch. (S. Car.) 455, it was said: "It is well established that relief is given in cases where the mistake has been clearly one of law, and the authorities relied on put the matter beyond all doubt, if, indeed, it could be doubted at this day."

Naylor v. Wench, 1 Sim. & St. 555, SIR JOHN LEACH: "If a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property, a court of equity will relieve him." And LORD JUSTICE TURNER, in *Stone v. Godfrey*, 54 Eng. Ch. Rep. 76, said: "We find no case in which a plain and acknowledged mistake of law is beyond the reach of equity."

So in *Hunt v. Rousmanier's Admr.*, 8 Wheat. (U. S.) 174, plaintiff loaned money to defendant's decedent, and as collateral security therefor took a power of attorney to transfer and sell an interest in certain vessels belonging to the defendant's decedent, after being advised by counsel that such power of attorney was as good security as a mortgage. MARSHALL, C. J., *held* that the power was revoked by the death of the defendant's decedent, and that though there had been a mistake at law, yet equity would grant relief. He said, in the course of the opinion: "We find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity. . . . We find no case which we think precisely in point, and are unwilling, when the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief."

But when this case was again before the supreme court of the United States, in *Hunt v. Rhodes*, 1 Pet. (U. S.) 1, MR. JUSTICE WASHINGTON, who delivered the opinion of the court, said: "The question then is, ought the court to grant the relief which is asked for upon the ground of mistake arising from any ignorance of law? We *hold* the general rule to be that a mistake of

this character is not a ground for reforming a deed founded on such a mistake, and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their characters."

In *Cumming's Appeal*, 23 Pa. St. 509, G sold land to C, and took from him therefor a mortgage and a judgment note, which said note he entered the day after the mortgage was recorded. Some time after judgment was entered on the mortgage lands. The property was then sold by G on a *vend. ex.* issued on the judgment note, and G bought in the land for full value. An auditor was appointed to distribute the fund arising from the sale, and he awarded the fund to the mortgagor, after paying the amount of the judgment note on which the execution issued, the act of assembly of Pennsylvania of April 16th, 1845, providing that the lien of a first mortgage should not be discharged, except in case of a sale made under or by virtue of it. The court below removed the auditor and applied the fund to the payment of the mortgage, G's bid being made on the supposition that it would be applied to the payment of his mortgage. The supreme court reversed the court below and confirmed the report of the auditor, but gave G the right to take a rule to set aside the sheriff's sale if it should appear equitable to the court below. LOWRIE, J., in the course of his opinion, said: "We do not forget the rule that refuses to hear the allegation of ignorance of law as a ground of relief, but we must be very cautious in applying this rule to judicial proceedings, for the whole doctrine of amendments proceeds upon a partial denial of it, and it is not at all of absolute obligation in questions of new trial. . . . And in a case exactly like the present one it is said that if the mortgagee bid for the land under a misapprehension of his right, the mistake might have furnished a sufficient reason for setting aside the sale."

1. Story's Equity Juris. 138.

2. Storrs v. Barker, 6 Johns. Ch. (N. Y.) 166.

That is, unless some special circumstance, such as undue influence, misrepresentation, or misplaced confidence

Yet, if a man actually pays what the law would not have compelled him to pay, but what in equity and good conscience he ought to have paid, he cannot recover it back.¹

III.—See note 2.

is shown, equity will not relieve from the effects of a mistake of law.

Boggs v. Fowler, 16 Cal. 559; *Branham v. San Jose*, 24 Cal. 608. "But while the weight of authority is clearly against granting relief merely on account of a mistake of the law, it seems to be conceded in nearly all the cases, and expressly decided in many of them, that there are exceptions to this rule. . . . Instead of saying that there are 'exceptions' to the rule, it would probably be more correct to say that, while relief will never be granted merely on account of the mistake of law, there are cases where there are other elements, not in themselves sufficient to authorize the court to interfere, but which, combined with such a mistake, will entitle the party to relief. . . . If a party who himself knows the law should deceive another by misrepresenting the law to him, or, knowing him to be ignorant of it, should therein take advantage of him, relief would be granted on the ground of fraud." Judge Davis in *Jordan v. Stevens*, 51 Me. 78.

1. *Mowatt v. Wright*, 1 Wend. (N. Y.) 355; *Clark v. Dutcher*, 9 Cow. (N. Y.) 674; *Nebbold v. Martin*, 8 Yerg. (Tenn.) 498; *Jones v. Watkins*, 1 Stew. (Ala.) 81; *Dickens v. Jones*, 6 Yerg. (Tenn.) 483; *Ladd v. Kenney*, 2 N. H. 341; *Brumagin v. Tillinghast*, 18 Cal. 265; *Bissell v. Edwards*, 5 Day (Conn.) 94; *Bond v. Coats*, 16 Ind. 202; *Johnson v. McGinness*, 1 Oreg. 292; *Evans v. Gale*, 17 N. H. 573; *Bean v. Jones*, 8 N. H. 149.

As if money be paid for a deed of release without covenants, where no fraud is charged, it cannot be recovered back, although by the deed no title or interest passed to the release. *Stewart v. Crosly*, 50 Me. 130.

Or where the accounting officers of the United States have jurisdiction of a claim, their adjustment, in the absence of fraud or mistake of fact, cannot be attached after payment, and the money recovered back because of their mistake of law. *Mullett v. U. S.*, 21 Ct. of Cl. (U. S.) 485.

Bize v. Dickason, 1 T. R. 285; *Black v. Ward*, 27 Mich. 91; s. c., 15 Am. Rep. 171, 184; *Bilbie v. Lumley*, 2 East 469;

Freeman v. Curtis, 51 Me. 140; *Irvine v. Hanlin*, 10 S. & R. (Pa.) 219; *Deysher v. Friebe*, 64 Pa. St. 383; *Sillman v. Wing*, 7 Hill (N. Y.) 159; *Elliott v. Swartwont*, 10 Pet. (U. S.) 137; *Tyler v. Smith*, 18 B. Mon. (Ky.) 798.

But in *Champlin v. Laytin*, 18 Wend. (N. Y.) 487, PAIGE, J., said: "I cannot see any good sense in the distinction of granting relief against mistakes of fact and refusing it in case of acknowledged mistakes of law. . . . Mere ignorance of law cannot be proved, but mistake can be proved and, therefore, though there should be no relief against ignorance of law, there should be in case of a mistake of law."

In *Levy v. Bank of U. S.*, 1 Binn. (Pa.) 27, plaintiff was credited with the deposit of a forged check. The clerk of the bank came to ask him to deposit another check in lieu of the forged one. He said: "If the check is a forgery, which is all I wish to ascertain, it is no deposit." SHIPPEN, C., J.: "It is said, the plaintiff has voluntarily renounced his right by agreeing that it was no deposit if the check was a forgery. If he had said this deliberately, knowing his right, it might have been obligatory on him, but it was the expression of an opinion of what he should be obliged to allow rather than of what he was willing to allow, and being under a mistake of his right, he is not bound by it." Judgment for plaintiff.

And see, also, *Warder v. Tucker*, 7 Mass. 449, where it was also held that, where one under a mistake of law acknowledged himself under an obligation which the law will not impose, he shall not be bound thereby.

The courts of *Kentucky* and *South Carolina* have gone further than any other courts in permitting the recovery of money paid under mistake of law. *Ray v. Bank of Kentucky*, 3 B. Mon. (Ky.) 510; *Lawrence v. Beaubien*, 2 Bailey (S. Car.) 623.

2. The statute 11 & 12 Vict., ch. 42, § 17, provides that if, upon the trial of any person accused of an indictable offence, "it shall be proved by the oath or affirmation of any credible witness, that any person whose deposition shall

ILLEGAL.—See note 1.

ILLEGAL ARREST.—See ARREST.

ILLEGAL CONTRACTS.—(See BRIBERY, CHAMPERTY AND MAINTENANCE, COMPOUNDING OFFENCES, CONTRACTS, CRIMINAL CONSPIRACY, FRAUD, GAMBLING CONTRACTS, INTERNATIONAL LAW (contracts to aid enemies, etc.), HUSBAND AND WIFE, MARRIAGE).

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have been taken" in a certain prescribed way by the justice of the peace upon the commitment of the prisoner, is "so ill as not to be able to travel . . . then . . . it shall be lawful to read such deposition as evidence in such prosecution." In *Queen v. Wellings*, L. R., 3 B. D. Q. 426, it was held that pregnancy may be an illness, within the statute. It was contended by counsel for the prisoner that pregnancy is not an illness or disease, but a natural condition; and that, therefore, although the witness might have been, in fact, unable to travel, such inability was not within the statute.

Ill Gotten Gains.—A newspaper report of a speech made by the colonial secretary in the house of assembly, of the Cape of Good Hope, contained the following: "Whether the members of the ministry or the honorable member for King William's Town and his friends are poorer or richer, I do not know, nor do I care to inquire. I will say this, however, that the occupants of the treasury bench have none of them acquired any wealth by selling guns to the natives, as the member for King William's Town has done." This portion of the speech had reference to remarks made by Irvine, the member for King William's Town, in regard to the comparative wealth of the members of the ministry and those of the opposition. Upon the proceedings in the assembly there was the following comment by the newspaper: "Mr. Irvine has mistaken his vocation, and seems to have entered parliament under the veridant misconception that a man whose money-bags are full of ill-gotten gains is more highly esteemed than one who has lost his all in the service of his country." It was held, in an action of libel brought by Irvine, that the ex-

pression "ill-gotten gains" merely indicated that the writer disapproved of a man making money by selling guns to the natives; and that no dishonorable or dishonest motives were imputed to the plaintiff; and that, therefore, there was no right of action. *Irvine v. Impey*, Foord's Rep. (Cape of Good Hope) 73.

1. A statute of Tennessee declares that "persons illegally voting" for candidates for certain offices "shall be liable to indictment or presentment," etc. The indictment in a prosecution under the act charged that the defendant "did unlawfully vote," etc. It was held that the fact that "unlawfully" was substituted for "illegally," was no ground of objection, "as the words are synonymous—of precisely the same legal signification." *State v. Hayworth*, 3 Sneed (Tenn.) 64.

The New Jersey "act concerning roads," passed Feb. 9, 1818, enacted that the court of common pleas should not set aside the proceedings of the surveyors, by whom the view was made and the necessity of the road determined, "for illegality or irregularity." In a case arising under this statute, the court said, in regard to this provision, that "it was intended that mere informalities and irregularities not touching the substance of the thing should not stand in the way of a fair execution of the law. But, in order to express this, terms are used which, in their strict sense, would not only be contradictory to one another, but also subversive of the whole scope of the act itself. . . . The term *illegality*, therefore, in this place, must be restrained in its general sense, and be taken to mean illegality in matter of form only, and not in matter of substance." *State v. Conover*, 2 Halst. (N. J.) 216.

1. *Nullity of Contract to Control Legislation*, 898.
2. "Log-rolling," 901.
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- VI. *Immoral Contracts*, 921.

DEFINITION.—An illegal contract, distinguished from those which are void for want of essentials, is an agreement with an unlawful object. It is not merely lacking in valid subject-matter, but its purpose is positively invalid.

While the absence of any essential renders a contract illegal, the term *illegal contracts* is usually applied to engagements between two or more persons to effect something in contravention of law, against public policy, or in violation of juridical morals; agreements to do what the law forbids, or to refrain from doing what the law requires. They are sometimes called "contracts of evil tendency."¹

Strictly, they are not contracts, but conspiracies for wrongdoing, which are not enforceable, since the law cannot be invoked to defeat itself.²

I. In General.—*Public Policy Explained.*—This term is equivalent to "the policy of the law." It is applicable to the spirit as well as the letter. Whatever tends to injustice or oppression, restraint of liberty, commerce and natural or legal right; whatever tends to the obstruction of justice, or to the violation of a statute, and whatever is against good morals, when made the object of a con-

1. Definition.—"Contracts illegal or of evil tendency;" "Immoral, or contrary to the policy of the law, or to public policy;" "agreement between parties to do a thing prohibited by law or subversive of any public interest which the law cherishes;" "...forbidden either by the common or the statutory law—whether *malum in se*, or merely *malum prohibitum*; indictable, or only subject to a penalty or forfeiture; or however otherwise prohibited by a statute, or the common law." Bishop on Contracts (1887), §§ 467, 470-1, citing Cannan v. Bryce, 3 B. & Ald. 179, 183, 184; White v. Buss, 3 Cush. (Mass.) 448, 450; Poplett v. Stockdale, Ryan & Moody, N. P., 337; Fores v. Johnes, 4

Esp. 97; Gale v. Leckie, 2 Stark. 107; Bartlett v. Vinor, Carth. 251; Ferguson v. Norman, 5 Bing. N. Cas. 76; 3 Jur. 10; Peck v. Burr, 6 Seld. (N. Y.) 294; Gas-light, etc., Co. v. Turner, 8 Scott 609; 6 Bing. N. Cas. 324; Hathaway v. Moran, 44 Me. 67; Lord v. Chadbourne, 42 Me. 429; Cook v. Phillips, 56 N. Y. 310; Bemis v. Becker, 1 Kan. 226; Dillon v. Allen, 46 Iowa 299.

2. Not Contracts.—Martin v. Bartow Iron Works, 35 Ga. 320; Odineal v. Barry, 24 Miss. 9; Stanley v. Nelson, 28 Ala. 514; Cummings v. Saux, 30 La. An., pt. 1. 207; Peterson v. Christensen, 26 Minn. 377; Ray v. Mackin, 100 Ill. 246; 2 Kent's Com. (13th ed.) 466.

tract, is against public policy, and, therefore, void, and not susceptible of enforcement.¹

A form of contract may be legal on its face; there may be parties competent, willing, and agreed upon the subject-matter, who enter into an engagement to do or not to do, with a seemingly fair consideration stipulated, yet their agreement is null and futile if its object is juridically immoral or against the policy of the law.²

Intent of Parties.—The object of a contract may be against public policy so as to render it void, though the contracting parties may have had no criminal or unlawful *animus*. It is not essential to the illegality that they should design to violate the law. As in criminal matters, ignorance of the law is no excuse for the perpetration of an offence, so it is not when contravention of public policy would result by the execution of an agreement.³

Construction.—In construing contracts, courts hold entirely void those that are partly illegal in their object. Legal stipulations are treated as unwritten when interwoven with others designed to contravene the law, or tending to that end. An illegal consideration will not be analyzed and dissected so as to separate good simples from bad, when the compound is noxious, rendering the object of the contract unlawful.⁴

A contract void against public policy because inhibited by statute does not become valid by reason of the subsequent repeal of the statute. It can neither be cured by a later statute nor by a supplemental agreement made after the repeal, by which the promise first given without lawful consideration is sought to be renewed. What was done against the letter or spirit of the law, in defiance of legal ethics, at the time of contract, does not become shorn of its illegality simply because a later time comes when the ban is removed, and a similar contract may be made. The parties cannot, by their convention, give life to the dead carcass; but, discarding it, they may make such agreement as the changed statute permits, if they make it as a new one in such sense that it is no-wise dependent on the old.⁵

1. **Public Policy.**—*Smith v. Arnold*, 106 Mass. 269; *Durgin v. Dyer*, 68 Me. 142; *Burkholder v. Beetem*, 65 Pa. St. 496; *Pierce v. Evans*, 61 Pa. St. 415; *Bank of U. S. v. Owens*, 2 Pet. (U. S.) 527; *Bishop v. Palmer*, 146 Mass. 469-474.

2. Contract may be illegal though fair on its face. *Riley v. Jordan*, 122 Mass. 231.

3. **Intent—Ignorance no Excuse.**—*Saratoga Co. Bank v. King*, 44 N. Y. 87. Though a party imposed upon may have relief against a wrong-intending party, yet the object of the contract, if against public policy, cannot be achieved. *Quirk v. Thomas*, 6 Mich.

76; *Suit v. Woodhull*, 113 Mass. 391; *Wright v. Crabbs*, 78 Ind. 487; *Distilled Spirits*, 11 Wall. (U. S.) 456; *Hanauer v. Doane*, 12 Wall. (U. S.) 342.

4. **Construction—Good not Separable from Bad in Illegal Contracts.**—*Bixby v. Moor*, 51 N. H. 402; *Dean v. Emerson*, 102 Mass. 480; *Saratoga Co. Bank v. King*, 44 N. Y. 87; *Braitich v. Guelick*, 37 Iowa 212; *Chandler v. Johnson*, 39 Ga. 85; *Hanauer v. Gray*, 25 Ark. 350; *Valentine v. Stewart*, 15 Cal. 387; *More v. Bonnet*, 40 Cal. 251; *Widoe v. Webb*, 20 Ohio St. 431; *Newberry Bank v. Stegall*, 41 Miss. 142.

5. **Effect of Repeal, New Law and New Contract.**—*Bancher v. Mansel*, 47 Me.

Executed illegal contracts are beyond relief. Courts of law and equity will not aid one of the guilty parties to enable him so far to undo what he has done amiss as to recover money paid pursuant to his unlawful stipulations. They will not touch the contract, but hold aloof from it as from an unclean thing—*contra bonos mores*. Certainly, they will do nothing to countenance such violations of law; but there are cases in which they will allow an innocent, defrauded party to recover of the wrong-doer, so as to get his money back. This, however, is not countenancing the illegal contract, but reprobating it. The rule is that immoral and illegal contracts, when executed, can have no relief.¹

Illegal Objects, in General.—All unlawful purposes of contracts are void, as against public policy; and there are many besides those to be hereafter treated under special heads. Some of the more common objects, which are yet not so important as to require separate treatment, will now be noticed. Contracts, with the object of violating Sabbath laws, are void.² Those which are illegal because made on Sunday, where the law forbids such transaction and renders it a nullity, when Sabbath violation is not the object, do not come within the purview of the topic under discussion, though they are void.³

When the object is to do business inhibited by law, or to do it without license when license is required (such as selling ardent spirits, selling them to minors, merchandising or peddling without previously paying the required license), contracts to effectuate such purposes are void.⁴

Two persons, contracting to defraud a third, have an unlawful object in view, and, therefore, their agreement is a nullity. This is so, whether the contracting parties commit an indictable offence or not. If merely the tendency is to defraud a third person, the contract cannot be enforced.⁵

58; *Robinson v. Barrows*, 48 Me. 186; *Webber v. Howe*, 36 Mich. 150; *Ludlow v. Hardy*, 38 Mich. 690; *Anding v. Levy*, 57 Miss. 51; *Decell v. Lewenthal*, 57 Miss. 331; *Gilliland v. Phillips*, 1 S. Car. 152; *King v. Winants*, 71 N. Car. 469 and 73 N. Car. 563; *Wilson v. Bozeman*, 48 Ala. 71; *Cate v. Blair*, 6 Coldw. (Tenn.) 639; *Pierce v. Kibbe*, 51 Vt. 559; *Everingham v. Meighan*, 55 Wis. 354; *Petrel Guano Co. v. Jarnette*, 25 Fed. Rep. 675. *Compare Carr v. La. Nat. Bank*, 29 La. Ann. 258.

1. *Executed Contracts.*—*Hutchens v. Weldin*, 114 Ind. 80; *Davis v. Leonard*, 69 Ind. 213; *Hill v. Freeman*, 73 Ala. 200; *Riley v. Jordan*, 122 Mass. 231.

2. *Sabbath Violation.*—*Slade v. Arnold*, 14 B. Mon. (Ky.) 232; *Morgan v. Bailey*, 59 Ga. 683. See, also, SUNDAY LAWS.

3. Inhibited Sunday Contracts Void.

—*Hussey v. Roquemore*, 27 Ala. 281; *Tucker v. West*, 29 Ark. 386; *Chestnut v. Harbaugh*, 28 Smith (Pa.) 473; *Merriam v. Stearns*, 10 Cush. (Mass.) 257; *Sayre v. Wheeler*, 32 Iowa 559; *Hill v. Sherwood*, 3 Wis. 343; *Love v. Wells*, 25 Ind. 503.

4. *Contracts to do inhibited business, void.* *Walker v. U. S.*, 106 U. S. 413; *Solomons v. Chesley*, 58 N. H. 238; *Hubbell v. Flint*, 13 Gray (Mass.) 277; *Johnson v. Hullings*, 103 Pa. St. 498; *Tedrick v. Hiner*, 61 Ill. 189; *Melchoir v. McCarty*, 31 Wis. 252; *Creekmore v. Chitwood*, 7 Bush (Ky.) 317; *Anding v. Levy*, 57 Miss. 51; *Decell v. Lewenthal*, 57 Miss. 331.

5. *Contracts to defraud third persons, void.* *Green v. Corrigan*, 87 Miss. 359; *York v. Merritt*, 77 N. Car. 213; *Powell v. Inman*, 8 Jones (N. Car.)

If the public is to be defrauded, the effect upon a contract having that object is the same—absolute nullity. Of this class may be mentioned contracts with the object of imposing spurious articles upon the people, or to mislead them by a false trade mark; or to deceive them by putting forward as a teacher, physician, broker or other professional man, one neither qualified nor licensed as the law requires.¹

So, also, contracts with the object of defrauding the government. Smuggling contracts, agreements for illicit liquor distilling, combinations to effect election frauds, and the like, are of this class; and all contracts to have indictable offences committed. These are not here discussed, since they are usually treated as belonging to criminal law, rather than to that of public policy; but they are illegal as against the latter, nevertheless.²

Bribing, champertous and gambling contracts, compounding offences, contracting to aid enemies, etc., belonging to other titles, are not treated in this article.

It is impracticable to treat, under separate heads, all the different species of contract which are illegal because of unlawful object. It would require the enumeration of every natural right. Our fathers, in their "declaration," held the truth self-evident that all men "are endowed by their Creator with certain *unalienable* rights; that among these are life, liberty and the pursuit of happiness." Being inalienable, no one can contract these rights away for a consideration. Legal ethics, as well as the interest which the public has in every man, forbids him to barter his life away, to sell his liberty, or give anyone control of it except temporarily, or to enter into any agreement with the object of destroying his own happiness. And our fathers might have mentioned character as another thing that cannot be made the *subject-matter* of a contract with the object of debasing it. So, our religion, our citizenship, and a hundred sacred things cannot be for sale. We have to state generally that all things which are prohibited by morality are, therefore, against public policy, and, therefore, against law; that they all alike are void. *Ex turpi*

436; *Munroe v. Hall*, 97 N. Car. 206; *Heineman v. Newman*, 55 Ga. 262; *Sternburg v. Bowman*, 103 Mass. 325; *Wight v. Rindskopf*, 43 Wis. 344; *Tardy v. Creasy*, 81 Va. 553; *Hamilton v. Scull*, 25 Mo. 165; *Fenton v. Ham*, 35 Mo. 409; *Harwood v. Knapper*, 50 Mo. 456; *Gray v. McReynolds*, 65 Iowa 461; s. c., 54 Am. Rep. 16; *Hinnen v. Newman*, 35 Kan. 709.

1. Contracts to impose on the public, void. *Stewartson v. Lothrop*, 12 Gray (Mass.) 52; *Ryan v. Dakota School District*, 27 Minn. 433; *Jerome v. Bigelow*, 66 Ill. 452; *Wells v. People*, 71 Ill. 532; *Woods v. Armstrong*, 54 Ala. 150; *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Johnston v. McConnell*, 65 Ga. 129.

2. Contracts to defraud government or violate statute, void. *Lord v. Chadbourne*, 42 Me. 429; *Hathaway v. Moran*, 44 Me. 67; *Roby v. West*, 4 N. H. 285; *Wheeler v. Russell*, 17 Mass. 258; *Elkins v. Parkhurst*, 17 Vt. 105; *Cook v. Phillips*, 56 N. Y. 310; *Dillon v. Allen*, 46 Iowa 299; *Milton v. Haden*, 32 Ala. 30; *Cummings v. Saux*, 30 La. Ann., pt 1, 207; *Armstrong v. Toler* 11 Wheat. (U. S.) 248; *Robinson v. Patterson*, (Mich.) 39 N. W. Rep. 21; *McGregor v. Donnelly*, 67 Cal. 149; *Macintosh v. Renton*, 2 Wash. Ty. 121.

*causa, non oritur actio.*¹

II. Restraint of Trade.—**I. Restrictions General or Partial.**—**Nullity of General Restraints.**—The law strikes with nullity all contracts made in general restraint of trade. The public being interested in commerce, cannot be deprived of the advantages it affords, by the conventions of persons who agree that one or both the contracting parties shall not engage in it. The right of making a livelihood by trading, and the duty of contributing to the public weal in such way as one can best do, are inalienable. A man cannot cut off this right and duty with more moral and legal justification than he can lop off his right hand. He cannot legally bind himself to abstain altogether from any particular business, though his promise be based on a valuable consideration.²

General Restraint Distinguished from Partial.—It is not only that contracts to abstain from all trade or business are unlawful, but to abstain from any given pursuit is equally beyond the legal subjects of contract. And the term "general restraint" applies to the latter as well as the former. Partial restraint is the limiting oneself to a particular time, territory or circumstance, within which he promises, for a valuable consideration, not to pursue his calling, or not to engage in a stated business. Within proper bounds, such restriction is held not violative of public policy.³

1. Violation of Legal Ethics, Etc.—“All contracts which provide that anything shall be done which is distinctly prohibited by law, or morality or public policy, are void.” *“Note:* No principle is better settled by law, as the following, among many other authorities, will show.”² *Parsons on Contracts* (7th ed.), p. *746, citing *Shiffner v. Gordon*, 12 East 304; *Belding v. Pitkin*, 2 Cal. (N. Y.) 149; *Springfield Bank v. Merrick*, 14 Mass. 322; *Russell v. DeGrand*, 15 Mass. 35; *Allen v. Rescous*, 2 Lev. 174; *Fletcher v. Harcot*, *Hutton* 56; *Holman v. Johnson*, Cowp. 346; *Gaslight Co. v. Turner*, 7 Scott 779; *Wetherell v. Jones*, 3 B. & Ad. 221; *Fivaz v. Nichols*, 2 C. B. 501; *Simpson v. Bloss*, 7 Taunt. 246.

2. General Restraint.—The rule is thus stated by MR. JUSTICE STORY: “An agreement in general or total restraint of trade is void, although it may be founded on a legal and valuable consideration. . . . An agreement, not to carry on a certain business anywhere is invalid, whether it be by parol or speciality, or whether it be for a limited or unlimited time.” *Story on Contracts*, § 650; *Mitchell v. Reynolds*, 1 P. Will. 181, 190; *Homer v. Ashford*, 3 Bing. 323; *Pierce v. Fuller*, 8 Mass.

223; *Nobles v. Bates*, 7 Cow. (N. Y.) 307; *Morris v. Coleman*, 18 Ves. 436; *Hinde v. Gray*, 1 Man. & Grang. 195; *Alger v. Thacher*, 19 Pick. (Mass.) 51; *Chappel v. Brockway*, 21 Wend. (N. Y.) 159; *Dunlop v. Gregory*, 10 N. Y. 244; *Hilton v. Eckersley*, 6 Ellis & B. 47; *Homer v. Ashford*, 3 Bing. 322; *Rousillon v. Rousillon*, 14 Ch. Div. 351; *Dean v. Emerson*, 102 Mass. 480; *Rosa v. Sadgbeer*, 21 Wend. (N. Y.) 166; *Heichew v. Hamilton*, 3 Greene (Iowa) 596.

3. Partial Restraint.—The rule is that contracts in partial restraint of trade, limited as to time and territory, founded on a reasonable consideration, confined to particular persons, are valid. *Rannie v. Irvine*, 7 Mann. & G. 976; *Chappel v. Brockway*, 21 Wend. (N. Y.) 157; *Hartley v. Cummings*, 5 C. B. 247; *Bunn v. Guy*, 4 East 190; *Pierce v. Woodward*, 6 Pick. (Mass.) 206; *Perkins v. Lyman*, 9 Mass. 522; *Hayward v. Young*, 2 Chit. 407; *Mallan v. May*, 11 M. & W. 653; *Wickins v. Evans*, 3 Young & J. 518; *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641; *Horner v. Graves*, 7 Bing. 735; *Bingham v. Maigne*, 52 Supr. Ct. (N. Y.) 90; *Mandeville v. Harman*, 42 N. J. Eq. 185; *Keeler v. Taylor*, 53 Pa.

The question is, when the validity of a restraining contract is to be passed upon, whether the restraint is general or partial; and nice distinctions frequently have to be drawn. The restraint may cover so wide a field, and be protracted for so long a time, that the courts will hold it to be general and void, though possibly thought by the contracting parties to be partial and valid. A stipulation not to run a certain steamer within the bounds of a State, for ten years, was held general and void.¹ But the contract of a railroad company not to do business between designated places was decided to be partial restraint, and, therefore, legal.²

When, however, such a company precluded itself from ever constructing a side-track in a certain place, the restriction was declared general, and the illegality of a stipulation binding it to not make the improvement, was held to vitiate the entire contract, including stipulations unobjectionable in themselves.³ The

St. 469; *Kimberly v. Jennings*, 6 Sim. 352; *Hitchcock v. Coker*, 5 Ad. & El. 454; *Jones v. Havens*, 4 Ch. Div. 636; *Leather Cloth Co. v. Lorsent*, L. R., 9 Eq. 345; *Brewer v. Marshall*, 4 C. E. Greene (Iowa) 537, 546; *Leather Cloth Co. v. Lorient*, L. R., 9 Eq. 345; *Jarvis v. Peck*, 10 Paige (N. Y.) 118; *Ward v. Byrne*, 5 M. & W. 548; *Hinde v. Gray*, 1 M. & G. 195; *Allsopp v. Wheatcroft*, L. R., 15 Eq. 79; *Collins v. Locke*, 4 App. Cas. 464; 1 *Smith's L. Cas.* (8th ed.) 432; *Arnott v. P. & E. Coal Co.*, 68 N. Y. 558; *Dean v. Emerson*, 102 Mass. 480; *Richardson v. Peacock*, 33 N. J. Eq. 597; *Guerand v. Dandeleit*, 32 Md. 561; *Warfield v. Booth*, 33 Md. 63; *Lange v. Werk*, 2 Ohio, St. 519; *Bowser v. Bliss*, 7 Blackf. (Ind.) 344; *Heichew v. Hamilton*, 4 *Greene* (Iowa) 317; *Hedge v. Lowe*, 47 Iowa 137; *Smalley v. Greene*, 52 Iowa 241; *McAlister v. Howell*, 42 Ind. 15; *Beard v. Dennis*, 6 Ind. 200; *Grasselli v. Lowden*, 11 Ohio St. 349; *Perkins v. Clay*, 54 N. H. 518; *Pierce v. Woodward*, 6 Pick. (Mass.) 206; *Chappel v. Brockway*, 21 Wend. (N. Y.) 157; *Saratoga Co. Bank v. King*, 44 N. Y. 87; *Curtis v. Gokey*, 68 N. Y. 300; *Treat v. Shoninger Melodeon Co.*, 35 Conn. 543; *Holmes v. Martin*, 10 Ga. 503; *Jenkins v. Temples*, 39 Ga. 655; *Goodman v. Henderson*, 58 Ga. 567; *Hatcher v. Andrews*, 5 Bush (Ky.) 561; *Kellogg v. Larkin*, 3 Chand. (Wis.) 133.

1. A steamboat corporation in Oregon agreed with some citizens of Washington Territory that it would not run a steamboat in Oregon or California, and certain parts of Washington Territory. The contract was held to be against

public policy, and in restraint of industry and commerce. *Oregon Steam Nav. Co. v. Hale*, 1 Wash. Tr. 283.

If the purchaser of a steamboat, at the time of the purchase, covenants with the seller that he will not run or employ, or suffer to run or be employed, the said boat for ten years upon any of the routes of travel of the waters of a State, the covenant, being in restraint of trade and commerce, is void, as against public policy. *Whright v. Ryder*, 36 Cal. 342. Compare *Perkins v. Lyman*, 9 Mass. 522.

A contract not to exercise a trade or carry on business at a particular place, made upon good consideration, may be upheld if shown to be reasonable, and if the restraint upon the covenantor be not greater than is needed for the protection of the covenantee in the enjoyment of his trade or business. Parties owning passage boats running between New York and Albany on the Hudson river, sold one of their boats, and received back a covenant from the vendees that the boat sold should never, under any circumstances, be run as a passage boat north of Saugerties. *Held*, a valid contract. *Dunlop v. Gregory*, 10 N. Y. 241.

2. A railroad company obligated itself to another such company to abstain from doing business between designated points, and to take no freight or passengers from a third railroad company named, except at unusually high rates. The obligation was held valid. *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667 (reversing s. c., 15 Fed. Rep. 650).

3. A railroad company contracted, for a consideration, that it would not

rule is that illegal covenants in general restraint of trade, for which both contracting parties are responsible, render all the accompanying covenants, in the same contract, void, in the sense that they cannot be enforced. Only when one of the parties is innocent, and asking the court to enforce the unobjectionable covenants, and when justice to him as against the reprehensible party demands the granting of relief, will the court cull the good stipulations from the bad in such a contract.¹

Duty to Oneself and the State.—No one can legally deprive himself of the right and duty of making a living for himself and his family by any contract that he may enter into; nor can he cut himself off from the following of any particular vocation, in that way.² It is not such deprivation, however, when he gives up the following of his calling in a particular place, in consideration of a proper equivalent. Nor can anyone, by his conventions, deprive the public of its interest in him and his industry. If he merely makes way for another in a particular town or vicinity, the public is not a loser.³ Whatever restraining contract deprives the public generally of the services of one or both of the contracting parties, or tends to create monopoly, is void from its incompetency.⁴

"build a side track to its main line in the town of El Moro." This being against public policy, invalidated other parts of the contract which were otherwise legal. *Pueblo, etc., R. Co. v. Taylor*, 6 Colo. 1; s. c., 45 Am. Rep. 512.

1. *Relief to an Innocent Party.*—A contract is wholly void if covenants in restraint of trade, which are illegal as against public policy, enter into and form a part of the entire consideration, and both parties are in fault as to those covenants. A separation of the good consideration from that which is illegal will be attempted in those cases only where the party seeking to enforce the contract is not the wrongdoer, or the denial of relief would benefit the guilty party at the expense of the innocent. It is an inflexible rule that no remedy can be had in a court of justice on an illegal contract, where both parties are *in pari delicto*. *Saratoga County Bank v. King*, 44 N. Y. 87.

2. "Contracts in General Restraint of Industry and Trade, preventing parties from gaining a livelihood in any particular vocation or profession, are absolutely null and void, as being contrary to public policy." Addition on Contracts, vol. 2, 737. *Thompson v. Harvey*, 1 Show. 2; *Com. Dig. Trade 3*; *Gunmaker's Co. v. Fell*, Willes 389;

Tailors of Lichfield's Case, 11 Co. 53a; *Hinde v. Gray*, 1 M. & Gr. 195; 1 Sc. N. R. 123.

3. The law will tolerate no contract which, upon its face, goes to prevent an individual for any time, however short, from rendering his services to the public in any employment to which he may choose to devote himself; nor one which deprives any section of the country, however small, of the chances that the obligor in such contract may furnish to it the accommodation arising from the prosecution of a particular trade; unless it appears that the obligee himself intends to, and can, supply such accommodation. *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641.

4. *Why Void.*—Two principal grounds on which contracts to abandon business or occupation are held to be void, are that they tend to deprive the public of the services of men in the employments and capacities in which they may be most useful, and that they expose the public to the evils of monopoly. *Alger v. Thacher*, 19 Pick. (Mass.) 51; *Bishop v. Palmer*, 146 Mass. 469, 474.

Such contracts are forbidden by the common law, and their nullity rests on the same ground as if they were inhibited by statute. 2 Kent's Com. 466; 2 Chitty's Cont. 974; *White v. Buss*, 3 Cush. (Mass.) 448, 450; *Hynds*

2. *Limitation as to Space.—Limitation to a State.*—Business, susceptible of being extended all over the United States, may be confined to a particular State by contract, where there are no legal reasons to the contrary in the particular case to which this rule is sought to be applied.¹

State lines are not the limits within which one may contract relative to the restriction of his business or industry. Some callings would be treated as being under general restraint if inhibited by contract throughout the State, while others would not. While a manufacturing company might legally bind itself against doing business in nearly all the States, and for a long period, under given circumstances,² it might be unable to make a valid obligation to abstain from manufacturing throughout a single State, under other circumstances.³

A promise not to manufacture at all, for a limited time, is a general restraint; such a covenant in a contract that contained others which were valid in themselves, vitiated the whole.⁴ We cannot sever a partial restraint from a general one when both are contained in the same contract; for instance, an agreement not to do business in a county might be good, while a conjoined stipulation not to do so within the State would be bad, and both would be declared illegal because of the conjunction.⁵

v. Hays, 25 Ind. 31, 36; *Bishop v. Palmer*, 146 Mass. 469, 474.

For one dollar a person agreed to not run a stage on a certain road, under a penalty of \$290. The agreement was held valid. SEDGWICK, J., said: "Bonds to restrain trade in general are unquestionably bad, as tending to create a monopoly injurious to the public. But bonds to restrain trade in particular places may be good, if executed for a particular and reasonable consideration." *Pierce v. Fuller*, 8 Mass. 223, 226; *Mitchell v. Reynolds*, 1 P. Williams 181; *Perkins v. Lyman*, 9 Mass. 530; *Stearns v. Barrett*, 1 Pick. (Mass.) 450.

1. A man may limit his business, by contract, to a particular State or section, though it may be susceptible of extension throughout the country. *Whitney v. Slayton*, 40 Me. 224; *Warren v. Jones*, 51 Me. 146; *Oregon Nav. Co. v. Winsor*, 20 Wall. (U. S.) 64. But see *Lawrence v. Kidder*, 10 Barb. (N. Y.) 641; *Taylor v. Blanchard*, 13 Allen (Mass.) 370; *Dunlop v. Gregory*, 6 Seld. (N. Y.) 241.

2. *Partial Restraint Extending Beyond State Lines*—Where the restraint to trade, or to the pursuit of a calling, is partial and not general in character, it does not vitiate the contract imposing it. A match manufacturing company

had stipulated to forego, for ninety-nine years, the making and selling of matches in all of the States except two; this stipulation was held not to vitiate the contract of sale by which he transferred his manufactory, trade mark, etc., to his purchaser.

The question as to what is a general restraint of trade does not depend upon State lines; they are not the boundaries of trade and commerce, and a restraint is not necessarily general which embraces an entire State. *Diamond Match Co. v. Roeber*, 106 N. Y. 476.

3. *Gill v. Ferris*, 82 Mo. 156.

4. *Promise to Give Up Business.*—Of three agreements, closely connected as one transaction, the court said that the first was clearly illegal and void, as being in restraint of trade: "It being a general agreement, without any limitation of space, that for five years the plaintiff will not carry on the manufacture of bed-quilts," etc. *Bishop v. Palmer*, 146 Mass. 469, 473; *Morse Twist Drill Co. v. Morse*, 103 Mass. 73; *Dean v. Emerson*, 102 Mass. 480; *Taylor v. Blanchard*, 13 Allen (Mass.) 370; *Alger v. Thatcher*, 19 Pick. (Mass.) 51; *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. (U. S.) 64; *Davies v. Davies*, 36 Ch. Div. 359.

5. *Contract in Restraint of Trade Not Severable.*—A contract by which one of

Territorial Limits.—Whether the restraint covers too extended a territory, or too long a time to be deemed partial, depends much upon the nature of the business restricted. A contract to abstain from trade throughout an entire State has been held general and illegal, while limitation to a particular place is allowable;¹ and, without reference to any bounds, five years of abnegation from the dry goods business being stipulated in a contract of sale, was held a general restriction, and, therefore, contrary to public policy.²

3. *Competition.*—*Competition in Trade.*—Although the law favors competition, and abhors monopoly, yet contracts in which one of the parties bound himself not to compete with the other in a designated line of business, and within certain limitations of territory, have been sustained. The old rules governing the restraint of trade have been greatly modified, and relaxed in this respect. Circumstances are now more freely considered by the courts when determining whether or not a stipulated restriction is prejudicial to the public. When the good-will of a business is purchased, and the avoidance of competition by the vendor is part of the consideration, without which the purchaser would not have bought, a covenant on the part of the seller, binding himself not to compete in the business, is valid.³ The purchase may be made for no other reason than that of becoming free from competition.⁴ Such restraints are not uncommon in con-

the parties binds himself not to engage in a particular business or occupation "in the city and county of San Francisco, or State of California," is in restraint of trade, and therefore void, as against public policy. Such a contract is an entire contract, and cannot be severed so as to enforce that portion relating to the city and county of San Francisco, and reject that relating to California. *More v. Bonnet*, 40 Cal. 251.

1. A covenant in restraint of trade, generally, throughout the State, is void. Otherwise of a covenant not to trade in a particular place, and for a particular time. *Nobles v. Bates*, 7 Cow. (N. Y.) 307; *Gill v. Ferris*, 82 Mo. 156.

2. A contract to sell dry goods, and not to engage in the dry goods business for five years thereafter, with no reference to any particular locality or territory, is an illegal restraint of trade. *Wiley v. Baumgardner*, 97 Ind. 66; s. c., 49 Am. Rep. 427. A merchant sold his "good-will" and agreed not to do business within five miles of his old stand. *Held*, good. *Elves v. Crofts*, 10 C. B. 241. Similar cases: *Benwell v. Inns*, 24 Beav. 307; *Nobles v. Bates*, 7 Cow. (N. Y.) 307; *Holmes v. Martin*, 10 Ga.

503; *Pierce v. Woodward*, 6 Pick. (Mass.) 206; *Grasselli v. Lowden*, 11 Ohio St. 349; *Laubenheimer v. Mann*, 17 Wis. 542; *Gompers v. Rochester*, 56 Pa. St. 194. A manufacturer agreed not to manufacture within two hundred miles of a given point, and the agreement was held valid. *Harms v. Parsons*, 32 Beav. 328.

3. *Preventing Competition in Business.*—It seems that, while the early doctrine of the common law that contracts in general restraint of trade are void, without regard to circumstances, has not been fully abrogated, it has been much weakened and modified. As to whether such a covenant is invalid, where the restraint is general, but, at the same time, is co-extensive only with the interest to be protected, and with the benefits intended to be conferred, *quære*. The motive of the covenant is not the test of the validity of such a covenant. A party may legally purchase the trade and business of another for the purpose of preventing competition. *Diamond Match Co. v. Roeber*, 106 N. Y. 473.

4. "We suppose a party may legally purchase the trade and business of another for the very purpose of prevent-

tracts dissolving partnerships, when one or more of the firm continue the business, and the others agree not to compete; and agreements to effect such result have been held good.¹

The law so favors freedom of industry, that it will not hold a party to a valid contract not to compete so far as to prevent him from being employed in his calling by another competitor. He may be bound, within reasonable limits as to time and place, not to do business or follow his trade on his own account, yet be legally open to employment in that same business, and that same place, and within the stipulated time, as the employe of another. This may seem an evasion of his contract, but the reason is that public policy does not allow him to cut himself off from earning his living when a strict construction of his agreement is not inconsistent with his being engaged to work, like any other journeyman, for one who is free to compete. The authorities seem not wholly agreed upon this—circumstances must be considered in each particular case.²

ing a competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties. Combinations between producers to limit production, and to enhance prices, are, or may be unlawful, but they stand on a different footing." *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 483; *Whittaker v. Howe*, 3 Beav. 383; *Jones v. Lees*, 1 Hurl. & N. 189; *Rousillon v. Rousillon*, 14 L. R., Ch. Div. 351; *Leather Co. v. Lorrent*, 9 Eq. Cas. L. R. 345; *Collins v. Locke*, 4 App. Cas. L. R. 674; *Oregon Steam Co. v. Winsor*, 20 Wall. (U. S.) 64; *Morse Drill Co. v. Morse*, 103 Mass. 73.

1. An agreement made upon the dissolution of a copartnership and purchase by one of the firm of the stock in trade, that the retiring partner shall not engage in the business for a specified period of time, or so long as the other shall continue such business, is not in restraint of trade, and is valid. The law will not presume an agreement void, as illegal or against public policy when it is capable of a construction which will make it valid. *Curtis v. Gokey*, 68 N. Y. 300.

When A, a school teacher, was induced by B, another school teacher, to purchase of B the lease of an academy, under inducements held out by B, that, if he could sell, he would quit teaching in the locality, and, on these inducements, the purchase was made. *Held*, that equity will enjoin B from teaching a school in the locality during the lease. *Spier v. Lambdin*, 45 Ga. 319. See *Mell v. Mooney*, 30 Ga. 414.

A livery-stable keeper sold his stock to two persons—to each a part—and engaged to refrain from his business for five years in his stable. The agreement was sustained and, upon violation of the promise, either of the purchasers could sue alone for the entire damages liquidated in the contract. *Johnson v. Gwinn*, 100 Ind. 466.

A merchant sold a stock of goods, and bound himself not to engage in the business of selling such goods in the town for five years. It was *held* a partial restraint, and therefore permissible. *Washburn v. Dosh*, 68 Wis. 436.

A contract binding a party not to compete in the running of a stage on the line from Boston to Providence, was sustained as legal. *Pierce v. Fuller*, 8 Mass. 223. So a contract not to ship poultry from New Jersey to the cities of New York and Washington, was deemed legal. *Richardson v. Peacock*, 33 N. J. Eq. 597.

2. One agreed with another that he would not open an eating and billiard saloon in a town. He opened and managed such a saloon as the employe of a third person, which was *held* not violative of his agreement. *Tabor v. Blake*, 61 N. H. 83.

But where a butcher obligated himself to quit his business, he was *held* to have violated his agreement by running such calling for another. *Finger v. Hahn*, 42 N. J. Eq. 606.

It was *held* that one who had contracted not to practice dentistry on his own account, or through the agency of another, within specified territory,

Competition in Industry.—It is illegal for an artisan, or anyone following an industrial pursuit, to make an agreement not to practice his art or calling. The reasons are that the public would be deprived of his services, and competition with rival workmen would be prevented, were such contracts allowed. The public is interested in the competition as a means of allowing the natural law of supply and demand to operate upon labor.¹

While general contracts preventing competition are thus unlawful, partial ones are permissible under certain circumstances. Where the reasons above given are inapplicable, part of the consideration for buying the free will may be the obligation taken by the seller that he will not compete. The test of the validity of a contract restraining competition is the question, "Will the public interest suffer?" If so, such a contract cannot be enforced. It may be to the advantage of a community that the number of artisans at a particular place should be limited in number, so that they can obtain sufficiently liberal support to enable them to do the better work.²

The principle applies to professional men. Physicians may bind themselves not to practice within certain towns or districts, and thus make way for their successors who buy the practice; and the public will not necessarily suffer by the exchange of one doctor for another.³

might yet work for another within the limits. *Bowers v. Whittle*, 63 N. H. 147; s. c., 56 Am. Rep. 499.

One may contract not to do a certain business, at a stated place, within a limited period. *Arnold v. Kreutzer*, 67 Iowa 214.

1. *Callahan v. Donnelly*, 45 Cal. 152; *Jenkins v. Temples*, 39 Ga. 655; *Craft v. McConoughy*, 79 Ill. 346; *Lange v. Werk*, 2 Ohio St. 520; *Davis v. Barney*, 2 Gill & J. (Md.) 382; *Harkinson's App.*, 78 Pa. St. 196; *Gompers v. Rochester*, 56 Pa. St. 194; *Keeler v. Taylor*, 53 Pa. St. 467; *Dakin v. Williams*, 11 Wend. (N. Y.) 67; *Nobles v. Bates*, 7 Cow. (N. Y.) 307; *Taylor v. Blanchard*, 13 Allen (Mass.) 370; *Alger v. Thacher*, 19 Pick. (Mass.) 51; *Whitney v. Slayton*, 40 Me. 224.

2. "It may be beneficial to the country that a particular place should not be overstocked with artisans or other persons engaged in a particular trade or business; or a particular trade may be promoted by being, for a short period of time, limited to a few persons, especially if it be a foreign trade recently discovered, and it can be beneficial but to a small body of adventurers." *Story's Eq. Jur.*, § 292, citing *Perkins v. Lyman*, 9 Mass. 522; *Bryson v. White-*

head, 1 Sim. & St. 74; *Vickery v. Welch*, 19 Pick. (Mass.) 523. See *Taylor v. Blanchard*, 13 Allen (Mass.) 370; *Gillis v. Hall*, 2 Brewst. (Pa.) 342; *Keeler v. Taylor*, 53 Pa. St. 467.

3. "An agreement not to practice (medicine) within what is, under the circumstances, the ordinary bounds of practice, will be sustained." *Wharton on Contracts*, vol. 1, § 443, citing *Davis v. Mason*, 5 T. R. 118; *Saintor v. Ferguson*, 7 C. B. 716; *Mallan v. May*, 11 M. & W. 653; *Atkyns v. Kinnier*, 4 Ex. 776; *Gravelly v. Barnard*, L. R., 18 Eq. 518; *Perkins v. Clay*, 54 N. H. 518; *Butler v. Burleson*, 16 Vt. 176; *Pierce v. Woodward*, 6 Pick. (Mass.) 206; *Dean v. Emerson*, 102 Mass. 480; *Dwight v. Hamilton*, 113 Mass. 175; *Treat v. Melodeon Co.*, 35 Conn. 543; *Sander v. Hoffman*, 64 N. Y. 248; *Mott v. Mott*, 11 Barb. (N. Y.) 127; *Van Marter v. Babcock*, 23 Barb. (N. Y.) 633; *Erie R. R. Co. v. Express Co.*, 6 Vroom (N. J.) 240; *McClurg's App.*, 58 Pa. St. 51; *McNutt v. McEwan*, 1 W. N. Cas. (Pa.) 552; *Palmer v. Graham*, 1 Pars. Eq. Cas. (Pa.) 476; *Guerand v. Dandelet*, 32 Md. 561; *Warfield v. Booth*, 33 Md. 63; *Bowser v. Bliss*, 7 Blackf. (Ind.) 344; *Heichew v. Hamilton*, 4 Greene (Iowa) 317; *Hubbard*

It was held that a physician who sold his practice in his town and obligated himself not to "settle" there, might practice there nevertheless.¹ Where the agreement is that the seller of "good-will" shall not compete, it has been held that there need not be any time specified.²

Not only within a town and its immediate vicinity, or a small district, may a professional man debar himself from exercising his calling, but even over wide areas. A circuit of a hundred miles radius from London was not deemed too great; and a lawyer, who agreed to forego the practice of law for twenty years throughout Great Britain, was held bound by his contract.³

Exclusive Privilege.—Though the grant of the exclusive privi-

v. Miller, 27 Mich. 15; *Jenkins v. Temple*, 39 Ga. 655; *Thompson v. Means*, 11 S. & M. (Miss.) 604; *More v. Bonnet*, 40 Gal. 251.

A physician who promised not to practice his profession in "the city and vicinity," for a valuable consideration, was enjoined from practicing within a circuit of ten miles. The injunction was sustained. *Timmerman v. Dever*, 52 Mich. 34; s. c., 50 Am. Rep. 240.

A patent medicine proprietor, selling his right, trade mark, etc., to his "Brewer's Lung Restorer," and promising not to make or sell any similar preparation, was enjoined from selling his "Brewer's Sarsaparilla Syrup" as a cure for all lung diseases. *Brewer v. Lamar*, 69 Ga. 656; s. c., 47 Am. Rep. 766.

1. A physician agreed to sell his practice in a certain town, and not to resettle there; but it was *held* that he might practice there while residing in another place. *Haldeman v. Simon-ton*, 55 Iowa 144. But it has been decided that a confidential agent cannot compete with his employers in a business at a certain place, after contracting not to compete there. *Rousillon v. Rousillon*, 14 Ch. Div. 351.

2. Such an agreement need not necessarily be limited as to time. *Catt v. Tourle*, L. R., 4 Ch. Ap. 659; *Perkins v. Clay*, 54 N. H. 518. The sale of "good-will" with promise not to compete may be unlimited as to time. *Hubbard v. Miller*, 27 Mich. 15; *Pemberton v. Vaughan*, 10 Q. B. 87. Partial restraint upon the practice of medicine within certain limits, was *held* permissible. The restriction was not limited as to time, but the court *held* that this did not make it a general restraint, and therefore void. *French v. Parker* (R. I.), 14 Atl. Rep. 870.

An agreement that defendant, a

moderately skilful dentist, would abstain from practising over a district 200 miles in diameter, in consideration of receiving instructions and a salary from the plaintiff, determinable at three months' notice, *held*, unreasonable and void. *Horner v. Graves*, 7 Bing. 735. But an agreement not to practice dentistry within ten miles of Litchfield was sustained. *Cook v. Johnson*, 47 Ct. 175.

Defendant bound himself with plaintiff, by an agreement in writing, in consideration of \$500, not to practice medicine nor in any manner to do business as a physician in the county of Oswego, at any time after the first day of May, 1851. *Held*, good. *Holbrook v. Waters*, 9 How. Pr. (N. Y.) 335.

3. A solicitor agreed not to practice within one hundred and fifty miles of London, and it was *held* not a general restraint, and was therefore lawful. *Bunn v. Guy*, 4 East 190.

So a contract to abstain from practicing law anywhere in Great Britain, for twenty years, was considered but partial restraint. *Whitaker v. Howe*, 3 Beav. 383.

An obligation not to practice law in a particular town was *held* good. *Smalley v. Greene*, 52 Iowa 241.

A journeyman at the trade of making printers' rollers, contracted not to work in his calling within the city of New York, nor within 250 miles of it. The contract was void, as being in restraint of industry. *Bingham v. Maigne*, 52 N. Y. Superior Ct. 90.

Rival washing-machine manufacturers contracted that one should discontinue business and become the partner of the other, for five years, and they adopted a scale of prices. This was *held* to be not a restraint on industry and trade. *Dolph v. Troy Laundry Machinery Co.*, 28 Fed. Rep. 553.

lege, by a railroad company to a telegraph company, to run wires along the line of the road, would not be a monopoly in strict parlance; nor would the grant of the exclusive privilege of running tubes to conduct oil through a large tract of land, yet such exclusions have been held restraining to trade and against public policy.¹ Even a municipal corporation is by that policy prohibited from binding itself to give an exclusive grant to a market.²

An agreement to give preference to certain customers has been reprobated,³ though it is held that contracting parties may legally agree to prefer each other mutually in their dealings.⁴ And, when the public interest was provided for, exclusive employment of one company by another was permissible.⁵ All monopolies

1. The granting of exclusive privilege to telegraph along a railroad line, is against public policy. *W. U. Tel. Co. v. Balt., etc.*, Tel. Co., 23 Fed. Rep. 12; *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; *Balt. & O. Tel. Co. v. W. U. Tel. Co.*, 24 Fed. Rep. 319; *W. U. Tel. Co. v. Am. U. Co.*, 19 Am. Law Reg. N. S. 173; *W. U. Tel. Co. v. Burlington & R. Co.*, 3 McCrary (U. S.) 130; s. c., 11 Fed. Rep. 1; *Atlanta Tel. Co. v. Railroad*, 1 McCrary (U. S.) 541.

The grant of exclusive privilege and right of way, through a tract of 2,000 acres of land, to construct tubing for the conduct of oil, was held to be in restraint of trade, and illegal. *West Va. Transp. Co. v. Ohio, etc., Co.*, 22 W. Va. 600; s. c., 46 Am. Rep. 527.

2. *Gale v. Kalamazoo*, 23 Mich. 344.

3. A telephone company agreed to prefer certain parties: held to be in conflict with statute. *State v. Telephone Co.*, 36 Ohio St. 296.

The plaintiffs contracted to erect a hotel, and the defendant (a railroad company) agreed to deed land to him for the site, and to keep a railroad station there, and to give the patronage of the company to the hotel, and dissuade all others from putting hotels at the place. The company violated its agreement, and was held liable for the breach. *Texas, etc., R. Co. v. Robards*, 60 Tex. 545; s. c., 48 Am. Rep. 268.

An attorney and the city of Laredo, Texas, agreed that the former should have for his professional services, one-third of the rents of the ferry privileges, or of any tolls, should the Rio Grande be bridged, etc. The contract was held void, because it restrained the city from establishing free ferries or bridges, etc. *Waterbury Co. v. Laredo*, 68 Tex. 565.

A man sold land on condition that the purchaser should sell no sand from it. The vendor's business was that of selling sand, and he exacted this stipulation to protect his business and prevent competition. The court sustained the contract, including the restraining stipulation. *Hodge v. Sloan*, (N. Y.) 17 N. E. Rep. 335.

The profits of an executed pooling contract between railroad companies, was allowed to be distributed in accordance with the contract. *Central Trust Co. v. Ohio Central R. Co.*, 23 Fed. Rep. 306.

To combine lumber makers, limit the production, and raise the price of lumber, and give the control of the business to a designated person over four counties for a year, that person contracted with other lumber makers, and secured control accordingly. He leased their mills, or purchased the products of them for one year, for this purpose. Those with whom he contracted agreed to manufacture no lumber for sale during the year in the four counties, under penalty. It was held that no part of this contract could be enforced; that it was in restraint of trade, and against public policy. *Santa Clara, etc., Co. v. Hayes*, (Cal.) 18 Pac. Rep. 391.

4. **Mutual Restrictions.**—It has been held that contracting parties may legally obligate themselves to deal with each other exclusively, in a certain line of trade. *Gale v. Read*, 8 East 80; *Cooper v. Twibill*, 3 Camp. 286 s; *Catt v. Tourle*, L. R., 4 Ch. 654. But this should be received with qualification and caution. *Compare Schwalm v. Holmes*, 49 Cal. 665.

5. A railroad company contracted to employ a certain ferry company ex.

are reprobated.¹

4. *Reasonable Consideration.—General Restraint Cannot be Legalized.*—A contract in general restraint of trade cannot be legalized by any form of agreement, however technical and solemn. In a deed conveying real estate, if the purchaser may be limited in his use of it,² such a contract cannot be inserted so as to make the restraint binding upon successive owners.³

Yet in a contract between gas companies, exchanging their mains, etc., a restriction upon the laying of pipes was imposed upon one of the parties, limited to a particular part of the city, to continue for a hundred years; and this restraint was sustained

causively as to its own business, but required the latter to give the usual facilities to the public. *Held*, good. *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 73 Mo. 39.

Granting exclusive right to a particular line of telegraph poles, when no monopoly of the entire road bed was given for such purpose, has been *held* legal. *W. U. Tel. Co. v. Chicago R. Co.*, 86 Ill. 246.

It has been *held* that a telephone company may lawfully limit its dealing to one telegraph company. *Am. Rapid Tel. Co. v. Telephone Co.*, 49 Conn. 352. *Compare State v. Telephone Co.*, 36 Ohio St. 296.

A doctor had a drug store which he sold, obligating himself to the purchaser that he would send all his prescriptions to that store. *Held*, that the obligation was binding. *Ward v. Hogan*, 11 Abb. (N. Y.) N. Cas. 478.

A manufacturer, in selling out, agreed not to compete with the purchaser in business. *Held*, valid. *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. Super. Ct. 442.

Manufacturers and sellers of a patent article may bind themselves not to dissolve their firm within a given time, and that, without the consent of the rest, one partner cannot withdraw. *Central Shade Roller Co. v. Cushman*, 143 Mass. 358.

An author may bind himself for a time to write exclusively for one publisher or publishing house; it has been so *held* with reference to a dramatic author. *Morris v. Coleman*, 18 Ves. 437.

1. *Monopoly.*—A contract is void, as against public policy, if its object is to create a monopoly; for public policy "favors free trade and is against monopoly and engrossing." *Addison on Contracts*, vol. 2, (8th ed.) 743, *citing*

East Ind. Co. v. Sandys, Skin. 169; *Darey v. Allen*, Moore 671. The case of Monopolies, 11 Co. 86 b; *Com. Dig. Trade* (D. 4); *Arnot v. Pittston, etc.*, Coal Co., 68 N. Y. 558; *Craft v. McConoughy*, 79 Ill. 346; *Skrainka v. Scharringhausen*, 8 Mo. App. 522; *W. U. Tel. Co. v. Am. U. Tel. Co.*, 65 Ga. 160; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. (U. S.) 64.

2. A contract in general restraint of trade is void; but if in partial restraint of trade only, it may be supported, provided the restraint be reasonable and the contract founded on a consideration. When H sold to A, a town lot, with a restriction that it should not be used as a tavern, *held*, that the restriction was valid. A general conveyance may be limited by restrictive words in the same instrument. *Holmes v. Martin*, 10 Ga. 503.

It was *held* that a stipulation by a purchaser, in the contract, that he would not allow a warehouse or shipping place upon the land bought by him, was not against public policy. *Robbins v. Webb*, 68 Ala. 393. But land being conveyed to a railroad company on condition that no station should be established within three miles of a designated place, the contract was *held* to be against public policy. *St. Louis, etc., R. Co. v. Mathers*, 104 Ill. 257. A railroad company agreed to place and keep its depot at a certain spot. This was *held* not against public policy, since the company did not debar itself from locating a depot at another place. *Louisville, etc., Ry. Co. v. Sumner*, 106 Ind. 55; s. c., 55 Am. Rep. 719.

3. Restrictions of business, trade, etc., cannot run with the land, though expressed in the deed conveying it. *Tardy v. Creasy*, 81 Va. 553. Inhibition, in a deed of any resale, is absolutely void. *Munroe v. Hall*, 97 N. Car. 206.

in court.¹ And restraint upon the sale of spirituous liquors, imposed by contract, is not against public policy.²

Partial Restraint Must be Reasonable.—Courts judge in each particular case, whether the restraint covenanted be reasonable as between the parties, and not injurious to the public. Circumstances must be duly considered. What holds a man from serving the community and providing for himself and his family is against public policy.³ Neither the public nor himself and family are necessarily injured when an artisan, for a valid consideration and upon good reason, binds himself not to pursue his calling in a particular place, and for a limited time. It is held, however, that the benefits must be mutual between the contracting parties, and that there must be good reason for the restraint beyond the monetary consideration.⁴

Mere limitation as to time is not sufficient to take a contract out of the inhibition of general restraint. However short the period, if the restraint is general as to space, it is illegal. One may obligate himself not to do business in a certain town, but not to refrain from business everywhere during a specified time.⁵

It has been held that a contract was unreasonable as to space, because it sought to bind a journeyman mechanic against following his trade in a particular place—the decision being in exposition of a statute.⁶

1. One gas company validly bound itself to another to lay no pipes for one hundred years in a certain part of a city, in consideration of the latter's transfer of the gas-mains, etc., in another part of the city. *People's Gas Light, etc. Co. v. Chicago Gas, etc., Co.*, 20 Ill. App. 473.

2. In *Michigan*, binding oneself not to sell ardent spirits is not against public policy as restraint of trade. *Watrous v. Allen*, 57 Mich. 362.

3. Questions about contracts in restraint of trade must be judged according to the circumstances on which they arise, and in subservience to the general rule that there must be no injury to the public by its being deprived of the restricted party's industry, and that the party himself must not be precluded from pursuing his occupation and thus prevented from supporting himself and family. *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. (U. S.) 64.

4. *Contracts for a Limited Restraint*—not to do business within certain limits—are valid, if entered into for good reasons. It seems that it is not enough that there be a *consideration*, such as would uphold a contract in which the public have no interest; but that whatever may be the pecuniary consideration,

it must appear in addition that there was some good reason for entering into contract, and that it imposes no restraint upon one party which is not beneficial to the other. *Chappel v. Brockway*, 21 Wend. (N. Y.) 157.

5. If the restraint is general, and not confined to any particular district or locality, the shortness of time for which it is imposed will not make it good. Therefore, when a coal merchant's clerk and traveller bound himself "not to follow or be employed in the business of a coal merchant for the space of nine months after he should have left the service of his employer, it was *held* that the bond was void." *Addison on Contracts*, vol. 2, 737. A contract not to engage in business at a certain place may be enforced. *Stewart v. Challacombe*, 11 Ill. App. 379.

6. *Held*, that though a contract in partial restraint of trade, restricting it within certain reasonable limits or times, and confining it to particular persons, is valid, if founded on a good and valuable consideration, the contract in this case is clearly unreasonable as to space, and is also against the spirit, if not the letter, of the State statute, making it unlawful to accept from any journeyman or apprentice

Sale of Patent Rights.—A contract to sell a patent, with covenants not to manufacture or sell them, need not be confined to a particular place or time. It may be a general restraint upon the seller and yet be perfectly valid. For such a contract does not injuriously affect the public. The patent law contemplates the exclusive benefit of the inventor, in the first instance; and, therefore, the transfer of his right to another puts no additional restraint upon trade or manufacture.¹ Should an inventor sell his right to obtain a patent, the public would not be injured by the exclusive privilege being vested in the purchaser instead of the inventor.²

But covenanting not to make or sell a patented machine, in a contract to sell a patent, has been held void, as not incidental to the sale of the patent. Doubtless, the vendor could not make or manufacture on his own account.³

5. *Combinations.*—*Combination to Affect Prices.*—All compacts between merchants, speculators or any class of men to elevate or depress the market, are injurious to the public interest, and in restraint of trade. When such a purpose is apparent in a contract, it strikes the agreement with nullity. Such a combination of dealers is nothing less than a conspiracy against trade, entered into for selfish purpose, and tending to make the poor poorer, and the rich richer.

Whether the design is to bring the price of any commodity to a point below its value in a fair and open market, or to raise it above its true worth, the illegality of the combination is the same. Such design will not be furthered by the courts, though there may be circumstances under which the object of such a contract does not sufficiently appear as to expose the illegality. If the true character is known, the contract will be held void.⁴

any contract that he shall not set up his trade in any particular place. *Bingham et al. v. Maigne*, 52 N. Y. Super. Ct. 90.

1. *Patents.*—A covenant made by the patentee of a process not local in character, for the purpose of selling the patent, and as a part of the transaction of sale and part of the consideration, to use his best efforts to invent improvements and transfer them to the buyer, and to encourage no competition against the buyer, was held not necessarily void, in restraint of trade. *Morse Twist Drill Co., v. Morse*, 103 Mass. 73.

Patents.—It is no restraint of trade to sell a patent right. *Gilmore v. Aiken*, 118 Mass. 94; *Morse Drill Co. v. Morse*, 103 Mass. 73; *Peabody v. Norfolk*, 98 Mass. 452; *Vickery v. Welch*, 19 Pick. (Mass.) 523; *Dorsey Rake Co. v. Bradley*, 12 Blatch. (U. S.) 202; *Kinsman v. Parkhurst*, 18 How. (U. S.) 289.

2. So, a right to an unpatented invention may be conveyed. *Hammond v. Organ Co.*, 92 U. S. 724; *Peabody v. Norfolk*, 98 Mass. 452.

3. The inventor and manufacturer of sandpapering machines sold his interest in the patents and in his business, covenanting not to make or sell any such machines of any description, without the purchaser's consent. The restriction was held to be greater than was necessary to protect the purchaser in the patents and business purchased, not being confined to any particular place or State, and not allowing the inventor to invent other sandpapering machines or to pursue his business anywhere, and therefore against public policy. *Berlin Machine Works v. Perry*, 71 Wis. 495.

4. *Combinations.*—*Arnot v. Pittston, etc.*, Coal Co., 68 N. Y. 558; *Fairbank v. Leary*, 40 Wis. 637; *Wiggins Ferry Co. v. Ohio, etc.*, R. Co., 72 Ill. 360;

Stock Sales.—A stockholder cannot legally divest himself of the right to sell his shares when he chooses to sell, and to any purchaser who may offer, by an agreement with other shareholders, to abstain from selling for three years, and then to sell only to each other—the stock meanwhile to be held by trustees.¹ But stockholders may have all their stock in the name of one of their number for the purpose of forming their corporation.²

Combinations to put stocks up or down, taking them out of the legitimate influence of supply and demand upon prices; combinations to elevate or depress the grain market, or to speculatively affect sales of any commodity irrespective of the natural laws of commerce, are all against public policy. They derange trade, rather than promote it, and are not legal nor enforceable.³

Contracts to Sell but Not Deliver.—Sales of stocks, grain, etc., on margin, in which delivery is not contemplated by either party, but merely an adjustment of the profits or losses at a future period, are not conducive to the public good, and are rather an incubus upon commerce than a healthy practice of it. They are,

Craft v. McConoughy, 79 Ill. 346; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666.

1. It was *held* a restraint on the right to sell property when some stockholders contracted to put their stock in the hands of trustees for three years; authorized the trustees to vote the stock at all stockholder's meetings, and stipulated that it should be sold only subject to the agreement, and to one another, rather than to others. Such contract could not be enforced in equity. *Moses v. Scott*, (Ala.) 4 So. Rep. 742.

2. To form a corporation, it was agreed that all the stock should be taken by one person, in behalf of himself and his associates. The agreement was *held* to be valid. *King v. Barnes*, 109 N. Y. 267.

3. When an extravagant price for red lion wheat was made the consideration of a note, it was *held* that the contract was against public policy, and the note void, because its object was to further the sale of the wheat at an extravagant price. There was an agreement in the note to sell thirty bushels of wheat to the maker at \$15 per bushel, and other stipulations, leading the court to its conclusion. *Davis v. Seeley*, (Mich.) 38 N. W. Rep. 901.

A note of \$125 was given as half the price of twenty-five bushels of Bohemian oats. The payee agreed to sell oats for the maker at \$10 per bushel, he to receive a commission. The contract was *held*

void, as against public policy. *McNamara v. Gargett* (Mich.), 36 N. W. Rep. 218.

"Corners in the Market."—Contracts to create what are called corners in the market, and thereby to control the prices of articles of commerce, such as breadstuffs, fuel and other necessities of life, are void, as against the policy of the law. They are unlawful interference with the freedom of trade. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 174; *Arnot v. Pittson & Elmira Coal Co.*, 68 N. Y. 558; *Raymond v. Leavitt*, 46 Mich. 447; *Sampson v. Shaw*, 101 Mass. 145; *Wright v. Crabbs*, 78 Ind. 487; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; *Craft v. McConoughy*, 79 Ill. 346; *Fisher v. Bush*, 35 Hun (N. Y.) 645. *Knowlton's Anson on Contracts*, (2 Am. ed.) *188.

Illinois has a statute against "cornering the market," and making contracts for that purpose void. Plaintiff and defendant successfully "cornered" the wheat market. The plaintiff left his share of the profits with the defendant for the purpose of using it in another mutual speculation—a deal in lard. In his suit to recover the money, it was *held* that, although the wheat deal was illegal, the plaintiff could recover. *Welk v. McGeoch*, 71 Wis. 196. In this case the plaintiff had made a settlement with the defendant, and largely overpaid the latter, because of false statements. This was a reason for judgment.

therefore, held to be against public policy.¹

The purchaser may have the right to have his purchase delivered to him, should he elect to take it rather than settle upon "differences"; therefore, the broker who bought for him is entitled to his commission.² And, where actual delivery is intended, the stipulation that it is to take place at a future day would not render the contract illegal.³

6. Restraint Upon Public Sales.—Contracts Not to Bid at Auctions.—It is illegal for persons to make an agreement to refrain from bidding at public auctions. Such an agreement tends to prevent free competition, which the law favors. It is a restraint upon trade, since the tendency is to hinder the natural operation of the great law of supply and demand as known to political economy. When the government offers public jobs to the lowest bidder, it is interested in free competition; and any combination of contractors to suppress bidding, with the view of getting the contract from the government at a higher figure than could otherwise be obtained, is prejudicial to the government. Putting one of their number forward to make a bid with the view of sharing the profits with him, rather than allowing free competition, is the method of restraint frequently employed. This would be a legal method if used by a partnership speaking through a single member of the firm, but not when used by independent contractors who combine merely to get an advantage in the bidding.⁴

1. Options and Margins.—It is against public policy to make an apparent contract of sale, when no delivery is meant, but merely a settlement of the differences of price at the date of the pretended sale and the time of adjustment. *Irwin v. Williar*, 110 U. S. 499; *Hentz v. Jewell*, 4 Woods (U. S.) 656; *Story v. Salomon*, 71 N. Y. 420; *Williams v. Tiedemann*, 6 Mo. App. 269; *Tenney v. Foote*, 4 Ill. App. 594; *Webster v. Sturges*, 7 Ill. App. 560; *Beveridge v. Hewitt*, 8 Ill. App. 467; *Kirkpatrick v. Adams*, 20 Fed. Rep. 287.

"Wheat deals"—differences to be settled according to the fluctuations of the market—are void, as against public policy. *Cockrell v. Thomson*, 85 Mo. 510. And in *Illinois*, the broker cannot recover the differences by suit against his principal. *McCormick v. Nichols*, 19 Ill. App. 334.

There can be no recovery on a note based on the fluctuations of the market, such as above described. *Lyons Bank v. Oskaloosa Packing Co.*, 66 Iowa 41.

Sales in which there is to be no delivery, but an adjustment of differences in the value of the thing nominally sold at the time of the contract as compared with the time of settlement, are void—

the object being against public policy. *Melchert v. Am. U. Tel. Co.*, 3 McCrary (U. S.) 521; *Cobb v. Prell*, 15 Fed. Rep. 774; *Colderwood v. McCrea*, 11 Ill. App. 379. Compare *Union Bank v. Carr*, 15 Fed. Rep. 438.

2. If the broker really buys and sells, in margin stock transactions, his acts have been held valid, whether his principal intends to take the stock or settle upon "the differences." *Baldwin v. Flagg*, 36 N. J. Eq. 48. Compare *Thompson v. Cummings*, 68 Ga. 124.

3. If there is to be actual delivery, the sale at what may be the price in future is held valid. *Gregory v. Wattowa*, 58 Iowa 711; *Cole v. Millmine*, 88 Ill. 349; *Pixley v. Boynton*, 79 Ill. 351; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Rumsey v. Berry*, 65 Me. 570. See further, on "futures," *Mann v. Bishop*, 136 Mass. 495; *Lowe v. Young*, 59 Iowa 364; *Murry v. Ocheltree*, 59 Iowa 435; *Dickson v. Thomas*, 97 Pa. St. 278.

4. **Bidding for Public Jobs.**—*Weld v. Lancaster*, 56 Me. 453; *Noyes v. Day*, 14 Vt. 384; *Gibbs v. Smith*, 116 Mass. 692; *Engleman v. Strainka*, 14 Mo. App. 437; *Atcheson v. Mallon*, 43 N. Y. 147; *Wilbur v. How*, 8 Johns. (N.

Judicial sales should be untrammelled by any restraint. There can be no legal contract binding any persons to refrain from bidding. When the law directs that property shall be offered at auction by a marshal, sheriff, constable or any official, it means that the land or goods shall command the highest price which anyone is willing to give. To defeat this intent of the law by a contract not to bid is manifestly against public policy, and contracts to that effect are void.¹

It has been held, however, that in the absence of fraud, and with the consent of all interested, such a contract may be sustained.²

III. Lobbying Contracts.—1. *Nullity of Contracts to Control Legislation.*—*Reason of the Illegality.*—Contracts, having for their object the improper influencing of legislative bodies, are juridically immoral and void. They strike at the very foundation of government, since they tend to prevent honest deliberation in such bodies, and thus to defeat the will of the people who elect the legislators for the purpose of having wise and useful laws enacted for the public good—not for the promotion of private, pecuniary interests. Hence, the law reprobates all contracts made for the nefarious purpose of inducing legislators to support a measure by other means than fair and open argument; and such contracts cannot be enforced.³

Y.) 444; *Sharp v. Wright*, 35 Barb. (N. Y.) 236; *People v. Lord*, 6 Hun (N. Y.) 390; *Gustick v. Ward*, 5 Halst. (10 N. J. L.) 87; *King v. Winants*, 71 N. Car. 469; *Kennedy v. Murdick*, 5 Harr. (Del.) 458; *Ray v. Mackin*, 100 Ill. 246; *Hannah v. Fife*, 27 Mich. 172; *Swan v. Chorpennning*, 20 Cal. 182; *Woodruff v. Berry*, 40 Ark. 251.

Public works were to be constructed—the lowest bidder to have the job. It was fraud upon the public for persons to obligate themselves not to bid, or not to bid beyond a certain sum. *Hunter v. Pfeiffer*, 108 Ind. 197.

Four persons agreed that one of them should bid in his own name, and should share the profits of the public employment (should it thus be obtained) with the other three. This suppression of bidding was held to be against public policy. *Woodruff v. Berry*, 40 Ark. 251. Compare *Smith v. Ullman*, 58 Md. 183; s. c., 42 Am. Rep. 329; *Hunt v. Elliott*, 80 Ind. 245; s. c., 41 Am. Rep. 794.

One cannot recover all beyond a certain sum for procuring bids for resale of decedent's estate; the assets received must form part of the estate, and cannot be disposed of. *Danielwitz v. Sheppard*, 62 Cal. 339.

1. **Bidding at Public Sales.**—Stifling competition at judicial or other public sales, by contracts not to bid, is against public policy; and such agreements are void. *Woodruff v. Berry*, 40 Ark. 251; *Cocks v. Izard*, 7 Wall. (U. S.) 559; *Webster v. Denison*, 25 Vt. 493; *Taylor v. Walt*, 54 Vt. 469; *Gardiner v. Morse*, 25 Me. 140; *Curtiss v. Aspenwall*, 114 Mass. 187; *Gibbs v. Smith*, 115 Mass. 592; *Brisbane v. Adams*, 3 N. Y. 129; *People v. Stephens*, 71 N. Y. 527; *Dick v. Cooper*, 24 Pa. St. 217; *Walter v. Germant*, 13 Pa. St. 515; *Brotherline v. Swires*, 48 Pa. St. 68; *Jenkins v. Frink*, 30 Cal. 586; *Hunter v. Pfeiffer*, 108 Ind. 197; *Gilbert v. Carter*, 10 Ind. 16; *Lloyd v. Malone*, 23 Ill. 43; *Corrothers v. Harris*, 23 W. Va. 177; *Cain v. Cox*, 23 W. Va. 635; *Rives v. Lawrence*, 41 Ga. 283; (compare *Matthews v. Starr*, 68 Ga. 521); *Wagner v. Phillips*, 51 Mo. 117; *Turner v. Adams*, 46 Mo. 95; *Durfee v. Moran*, 57 Mo. 374; *Miller v. Baynard*, 2 Houst. (Del.) 559; *Smith v. Ullman*, 58 Md. 183; s. c., 42 Am. Rep. 329.

2. *Maffet v. Ijams*, 103 Pa. St. 266.

3. **Personal Solicitation.**—To secretly approach the members of a body, authorized to pass upon a measure,

Pay for Influence.—A promise to pay for personal solicitation of legislators can no more be countenanced than such a stipulation for persuading a judge to render a judgment by other means than argument addressed to him in open court on the trial of a cause. The rule of law which denies a remedy to one who has rendered such service is the same as that which refuses compensation for personal solicitation of executive officers for favors or so-called "patronage," though the solicitor may have been promised payment under the form of a contract. The rule is founded upon public policy, and is meant to remove from public officers, and especially from legislators, any consideration for the performance of their duty other than arguments addressed to their reason in a proper and public way, leaving their judgment untrammelled, and their consciences pure and active.¹

Mere persuasion of members, exertion to control them by social favors, is not legitimate service, to be made the subject of contract; it stands on a different footing from that rendered by open argument before a committee or before the legislature.² And if, beyond mere importunity, the lobbyist resorts to bribery or other criminal means for corrupting and seducing the law-maker; if even the tendency is towards such a result, he cannot recover on a contract for his services, though such corrupt means were not contemplated by his employer, and were not expressed or implied in the agreement. The parties cannot evade the rule of public policy with reference to such services by making their contract after the rendition of them, and after a bill has been passed which the services were intended to further.³

Evil Tendency.—The tendency to corruption in lobbying contracts renders them offensive to the judicial sense, and puts them beyond the pale of the courts, whether actual corruption is con-

with a view to influence their action at a time and in a manner that does not allow the presentation of opposite views, is improper, and unfair to the opposing interest; and a contract to pay for this irregular and improper service would not be enforced by the law. Cooley's Const. Lim. (5th ed.) 165.

1. "Personal solicitation of legislators or of judges, is not a lawful subject of contract. Personal solicitation of the president, the governor or the heads of departments, for favors or for clemency, is not the lawful subject of contract. The apprehension that considerations, other than a high sense of duty and of the public interest, may thus be brought to influence their determination, forbids this employment." *Lyon v. Mitchell*, (HUNT, J.) 36 N. Y. 241; *Mills v. Mills*, (HUNT, J.) 40 N. Y. 546.

2. For seeing members of a legisla-

ture to induce them to vote for a bill, when no service is performed before the body itself, or a committee, the lobbyist cannot recover. *Sedgwick v. Stanton*, 4 Kernan (N. Y.) 289.

3. A contract for lobby services, for personal influence, for mere importunity to members of the legislature or other official body, for bribery or corruption, or for seducing or influencing them, by any other means than such as bear directly and legitimately on the merits of the pending application, is illegal and against public policy, and void. And it is so, though the parties are not necessarily adjudged to have stipulated for corrupt action. The tendency is enough. If the contract be made relative to the passage of an act of congress, and after its passage, the effect is the same. *McKee v. Cheney*, 52 How. Pr. (N. Y.) 144; *Gray v. Hook*, 4 Comst. (N. Y.) 449.

templated by the contracting parties or not. Pecuniary recompense for personal influence on legislators to secure the passage of a bill, or on judges to affect the administration of justice, or on public officers to control their appointments, tend strongly to tempt the promisee of a contract having such an object, to resort to reprehensible and even criminal means to earn the money. Such recompense promised to a lobbyist to influence legislators is a greater temptation to bribery, direct or indirect, than when other officers are to be influenced, owing to the variety of character usually found in legislative bodies. And the evil is greater. The law stamps with nullity all contracts having such tendency.¹

While all sales of personal influence to control public bodies are unlawful, those having the passage of a law by a legislature for their object are more reprehensible than those for influencing private corporations. The circumstances under which such transactions occur are sometimes considered by way of aggravating or ameliorating the infringement of the rule of public policy. Thus, while one who engaged to use his utmost influence and exertion to effect the passage of a bill before the legislature, in consideration of the conveyance of certain real estate to himself, could not recover on his contract; another who prevailed on a board of railroad directors to locate a depot on certain land, recovered his promised compensation—there being no corrupt practice in either case.²

The Settled Rule.—It is well settled that contracts made with the object of influencing legislators and seducing them from their high public duties as law-givers, by any such means as those above mentioned, are repugnant to the best interests of the State, against public policy, and void from their incipiency. It is so settled by the courts of the United States and of the several

1. **Agreements to Control Government Action.**—"All agreements for pecuniary considerations to control the business operations of the government or the regular administration of justice, or the appointments of public officers, or the ordinary course of legislation, are void, as to public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country. *Tool Co. v. Norris*, 2 Wall. (U. S.) 45.

In the above case, the one next herein cited was strongly approved. The substance is: A contract is void and without judicial standing when one party stipulates to engage secret agents to have a law passed, and the other

promises pay in case of success. *Marshall v. Balt., etc., R. Co.*, 16 How. (U. S.) 314.

2. An agreement to convey land to another upon the consideration that the latter shall give all the aid in his power, spend his time, and use his utmost influence and exertions to procure the passage of a law pending before the legislature, conferring upon the covenantor a valuable public franchise, is illegal and void, as being against public policy. *Mills v. Mills*, 36 Barb. (N. Y.) 474. Compare *Sedgwick v. Stanton*, 14 N. Y. 289.

But for like services, in securing the location of a depot, on certain land, rendered by petitioning, etc., the directors of a railroad company, it was held that the promised contingent compensation could be recovered. *Workman v. Campbell*, 46 Mo. 305.

States, and the rule is of universal application. It has its basis in the common law. It is operative everywhere in this country, and generally in all enlightened countries, without the need of statutory inhibition to render such contracts void. Not only indictable offences, such as bribery, but all undue influences are beyond the limits of legitimate contract. Whether the lobbyist be criminally amenable to the law for the violation of a statute or not, his undertaking to control a legislator corruptly, or even improperly, is one for which he cannot recover compensation on a contract.¹

2. "*Log Rolling*."—One of the most pernicious forms of lobbying is known by the slang name of "log rolling." It is the combination of different interests in pending bills, by lobbyists who work together to further their respective projects, uniting their various influences and incentives to act the more powerfully upon the legislative body. They resort to various means to accomplish the multifarious objects in view; "wine and dine" the legislators in a general way, and sometimes administer a general fund contributed by their several principals to effect the "bargain and sale" projected to "put through" bills which could never be passed upon their own merits. Nothing in the practices of professional lobbyists can be more obnoxious to sound public policy than such combinations. Contracts to pay the wrong-doers cannot be enforced where the purpose is "log rolling," even though there be no actual bribery or corruption.²

1. *The General Doctrine Settled.*—

"An agreement to solicit legislative action by the use of private personal influence on members individually is void against the policy of the law." Wharton on Contracts, § 402, citing Story's Eq. Jur. 12th ed., § 293 b.; Edward's v. R. R., 1 Myl. & Cr. 650; Marshall v. Baltimore, etc., R. Co., 16 How. (U. S.) 314; Meguire v. Corwine, 101 U. S. 103; Usher v. McBratney, 3 Dill (U. S.) 385; Powers v. Skinner, 34 Vt. 274; Pingry v. Washburn, 4 Aik. (Vt.) 264; Frost v. Belmont, 6 Allen (Mass.) 152; Mills v. Mills, 40 N. Y. 543; Harris v. Roof, 10 Barb. (N. Y.) 489; Rose v. Truax, 21 Barb. (N. Y.) 361; Smith v. Applegate, 3 Zab. (N. J.) 352; Hatzfield v. Gulden, 7 Watts (Pa.) 152; Clippinger v. Hepbaugh, 5 W. & S. (Pa.) 315; Martin v. Passenger R. Co., 3 Phila. (Pa.) 316; Wood v. McCann, 6 Dana (Ky.) 366; McBratney v. Chandler, 22 Kan. 692; Cummings v. Laux, 30 La. Ann., part 1, 207.

To these cases may be added, as embodying substantially the same principle: Brown v. Brown, 34 Barb. (N. Y.) 533; Devlin v. Brady, 32 Barb. (N.

Y.) 518; Barton v. Port J., etc., Co., 17 Barb. (N. Y.) 397; Ogden v. Des Arts, 4 Duer N. Y. 275; Satterlee v. Jones, 3 Duer (N. Y.) 116; McKee v. Cheney, 52 How. (N. Y.) 144; Bell v. Leggett, 3 Seld. (N. Y.) 176; Cunningham v. Cunningham, 18 B. Mon. (Ky.) 19; Bartle v. Nut, 4 Pet. (U. S.) 188; 2 Kent *466-7; Broom's Max. *573, 583; Frankfort v. Winterport, 54 Me. 250; Tilson's Trustees v. Hines, 5 Pa. 452; Weed v. Black, 2 McArthur (U. S.) 268; Hunt v. Test, 8 Ala. 719; Com. v. Callaghan, 2 Va. Cases 460; Hillyer v. Travers, 1 Law Rep. 146.

2. "*Log Rolling*."—"If the 'lobby member' is selected because of his political or personal influence, it aggravates the wrong. If his business is to unite various interests by means of projects that are called 'log rolling,' it is still worse. The practice of procuring members of the legislature to act under the influence of what they have eaten and drunk at homes of entertainment tends to render those of them that have yielded to such influence wholly unfit to act in such cases. They are disqualified from acting fairly towards

3. *Contingent Consideration for Lobbying.—Compensation Dependent on Success.*—It is an aggravation of the offence when a lobbyist contracts and works for contingent compensation. If his pay depends upon his securing the passage of a bill, the temptation to bribe such members as are open to approach is greatly enhanced. He is likely to leave no stone unturned that may help him in his greed for the promised gain. Contingent pay is usually much larger than certain compensation; and the lobbyist, feeling that he has great pecuniary incentive for exertion on the one hand, and great danger of losing his time and labor on the other, will be likely to resort to unscrupulous means, if he deems them necessary to his success. When he is to receive a portion of the spoils, his avarice will be unusually whetted. Large corporations may offer him extraordinary inducements. All these considerations lead the courts to condemn contingent fees to lobbyists in strong terms.¹

4. *Presumptive Guilt and Illegality.—Statute Implication.*—Statutory inhibition of designated forms of lobbying, attaching penalties therefor, does not leave other practices open to contract.

interested parties, or toward the public. The tendency and object of these influences are to obtain by corruption what it is supposed cannot be fairly obtained." CHAPMAN, J., in *Frost v. Belmont*, 6 Allen (Mass.) 159.

Though an interested person may appear himself or by attorney, he cannot "resort to 'log-rolling,' nor to deceit or . . . other corrupting influences." *Coquillard v. Bearss*, 21 Ind. 479, 481-2.

1. *Contingent Compensation.*—A contract by which a lobbyist is to receive a contingent fee for getting a bill passed, is void, for it is "a direct and strong incentive to the exertion of not merely personal but sinister influence upon the legislature, and therefore public policy forbids the legal recognition of any such contracts." *Wood v. McCann*, 6 Dana (Ky.) 366, 370.

Substantially to the same effect: *Marshall v. Baltimore, etc., R. Co.*, 16 How. (U. S.) 314; *Tool Co. v. Norris*, 2 Wall. (U. S.) 45; *Weed v. Black*, 2 McArthur (D. C.) 268; s. c., 7 Chicago Leg. N. 124; *Fuller v. Dame*, 18 Pick. (Mass.) 472; *Frost v. Belmont*, 7 Allen (Mass.) 152; *Bryan v. Reynolds*, 5 Wis. 200*. Compare *Burbridge v. Fackler*, 2 McArthur (D. C.) 407.

"The plaintiff in this case cannot recover, not because he has resorted to bad means in order to procure the passage of laws in which he had a direct pecuniary interest (for of this there is

no proof and no imputation), but because he has made a contingent contract, which, if enforced in this case, might open the door to a practice of corruption, and to the use of sinister influences." *Gil v. Williams*, 12 La. Ann. 219.

"Bribes in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are 'proper means;' and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or 'careless' members in favor of the bill. The use of such means and such agents will have the effect to subject the State governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector. Speculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capitol of the Union and of every State, till corruption shall become the normal condition of the body politic, and it will be said of us as of Rome, *omne Roma venale*." *Marshall v. Balt., etc., R. Co.*, 16 How. (U. S.) 324.

There is no implication that the means of corruptly influencing legislatures which are not enumerated in the penal enactment may be employed with impunity. The general rule of the common law which condemns all nefarious influencing of legislatures is not abrogated by implication when the statute renders particular acts of lobbying punishable.¹

Presumption.—When one sues on a contract for lobby service, the presumption is against him. The general rule of evidence is reversed so far as to require him to show affirmatively that his services were legitimate, and the contract lawful. The reason is that such services are ordinarily corrupting and so repugnant to juridical morals that an exception cannot be presumed without endangering the public weal.²

The presumption of corrupt practice does not apply to those whose interests are at stake before a legislature, and who have the moral and legal right to advocate their claims in a legitimate way. The congress of the United States, and the legislatures of many States are such large bodies, composed of many members, some of whom are too busy or too disinclined to study the merits of a private bill, that it is frequently necessary for a citizen who is honestly interested in its passage, to explain and illustrate the character of the measure. He cannot resort to undue influence any more than a common lobbyist could do in his behalf; but, within proper bounds, he may advocate his personal claim without doing any violence to the rule of public policy, which has been above considered. The authorities fully sustain this position.³

Personal Claim.—The advocacy of one's own claim before the legislature cannot be done legitimately by secret or corrupt means, by combinations called "log rolling," or any other which is condemned in the lobbyist. It must be open. Argument before committees is the usual means allowed. Speaking before the legislature in session is sometimes permitted by the body, and

1. *Effect of Statutory Inhibition.*—The Criminal Code of *Oregon* (see 638), making certain lobby practices criminal, does not legalize others by implication. Courts will not enforce lobby contracts, though they be such as are not rendered criminal under the statute. *Sweeny v. McLeod*, 15 *Oreg.* 330.

2. *Burden of Proof.*—The *onus* is on the lobbyist to show that his services were legitimate, when he seeks to enforce a contract for them. *Harris v. Simonson*, 28 *Hun* (N. Y.) 318.

3. *Interested Claimants.*—"All those whose interests are to be affected by legislation, may, both morally and legally, for the protection and advancement of their interests, use all means

of persuasion which do not come too near to bribery or corruption; but the promise of any personal advantage to a legislator is open to this objection, and therefore void." 2 *Parsons on Contracts* (6th ed.), 919; *Clippinger v. Hepbaugh*, 5 *W. & S.* (Pa.) 315; *Wood v. McCann*, 6 *Dana* (Ky.) 366; *Coppock v. Bower*, 4 *M. & W.* 361; *Hatzfield v. Gulden*, 7 *Watts* (Pa.) 152; *Norman v. Call*, 3 *Esp.* 253; *Fuller v. Dame*, 18 *Pick.* (Mass.) 472; *Bingry v. Washburn*, 1 *Aik.* (Vt.) 264; *Gulick v. Ward*, 5 *Halst.* (N. J.) 87; *Harris v. Roof*, 10 *Barb.* (N. Y.) 489; *Marshall v. Balt.*, etc., *R. Co.*, 16 *How.* (U. S.) 314; *Harris v. Simonson*, 28 *Hun* (N. Y.) 318; *Usher v. McBratney*, 3 *Dill.* (U. S.) 385 *n.*

is a legitimate method of advocacy whenever opportunity is given. What one may do by attorney before such assemblies, he may do himself.¹

5. Legal Services Before Legislative Bodies.—Professional Service.—A lawyer is sometimes needed by a person interested in the passage of a bill as much as he would be needed in the advocacy of a cause in court. A contract engaging him for such professional service is perfectly legal, and is held to be not against public policy.²

Even where contracts to secure the passage of laws and pay compensation therefor were forbidden by statute, and the act of taking or of giving a fee for service in passing a bill made a misdemeanor, the court held that the inhibition and penalty did not apply to attorneys for rendering strictly professional services for their clients, before a legislature.³

What Are Legal Professional Services Before a Legislature.—A lawyer may be engaged, lawfully, in taking testimony, collecting evidence, stating claims, drawing petitions, and in arguing the merits of a bill before a legislative committee, or before the general assembly itself. Open argument, either oral or written, to which persons of adverse interest have the opportunity of replying, is within the bounds of legitimate practice. The fact that he appears as a professional advocate, duly licensed to represent his clients as a member of an honorable profession, places him in an attitude altogether different from that of the common lobbyist. So long as he confines himself to his professional

1. **Professional Service.**—"As in a court of justice, so in a legislative committee or assembly, we suppose a person may, if permitted, appear by himself or attorney, to openly and fairly present the facts and agreements upon which he relies. *Marshall v. Balt., etc., R. Co.*, 16 How. (U. S.) 337; 2 *Parsons on Contracts* (6th ed.) 361. But he cannot do even this secretly, nor resort to 'log-rolling,' nor to deceit or undue means, nor promises of personal advantage or benefit to members, or by bringing to bear other corrupting influences." *Coquillard v. Bearss*, 21 Ind. 479, 481-2.

2. A contract to pay for legitimate professional service before a legislature may be enforced. "The fact appearing that persons do so act (as attorney and counsel) prevents any injurious effects from such proceeding. Such counsel is considered as standing in the place of his principal, and his agreements and representations are weighed and considered accordingly." *Fuller v. Dame*, 18 Pick. (Mass.) 472. See *Hatzfield v. Gulden*, 7 Watts (Pa.) 152; *Hunt v.*

Test, 8 Ala. 719; *Com. v. Callaghan*, 2 Va. Cas. 460; *Russell v. Burton*, 66 Barb. (N. Y.) 539; *Cooley Const. Lim.* (5th ed.) 166.

Proper professional services before a legislature are not against public policy. *Meguire v. Corwine*, 101 U. S. 111; *Trist v. Child*, 21 Wall. (U. S.) 441; *Oscanyan v. Arms Co.*, 103 U. S. 261; *Sedgwick v. Stanton*, 4 Kern. (N. Y.) 289; *Mills v. Mills*, 40 N. Y. 543; *Winpenny v. French*, 18 Ohio St. 469; *Bowers v. Skinner*, 34 Vt. 274; *Bryan v. Reynolds*, 5 Wis. 200; *Denison v. Crawford Co.*, 48 Iowa 211; *Willey v. Collier*, 7 Md. 273; *Gil v. Williams*, 12 La. Ann. 219.

3. The statute of *Virginia* forbidding contracts to secure the passage of laws, and rendering the paying or receiving of compensation for such work a misdemeanor, was not held applicable to attorneys for professional service in drawing petitions, stating claims, collating facts, taking testimony, and making arguments before the legislature, and like services. *Yates v. Robertson*, 80 Va. 475.

duties, he is no lobbyist, and it would be unjust to classify him with that reprehensible personage.

But should he so far forget his high calling and responsibility as to resort to personal influence to effect the passage of a bill; should he imitate the practices of the lobbyist; should he even countenance corrupt means to accomplish his object, he is no longer screened by his professional cloak. It is just as much against public policy to contract for the personal influence and secret service of a member of the bar to secure the enactment of a law, or to further a private claim before the legislature, as to contract with any other person for such a purpose. And the attorney cannot collect a fee for services rendered on such a contract. Whether a contract with a lawyer for services before a legislature is illegal or otherwise, depends upon the character of the services to be rendered—whether strictly professional or not.¹

1. Distinction Between Right and Wrong Services.—"Persons may no doubt be employed to conduct an application to the legislature, as well as a suit at law; and may contract for, and receive pay for their services in preparing documents, collecting evidence, making statements of facts, or preparing and making oral or written arguments, provided all these are used or designed to be used before the legislature, or some committee thereof as a body; but they cannot with propriety be employed to exert their personal influence with individual members, or to labor in any form privately with such members out of the legislative halls. Whatever is laid before the legislature in writing, or spoken openly or publicly in its presence or that of a committee, if false in fact, may be disproved; or, if wrong in argument, may be refuted; but that which is whispered into the private ear of individual members is frequently beyond the reach of correction." *Harris v. Roof*, (SELDEN, J.) 10 Barb. (N. Y.) 489.

Distinction exists between legitimate professional services and the prostitution of one's influence to control legislation. In a case in which the plaintiff had engaged to get a bill through congress to pay a claim against the government, and the defendant had promised pecuniary compensation, and it was considered by the court to have been an agreement for lobby services and therefore void, SWAYNE, J., said: "We entertain no doubt that in such cases, as under all other circumstances, an agreement, express or implied, for profes-

sional service is valid. Within this category are included drafting the petition to set forth the claim, attending to the taking of the testimony, collecting facts, preparing arguments, and submitting them, orally or in writing, to a committee or other authority, and other services of like character. . . . But such services are separated by a broad line of demarkation from personal solicitation," etc. *Trist v. Child*, 21 Wall. (U. S.) 441.

Bishop says that contracts relating to the procurement of legislation may be legal or otherwise "according to the particular case," citing *Weed v. Black*, 2 McArthur (D. C.) 268; *Reed v. Peper Tobacco Warehouse Co.*, 2 Mo. 82. "Thus it was held that an agreement to obtain the passage of a law, made with the corrupt intent to collect of the State a claim, invalidates the claim, even in the hands of an assignee. (*Monroe Bank v. State*, 26 Hun (N. Y.) 581.) But there are various forms of contract relating to private bills and even to public ones,—such as the withdrawal of opposition to the former, by one interested (*Vauxhall Bridge Co. v. Spencer*, Jacob, 64, 68; 2 Madd. 356,) to which there is no objection. *Simpson v. Howden*, 9 Cl. & F. 61; *Edwards v. Grand Junction Railway*, 7 Sim. 337, 1 Myl. & C. 650; *McGregor v. Dover*, etc., Railway, 18 Q. B. 618; *Bowman v. Coffroth*, 9 Smith (Pa.) 19, 23." *Bishop on Contracts* (1887), § 501.

Influence.—"A lawyer may be entitled to compensation for writing a petition, or even for making a public argument before a legislature or a com-

Contingent Fee.—If the lawyer's compensation, by contract, is conditioned upon his success in getting a bill passed, he cannot recover, it has been held.¹ Yet when a county contracted to give an agent half of what he might recover of the general government in an application for swamp lands or indemnity for them, though congressional action was contemplated by the contracting parties, the court held the contract valid. The circumstance that the political corporation could only act through an agent, may differentiate this case from those in which private applicants have contracted to pay contingently.²

Such a contract as the one just mentioned, in which half of what might be recovered of congress by the agent was to be his compensation, would be deemed champertous in an agreement between a lawyer and his client for services in court.³

Distinction is made between contracts, for contingent fees, made between client and attorney, and contracts in which the attorney is interested in the judgment itself so far as to share in the proceeds recovered by him.⁴

The rule would seem reversed so far as professional service before a legislative body is concerned, if we are to consider it expressed in the two cases just cited from the reports of Pennsylvania and Iowa. There are certainly good reasons against

mittee thereof; out the law should not help him or any other person to a recompense for exercising any personal influence in any way, in any act of legislation. It is certainly important to just and wise legislation, and therefore to the most essential interest of the public, that the legislature should be free from any extraneous influence, which may either corrupt or deceive the members, or any of them." *Wood v. McCann*, 6 Dana (Ky.) 366.

1. *Contingent Fee.*—A contract to pay a contingent fee to a lawyer for services to get a statute passed—the condition being that he should be paid in case it should pass—was *held* to be null and void, because it offered a strong incentive to the use of personal and sinister influence. *Clippinger v. Hepbaugh*, 5 W. & S. (Pa.) 315.

2. *Contingent Fee Held Lawful for Service Before Congress.*—A contract between a county and an agent provided that the latter should be authorized to make the proper application to the general government for its swamp lands, or indemnity therefor. He was to have, for his services, one-half of what he might procure. To effect the object of his contract, certain congressional action became necessary, which he aided in procuring by legitimate means. *Held*,

that the contract was not void, as against public policy, and that a county may lawfully employ agents for such purpose, and an agreement to pay them is valid. *Denison v. Crawford Co.*, 42 Iowa 211.

3. If part of the amount recovered by a lawyer for his client is to be received in compensation for his services, and he is to have no personal liability, the contract is champertous. *Acker v. Barker*, 131 Mass. 436; *Belding v. Smythe*, 138 Mass. 530.

4. A lawyer was employed to represent his client's claim to an estate—the fee to be greater than usual, owing to the doubtful character of the case, but not to exceed fifty per cent. for him and other lawyers by him employed—the fee to be contingent upon success. *Held*, not to amount to champerty or maintenance. *Blaisdell v. Ahern*, 144 Mass. 393.

The contract for fees was not one for sharing in the fruits of the litigation, and therefore not champertous, the court say in the above case, and cite *Thurston v. Percival*, 1 Pick. (Mass.) 415; *Lathrop v. Amherst Bank*, 9 Met. (Mass.) 489; *Tapley v. Coffin*, 12 Gray (Mass.) 420; *Scott v. Harmon*, 109 Mass. 237; *McPherson v. Cox*, 96 U. S. 404; *Christie v. Sawyer*, 44 N. H. 298.

allowing contingent fees for professional services before a legislature which do not apply to court service.

But the authorities are against the employment of lobbyists by political corporations to control legislation, whether upon promise of either certain or conditional compensation. A city cannot legally pay for services already rendered in inducing a legislature to grant a charter, when they consisted of the usual lobby tactics.¹ Privileges awarded by corporations to persons to buy them off from opposing legislative measures are given in violation of law; and a contract to grant them cannot be enforced. The rule of public policy applies to corporations, public and private, as well as to private parties, with reference to lobby contracts.²

IV. Contracts to Obstruct Justice and Duty.—1. *To Suppress Prosecution.*—When the object of the contract is to prevent legal proceedings to the defeat of justice and hindrance of the due course and administration of the law, it is against public policy, and the agreement is void. At common law, the parties to such a contract are liable to criminal prosecution, and the agreement itself cannot be enforced, since a court of justice cannot be prostituted to defeat justice.³

Should such a contract be fair on its face, should it take the form of a mortgage, it cannot have the aid of a court to foreclose it, if the nefarious object be proved.⁴

There may be some exception in States which allow the compounding of misdemeanors, but the rule is that a mortgage contract is void when the suppression of prosecution for crime, fraud, etc., is the consideration.⁵

1. **Town Paying Lobbyist.**—A town has no authority to appropriate money for the payment of expenses incurred by individuals, prior to its corporate existence as a town, in procuring the passage of its charter. Services rendered in procuring the passage of an act of legislation by means of secret attempts to procure votes, or sinister or personal influences upon members, are not a legal consideration for a contract. *Frost v. Belmont*, 6 Allen (Mass.) 152.

2. A contract by a corporation to grant privileges to certain persons, when the consideration was that they should cease to oppose the enactment of a law affecting the interests of the corporation, is void, as against public policy and prejudicial to impartial legislation. *Pingry v. Washburn*, 1 Aiken (Vt.) 264.

A town cannot pay lobbyists for getting its limits extended or its territory divided. *Minot v. West Roxbury*, 112 Mass. 1; s. c., 17 Am. Rep. 52; *Westbrook v. Deering*, 63 Me. 231.

3. "Since any agreement to obstruct the course of justice is an indictable conspiracy at common law, such agreements are to be regarded as void, and incapable of sustaining the suit." Wharton on Contracts, § 415, citing *Dixon v. Olmstead*, 9 Vt. 310; *State v. Noyes*, 25 Vt. 415; *Com. v. McLean*, 2 Pars. Eq. Cas. (Pa.) 367; *State v. Norton*, 3 Zab. (N. J.) 33; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *State v. McKinstry*, 50 Ind. 465; *Porter v. Jones*, 52 Mo. 399; *Baker v. Farris*, 61 Mo. 389; *Shaw v. Reed*, 30 Me. 105; *Southern Ex. Co. v. Duffey*, 48 Ga. 358; *Patterson v. Donner*, 48 Cal. 369; *Dawkins v. Gill*, 10 Ala. 206; *Grove v. McCalla*, 21 Pa. St. 44; *Barron v. Tucker*, 53 Vt. 338.

4. A mortgage given to prevent legal prosecution is void. *Riddle v. Hall*, 99 Pa. St. 116; *Crowder v. Reed*, 80 Ind. 1. Services to that end will not support an action. *Barron v. Tucker*, 53 Vt. 338; s. c., 38 Am. Rep. 684.

5. The consideration of a mortgage

So, if the promise be evidenced by a note, if only a part of the consideration is that a prisoner shall be acquitted, the note is not collectible.¹ And so of a promise to return embezzled money to prevent the prosecution of a prisoner, though made by another. And if a compromise with one who has stolen property, made with him by the loser for the purpose of getting it back, be permissible, it is not so when a promise not to prosecute is included.²

Contracts to hinder a judicial trial, by hiring a witness to be absent, etc., are void.³ A contingent fee cannot be collected by an attorney, promised if he should suppress prosecution.⁴

2. *To Seduce from Official Duty.*—It may be stated generally that all agreements having the violation of public duty as their object, the neglect of official functions, the seduction of those entrusted with the enforcement of the law from the faithful performance of their duty, are reprobated by the law and are disregarded by the courts, except as evidence in the prosecution of the parties to such contracts.⁵

Agreements having the suppression or control of a civil proceeding of such nature as to give the public an interest in it, are void, as against public policy, and doubly so if there be fraud or illegal consideration.⁶

was, that a criminal prosecution for fraud and embezzlement should be suppressed. This was *held* void, though some misdemeanors may be compounded in *Pennsylvania*. *Pearce v. Wilson*, 111 P. St. 14; s. c., 56 Am. Rep. 243.

1. The consideration of a note was partly to use influence for the acquittal of a prisoner. It could not be enforced. *Ricketts v. Harvey*, 106 Ind. 564.

2. A contract that an embezzler should not be prosecuted if his father would pay the sum embezzled, could not be enforced. *Haltheus v. Kuntz*, 17 Ill. App. 434.

It has been *held* that one who has had money stolen from him may compromise with the thief, though he cannot validly stipulate anything tending to prevent prosecution for the crime. *Souhegan Bank v. Wallace*, 61 N. H. 24.

3. A promise to pay a witness for keeping out of the jurisdiction of the court to avoid service is of unlawful object and void. *Bierbauer v. Wirth*, 10 Biss. (U. S.) 60.

4. *Ormerod v. Dearman*, 100 Pa. St. 561; s. c., 45 Am. Rep. 391.

5. When the object of a contract is to cause a public officer to violate his trust or neglect his duty, the contract is void and the parties are indictable. *Colby v. Sampson*, 5 Mass. 310; *Denny v. Lincoln*, 5 Mass. 385; *Churchill v. Perkins*, 5 Mass. 541; *Hodsdon v. Wil-*

kins, 7 Greenl. (Me.) 113; *Richardson v. Crandall*, 48 N. Y. 328; *Devlin v. Brady*, 36 N. Y. 531; *Doty v. Wilson*, 14 Johns. (N. Y.) 381; *Satterlee v. Jones*, 3 Duer (N. Y.) 102; *Webber v. Blunt*, 19 Wend. (N. Y.) 188; *Kenworthy v. Stringer*, 27 Ind. 498; *Hopkinson v. Leeds*, 78 Pa. St. 396; *Newson v. Thighen*, 30 Miss. 44; *Odineal v. Barry*, 24 Miss. 9; *Gilmore v. Lewis*, 12 Ohio 381.

6. A contract is void if its object is the abandonment of proceedings to establish a public road, for a moneyed consideration. *Jacobs v. Tobiasson*, 65 Iowa 245; s. c., 54 Am. Rep. 9.

A contract in which the father and grandfather of an infant legatee agreed with an heir-at-law that they should insist on probate, while he should oppose it; and if the will should not be probated he should pay the legacy to the infant, was *held* void, because the object was to defeat a residuary legatee. *Gray v. McReynolds*, 65 Iowa 461; s. c., 54 Am. Rep. 16.

An overseer of a road, appointed by the State, whose duty was to examine a road made under contract, and to approve and accept it in behalf of the State if work was found well done, entered into a contract by which he became interested in lands which were to be given to the contractor for his work. The contract was *held* void, as

3. *Contract to Violate Statute.*—When the object of the contract is to obstruct justice and duty by defeating the letter or spirit of the law, the courts will not enforce the agreement. It would be a travesty upon government. Could its judiciary lend aid to attempts to defeat the very ends of government itself? It has been repeatedly and most emphatically decided that contracts contrived for the purpose of violating statutes, are inoperative and void.¹ When such a contract is in defiance of an absolute provision of a statute, the illegality is the more apparent.²

The illegality of such conventions does not depend upon the attachment of a penalty for the violation of the statute. If an act is forbidden, a contract to do it is void, whether any penalty be attached or not, for no one can use the law to effect its violation.³

against public policy and prejudicial to the rights of the State. *Robinson v. Patterson*, (Mich.) 39 N. W. Rep. 21.

It is not against public policy to enter into a contract to pay money to sureties on a bond to ensure the carrying out of a contract with the government of the United States. *Samuel v. Fidelity & Casualty Co.*, 1 N. Y. Supp. 850.

It is held not to be against public policy for a railroad company to enter into a contract to obtain security for one of its detectives in case of his arrest, and to pay what is necessary for his defence. *Hewlett v. Cincinnati, etc., R. Co.*, (Miss.) 4 So. Rep. 547.

An officer, such as a deputy sheriff, may contract to collect evidence against a prisoner to be tried in a county other than that of the officer, for a crime alleged to have been there committed. It is not against public policy to contract with him for such object. *Harris v. More*, 70 Cal. 502.

1. Courts will not enforce a contract made to violate a statute of the State. *Smith v. Arnold*, 106 Mass. 269; *Prescott v. Battersby*, 119 Mass. 285; *Wheeler v. Russell*, 17 Mass. 258; *Springfield Bank v. Merrick*, 14 Mass. 322; *Hackett v. Chellerton*, 13 R. I.; *Peck v. Burr*, 10 N. Y. 294; *Barton v. Plank Road*, 17 Barb. (N. Y.) 397; *Tenney v. Foote*, 4 Ill. App. 594; *Ryan v. School District*, 27 Minn. 433; *Caldwell v. Bridal*, 48 Iowa 15; *Woods v. Armstrong*, 54 Ala. 150; *Durgin v. Dyer*, 68 Me. 142; *Decell v. Lewenthal*, 57 Miss. 331; *Cotten v. Mackenzie*, 57 Miss. 418; *Thomas v. Richmond*, 12 Wall. (U. S.) 349; *Bank U. S. v. Owens*, 2 Pet. (U. S.) 527; *Mitchell v. Smith*, 1 Binn. (Pa.) 110; *Cope v. Rolands*, 2 M. & W. 149; *Newman*

v. Newman, 4 M. & S. 66; *Hope v. Hope*, 8 D. M. & G. 731; *Graeme v. Wroughton*, 11 Exch. 146; *Pellecat v. Angell*, 2 C. M. & R. 311; *Cork, etc., R. R. in re*, L. R., 4 Ch. Ap. 748; *Yorkshire Wagon Co. v. Maclure L. R.*, 19 Ch. D. 478; *Grell v. Levi*, 16 C. B. N. S. 79.

A contract by which one of the parties agrees to acquire public land for the other, in violation of statute, cannot be enforced. *McGregor v. Donnelly*, 67 Cal. 149. Nor can a suit be sustained by the transferee of a government contract, when the transfer is prohibited by a statute of the United States. *Turnbull v. Farnsworth*, 1 Wash. (Ty.) 444; *Mackintosh v. Renton*, 2 Wash. (Ty.) 121.

Contracts having for their object the violation, defeat or evasion of a bankrupt law are illegal and void. *Claffin v. Torlina*, 56 Mo. 369; *Blasdel v. Fowle*, 120 Mass. 447; *Austin v. Markham*, 44 Ga. 161; *Wilson v. Jordan*, 3 Woods (U. S.) 642; *Wilson v. Prewett*, 3 Woods (U. S.) 631; *Macay Ex parte*, L. R., 8 Ch. 643; *Jackson Ex parte*, 14 Ch. 725; *Elliott v. Richardson*, L. R., 5 C. P. 744; *McKewan v. Sanderson*, L. R., 20 Eq. 65.

2. If the object of a contract is something absolutely inhibited by statute the agreement cannot be enforced. *Burkholder v. Beeten*, 65 Pa. St. 496; *Griffith v. Wells*, 3 Den. (N. Y.) 226; *Cope v. Rolands*, 2 M. & W. 149.

3. And this is true whether or not a penalty is attached. *Stanly v. Nelson*, 28 Ala. 514; *Woods v. Armstrong*, 54 Ala. 150; *Prescott v. Battersby*, 119 Mass. 285; *Smith v. Arnold*, 106 Mass. 269; *Larned v. Andrews*, 106 Mass. 435; *People v. Albany*, 11 Wend. (N.

And if there is no express prohibition against doing an act, no positive requirement that a manifest duty shall be performed, and no penalty for the commission or omission of an act (as the case may be), still a contract is void if its object is to contravene the spirit of a statute. What is implied or morally inculcated by a statute cannot be neutralized and defeated by any agreement between parties. Compliance with the letter, while violating the spirit, will not avail them.¹

So strongly does public policy repel agreements made for the purpose of violating law, that they are held incurable by legislative act, so that such contracts cannot be ratified and legalized by the passage of a statute to that effect after they have been made.²

4. *Parties to Illegal Contract.*—While an agreement with the object of violating law is always against public policy, so that the courts will not aid such object by enforcing the contract, and while this is always true whether one or both of the contracting parties be innocent of wrong design or not, still an innocent party, defrauded by a guilty one, may have redress as to him. It has been questioned, however, whether a contract is necessarily void because one of the parties has an unlawful purpose in view as a motive for making it.³ It has been frequently held, though not invariably (and the tendency is strongly in that direction), that a contract of sale is not invalidated by the knowledge of the vendor that it is the purpose of the purchaser to apply the purchased property in an illegal way. He may recover the price of the goods, but he cannot if the contemplated illegal use is stipulated in the contract of sale, nor if he is *particeps criminis* with respect to the subsequent use, or does something to further it.⁴

Y.) 539; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Fennell v. Ridler*, 5 B. & C. 406; *Elkins v. Parkhurst*, 17 Vt. 105.

1. A contract which violates the spirit of a statute, though not its letter, will not be enforced. *Bank U. S. v. Owens*, 2 Pet. (U. S.) 527; *Eberman v. Reitzel*, 1 W. & S. (Pa.) 181; *Booth v. Bank*, 7 Cl. & F. 509; *De Begnis v. Armistead*, 10 Bing. 107; *Mackay Ex parte*, L. R., 8 Ch. 643; *Williams Ex parte*, L. R., 7 Ch. Div. 138; *Evans v. Negley*, 31 S. & R. (Pa.) 218; *Pierce v. Evans*, 61 Pa. St. 415; *Manderson v. Bank*, 28 Pa. St. 379; *Marsh v. Robeno*, 5 Phila. (Pa.) 190; *Fuller v. Dame*, 18 Pick. (Mass.) 472; *White v. Buss*, 3 Cush. (Mass.) 449.

2. It is held that illegality in the object of a contract cannot be cured by subsequent legislation. *Ludlow v. Hardy*, 38 Mich. 690; *Decell v. Lewen*, 57 Miss. 331; *Anding v. Levy*, 57 Miss. 51; *Robinson v. Barrows*, 48 Me. 186.

It has been held that a contract to ship goods between ports of the United States in a foreign vessel, is not legalized by a remittal of the penalty of forfeiture by the government. *Petrel Guano Co. v. Jarnette*, 25 Fed. Rep. 675.

Liquor was sold in Massachusetts to be resold in New Hampshire, where the sale was inhibited, and it was surreptitiously introduced into the latter State. The New Hampshire court refused to enforce the contract by giving judgment for the price of the liquor, though the sale was not prohibited in Massachusetts, where the contract was made. *Fisher v. Lord*, 63 N. H. 514.

3. While it is not fully settled in *Texas* that a contract is illegal because the purpose of one of the parties is to use it for an unlawful purpose, the tendency is to deny the invalidity. *Labbe v. Corbett*, 69 Tex. 503.

4. As a rule, the vendor of goods will not be deprived of his right of payment when he knows that the buyer intends

If, in a contract of sale, the purchaser is innocent but the seller is guilty of the design to commit a fraud upon creditors, the sale will be set aside as a contract of illegal object. Were both parties guilty of such design, the courts would not grant relief after the contract has been executed; but the buyer, who has paid out his money innocently, has the right of getting it back.¹

If both parties to a contract unite in the object of defrauding a third person by coercion, false pretences or any other means, the contract is void because of its object, and the illustrations in the decisions are numerous.²

Such contracts, with creditors as the third persons to be victimized, unhappily have many examples in the reports, and they are always condemned as void, though the facts often present curious complications.³

to use them illegally, "unless (a) it be made a part of the contract of sale that the property shall be used for an unlawful purpose; or (b) unless the vendor does something beyond making the sale in aid or furtherance of the unlawful design; or (c) unless the illegal act contemplated is such that no man 'having a knowledge of the design can remain neutral without being in a just sense a criminal himself.' The weight of authority in the United States sustains these propositions, though there is much conflict in the decisions. Tracy v. Talmage, 14 N. Y. 162, 215; Hanauer v. Doane, 12 Wall. (U. S.) 342, 349; Michael v. Bacon, 49 Mo. 474; Curran v. Downs, 3 Mo. App. 471; Rose v. Mitchell, 6 Colo. 103; Hill v. Spear, 50 N. H. 253 (criticising Metcalf on Contr. 260); Gaylord v. Soragen, 32 Vt. 110; Webber v. Donnelly, 33 Mich. 469; McKinney v. Andrews, 41 Tex. 363; Rickel v. Sheets, 24 Ind. 1; De Groot v. Van Duzer, 17 Wend. (N. Y.) 170. (See Gillam v. Looney, 1 Helsk. (Tenn.) 319; Roquemore v. Alloway, 33 Tex. 461)." Knowlton's Anson on Contracts (2nd Am. ed.), p. *192, note.

1. When a contract of sale is for the purpose of defrauding creditors, the sale will be set aside, though the purchaser may have honestly paid the price. Kempner v. Churchill, 8 Wall. (U. S.) 362; Blennerhassett v. Sherman, 105 U. S. 100; Chandler v. Van Roeder, 24 How. (U. S.) 224; Thorpe v. Thorpe, 12 S. Car. 154; Levick v. Brotherline, 74 Pa. St. 149; Robinson v. Holt, 39 N. H. 557; Harrison v. Jaquess, 29 Ind. 208; Gragg v. Martin, 12 Allen (Mass.) 498; Wadsworth v. Williams, 100 Mass. 126; Bridge v. Eggleston, 14 Mass. 245; Harrison v. Phillip's Academy, 12

Mass. 456; Hopkins v. Langton, 30 Wis. 379.

2. When the object of the contracting parties is to perpetrate a fraud upon another, the law will lend them no aid, for this contract is null and void. In illustration of such an object, the obtaining of money by coercion may be instanced. State v. Shooter, 8 Rich. (S. Car.) 72.

The obtaining of goods by false statements and pretences. Com. v. Warren, 6 Mass. 72; Fuller v. Dame, 18 Pick. (Mass.) 472; Rice v. Wood, 113 Mass. 133; Bloomer v. State, 48 Md. 521; Bliss v. Matteson, 45 N. Y. 22; Byrd v. Hughes, 84 Ill. 174; State v. Buchanan, 5 Har. & J. (Md.) 317; People v. Richards, 1 Mich. 216; Com. v. McKisson, 8 S. & R. (Pa.) 420; Powell v. Inman, 8 Jones (N. Car.) 436; Fenton v. Ham, 35 Mo. 409; Heineman v. Newman, 55 Ga. 262; State v. Bartlett, 30 Me. 132; Jackson v. Ludeling, 21 Wall. (U. S.) 616; McKewan v. Sanderson, L. R., 15 Eq. 229; R. v. Aspinwall, L. R. 1 Q. B. Div. 735; R. v. Heymann, L. R., 8 Q. B. 102; Harrington v. Dock Co., L. R., 3 Q. B. Div. 549; R. v. Kenrick, 5 Q. B. 49.

A railroad company agreed to pay a doctor a sum proportionate to what it should pay in damages to a person injured by the road. The payment was for the doctor's opinion of the extent of the injury. The agreement was held void, as against public policy. Thomas v. Caulkett, 57 Mich. 392.

3. Another illustration of this principle is the contracting or conspiring together of persons with the object of cheating their creditors. Blant v. Gabler, 77 N. Y. 461; Southard v. Bonner, 72 N. Y. 424; Gragg v. Martin, 12 Allen (Mass.) 498; Bunn v. Ahl, 29 Pa. St.

Whether an agreement by which designated creditors are favored above others of their own rank is illegal in its object, depends upon statutory provisions in the State where the contract is made. In some of the States such a contract is inhibited and held to be juridically immoral in fraud of unpreferred creditors and against public policy.¹

When the third person to be defrauded is the principal of one of the contracting parties, the treachery and bad faith of the agent renders the object of the contract especially repulsive, while the fraudulent design of the parties strikes the agreement with nullity.²

5. *Corporation Partnerships.*—A contract between railroad corporations that one should guarantee the other against losses upon being secured by a lien on the property and franchises of the latter, and the deposit of a majority of the stock, but reserving the right to vote on it should its road be satisfactorily operated. This contract was sustained as not against public policy *per se*.³

387; Blystone v. Blystone, 51 Pa. St. 373; Miller v. Sauerbier, 30 N. J. Eq. 71; Root v. Reynolds, 32 Vt. 139; Huse v. Preston, 51 Vt. 245; McQuade v. Rosecrans, 36 Ohio St. 442; Appleton Bank v. Bertschey, 52 Wis. 438; Tobey v. Robinson, 99 Ill. 222; Annis v. Bonar, 86 Ill. 128; Crapster v. Williams, 21 Kan. 109; Brockenbrough v. Brockenbrough, 31 Gratt. (Va.) 580; Harrison v. Bailey, 14 S. Car. 334; Marshall v. Croon, 60 Ala. 121; Horn v. Wiatt, 60 Ala. 297; Fisher v. Lewis, 69 Mo. 629; Sattler v. Marino, 30 La. Ann. (part 1) 355; Kempner v. Churchill, 8 Wall. (U. S.) 362.

1. An agreement to prefer creditors, where it is prohibited by law, is void. Harvey v. Hunt, 119 Mass. 279; Sternburg v. Bowman, 103 Mass. 325; Huntington v. Clark, 39 Conn. 540; Bell v. Leggett, 7 N. Y. 176; Bliss v. Matteson, 45 N. Y. 22; Crossley v. Moore, 40 N. J. L. 27; Bixby v. Carskaddon, 55 Iowa 533; Way v. Langley, 15 Ohio St. 392; Clarke v. White, 12 Pet. (U. S.) 178; Cockshott v. Bennett, 2 T. R. 763; Mallallen v. Hodgson, 16 Q. B. 711; Britton v. Hughes, 5 Bing. 466; Jackman v. Mitchell, 13 Ves. 581; Wood v. Barker, L. R., 1 Eq. 139; Bissel v. Jones, L. R., 4 Q. B. 49; Leicester v. Rose, 4 East 372.

2. If an agent, authorized to make a contract, makes one in the interest of himself and against that of his principal, it is void, as fraudulent in relation to his principal. Provost v. Gratz, 6 Wheat. (U. S.) 481; Ringo v. Binns, 10 Pet. (U. S.) 269; Marsh v. Whitmore, 21

Wall. (U. S.) 178; Baker v. Humphrey, 101 (U. S.) 494; Lorillard v. Clyde, 86 N. Y. 384; Fulton v. Whitney, 66 N. Y. 548; Taussig v. Hart, 58 N. Y. 428; Everhart v. Searle, 71 Pa. St. 256; Mott v. Harrington, 12 Vt. 199; Smith v. Townsend, 109 Mass. 500; Condit v. Blackwell, 22 N. J. Eq. 486; Piatt v. Longworth, 27 Ohio St. 159; Ackenburgh v. McCool, 36 Ind. 473; Kruse v. Steffens, 47 Ill. 112; Eldridge v. Walker, 60 Ill. 230; Mason v. Bauman, 62 Ill. 76; Firestone v. Firestone, 49 Ala. 128; Gaines v. Allen, 58 Mo. 541; Dunne v. English, L. R., 18 Eq. 524; Mollett v. Robinson, L. R., 5 C. P. 653; Lowther v. Lowther, 13 Ves. 95; Wharton on Agency, §§ 231, 573, 760.

A member of a local water works board, who was its attorney, with power to make contracts for it, stipulated with a contractor that he should share the profits. The contract was void as to his interests in the profits, because in fraud of the company. Green v. Corrigan, 87 Miss. 359.

An auctioneer engaged an under bidder to buy for him; this, being in fraud of his principal, was a void contract. Hinnen v. Newman, 35 Kan. 709.

3. Two railroads contracted. One agreed to make up any deficiencies in the other's net earnings, so that the latter should be enabled to pay its interest on its bonds. For this the second road promised a lien on its property and franchises ranking next to that of the bondholders, and also to deposit with the other party the majority of its

Such an agreement is not a partnership of corporations. Nothing short of statutory authorization will legalize contracts creating such partnership. Without it they are *ultra vires*, and cannot be enforced. Corporations combining to do business together under the supervision of a common committee, and to share the profits, constitute such a partnership, though there may be a degree of business traffic carried on without partnership relation, which is not inhibited.¹

6. *Contracts Relative to Future Damages.*—Whoever causes damage to another in person or property, is in duty bound to repair it, and it is held to be against public policy to contract that such obligations shall not follow the infliction of injury. It is even held that carriers cannot avoid the responsibility for damage to goods in transportation by a contract exempting them in advance.²

A covenant in a contract between a railroad company and its employes, that they shall not have the right to recover damages for injuries that may be suffered from it in the exercise of their functions, is inoperative and void.³ Nor can such company obtain immunity against future liability for damages to passengers by

stock, reserving the right to vote thereon, where the road should be operated satisfactorily. This contract was held not void *per se*, on the ground of being against public policy. *Bradford E. & C. R. Co. v. N. Y. L. E. & W. Co.*, 1 N. Y. Supp. 363.

1. When several corporations combine to do certain business, under the general management of a committee, which, representing all the corporations, is to have charge of the property, machinery, etc., of all; and when the profits thus earned are to be divided between the parties to the combination, they thus constitute a partnership of corporations, not a mere "traffic arrangement." Such contract of partnership is *ultra vires* and void, unless duly authorized by statute. *Mallory v. Hanauer Oil Works*, 86 Tenn. 598; *Elevator Co. v. Railroad*, 85 Tenn. 703; *Thomas v. West J. R. Co.*, 101 U. S. 71; *Whittenton Mills v. Upton*, 10 Gray (Mass.) 582; s. c., 71 Am. Dec. 681.

2. A transportation company, employing other common carriers to do its work, cannot legally contract with the shipper, and insert in the bill of lading, that itself and the sub-carriers shall not be responsible for the damage or loss of goods received for transportation. Such a stipulation is against public policy. *Merchants' Despatch Trans. Co. v. Bloch Bros.*, 86 Tenn. 392; *Coward v. East Tenn.*, etc., R.

Co., 16 Lea (Tenn.) 225; *Dillard v. Louisville, etc., R. Co.*, 2 Lea (Tenn.) 288; *Marr v. Telegraph Co.*, 85 Tenn. 529; *N. Y. Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.

General application of the principle. *Tyler v. W. U. Tel. Co.*, 60 Ill. 421; *W. U. Tel. Co. v. Tyler*, 74 Ill. 168; *Sweatland v. Ill. & Miss. Tel. Co.*, 27 Iowa 432; *Manville v. Tel. Co.*, 37 Iowa 214; *Tel. Co. v. Griswold*, 37 Ohio St. 301; *Passmore v. W. U. Tel. Co.*, 78 Pa. St. 238; *U. S. Tel. Co. v. Wenger*, 55 Pa. St. 262; *True v. Tel. Co.*, 60 Me. 9; *Graham v. Tel. Co.*, 1 Cal. 230; *Blanchard v. Tel. Co.*, 68 Ga. 299; *Candee v. W. U. Tel. Co.*, 34 Wis. 471.

3. *Criminal Negligence.*—It is against public policy to make an agreement waiving damages for injuries caused by criminal negligence. *Cook v. Western, etc., R. Co.*, 72 Ga. 48.

In employing a brakeman, a railroad company cannot validly bind him to renounce his right to claim for future damage caused by the negligence of conductors in the company's employ. *Lake Shore, etc., R. R. Co. v. Spangler*, 44 Ohio St. 471.

A contract exempting a railroad company from general liability for injury to cattle while transporting them cannot be enforced. *Railway Co. v. Harris*, 67 Tex. 166.

Railroads cannot screen themselves from liability to their employes for

contracting with them to that effect.¹ Whether it may so contract when taking passengers gratuitously, has been a subject of decisions in the courts, and does not seem to have been fully settled.² But where there is no prior agreement to the contrary, such passengers may recover. It would seem that the exemption might be a reason without which the carrier would refuse to take passengers for nothing; and that, between the company and themselves, a contract granting immunity would be reasonable and enforceable; but the public have an interest in the safety and lives of travellers, and in the orderly conduct of railroads conveying them; and it is the policy of the law that such contracts be discountenanced.³ The application of the doctrine of public policy to contracts of this character has been brought largely under review in relation to what are called "drovers' passes."⁴

7. *Contracts Affecting Compensation of Public Officers.*—Public officers cannot legally contract to increase or diminish their statutory compensation, nor can they bind themselves to forego resort to the statutory remedy for the collection of fees.⁵

The delegation of official duty by contract cannot be done legally; for, while the performance of official acts may be, and often must be, entrusted to deputies, no agreement by which the officer himself seeks to evade responsibility can be countenanced by the courts. He presumably is elected or appointed on account of his fitness, and he cannot substitute the qualities of another

injuries that may be received in the service of the roads by so stipulating in the contract of employment. Such immunity is against public policy. *Lake Shore, etc., R. Co. v. Spangler*, 44 Ohio St. 471; *Roesner v. Hermann*, 8 Fed. Rep. 782; *Kansas Pac. R. Co. v. Peavey*, 29 Kan. 169; 2 Thompson on Neg. 1025; 1 Cent. Law Jour. 485.

1. Nor can railroads exempt themselves from like liability to passengers by contract. *Wells v. N. Y. Cent. R. Co.*, 24 N. Y. 193; *Smith v. N. Y. Cent. R. Co.*, 24 N. Y. 231; *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1.

2. It has been thought that if passengers are conveyed without compensation, they may contract so as to alienate their right to claim damages in case of injury, and the railroads thus contracting and carrying become exempt. The authorities do not seem to be in full accord. *Perkins v. N. Y. Central R. Co.*, 24 N. Y. 196; *Bissell v. N. Y. Central R. Co.*, 25 N. Y. 448; *Kinney v. Central R. Co.*, 34 N. J. L. 513. Compare *Jacobus v. St. Paul, etc., R. Co.*, 20 Minn. 110.

3. In the absence of exemption by agreement, nonpaying passengers may

recover for injuries. *Phila., etc., R. Co. v. Derby*, 14 How. (U. S.) 468; *Wilton v. Middlesex R. Co.*, 107 Mass. 108; *Nolton v. Western R. Cor.*, 15 N. Y. 444; *Blair v. Erie R. Co.*, 66 N. Y. 313; *Gillenwater v. Madison, etc., R. Co.*, 5 Ind. 340.

4. The public policy of contract exemption has been considered in relation to "drovers' passes." *N. Y. Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 660; *Pa. R. Co. v. Henderson*, 51 Pa. St. 315; *Ohio R. Co. v. Selby*, 47 Ind. 471; *Cleveland, etc., R. Co. v. Curran*, 19 Ohio St. 1.

5. *Officers' Fees.*—"We think a contract whereby an officer agrees to accept a less or greater compensation than is prescribed by statute, or whereby he agrees not to avail himself of a statutory mode of enforcing the collection of his fees, is contrary to public policy, and void." *Hawkeye Ins. Co. v. Brainard*, 72 Iowa 130; *SEEVERS, J., citing Gilman & Des Moines R. Co.*, 40 Iowa 200; *McConkey v. Chapman*, 58 Iowa 281, and referring to *Boardman v. Thompson*, 25 Iowa 487; *Adye v. Hanna*, 47 Iowa 264.

for his own without possibly prejudicing the public interest.¹

It has been held that an agreement between an officer and his deputy that the latter shall receive part of the official salary, is good;² but not that fees shall be divided between them.³

Official Favoritism.—There can be no valid agreement when the object of it is to obtain favors of public officers; to secure their influence with the government, or other authorities or persons; to induce an officer to resign in another's favor, and the like. Courts will take judicial notice of the nullity of such contracts, when sued upon, though the defendant may not have pleaded their violation of public policy. They will do so whether there be any statute inhibiting such agreements or not, since they are *contra bonos mores* and void by the common law.⁴ The principle is not confined to contracts with officers of our own government, State and Federal, but those of foreign powers resident here cannot validly contract to sell their influence either with their own government or with ours. Consular pledges of their influence for monetary consideration have been justly rebuked in our courts.⁵

1. Contracts delegating official duty are void. *Engle v. Chipman*, 51 Mich. 524; *Gould v. Kendall*, 15 Neb. 549; *Robertson v. Robinson*, 65 Ala. 610; s. c., 39 Am. Rep. 17.

Nor can a clerk of court assign the collection of official fees to his creditor, it seems. *Field v. Chipley*, 79 Ky. 260; s. c., 46 Am. Rep. 215.

2. An officer may contract to pay his deputy part of his salary as compensation. *Stout v. Ennis*, 28 Kan. 706.

3. It is against public policy for a United States marshal to contract with his deputy that the latter shall appoint assistants, and that the fees to be earned shall be divided between himself and the deputies in certain proportions. *Schloss v. Hewlett*, 81 Ala. 266.

4. Contracts to secure official favoritism are void. *Odineal v. Barry*, 24 Miss. 9; *Swayze v. Hull*, 8 N. J. 54; s. c., 14 Am. Dec. 399; *Gil v. Davis*, 12 La. Ann. 219; *Frankfort v. Winterport*, 54 Me. 250; *Powers v. Skinner*, 34 Vt. 274; *Devlin v. Brady*, 36 Barb. (N. Y.) 531; *Gray v. Hook*, 4 Comst. (N. Y.) 449; *Hopkins v. Prescott*, 4 C. B. R. 518; *Hartz v. Gulden*, 7 Watts (Pa.) 152; *McGill's Admr. v. Burnett*, 7 J. J. Marsh. (Ky.) 640; *Bryan v. Reynolds*, 5 Wis. 200.

Appointments of Offices.—One sued on a contract by which he was to have half the fees of an office for securing the defendant's appointment as gov-

ernment counsel. The claim was declared untenable; the contract void; all such transactions, "unmixed evil." The court declared that "no legal right can spring" from such a contract, whether it be forbidden by statute or public policy. *Meguire v. Corwine*, 101 U. S. 108, 111.

A candidate agreed to pay half the net profits of the office he sought to his rival. The contract was held contrary to public policy and not enforceable. *Glover v. Taylor*, 38 La. Ann. 634.

A contract to pay for personal influence in favor of a candidate at an election, for money or other consideration, is void. A note given pursuant to such contract is void in the hands of the payee. So, if the consideration of the note was the payee's relinquishment of his office to another—to make way for him and solicit the appointment of the payor to his place. *Meacham v. Dow*, 32 Vt. 721; *Nichols v. Mudgett*, 32 Vt. 546. See *Strasberger v. Burk*, 13 Am. L. Reg. n. s. 607, 610.

5. *Consular Influence.*—A consul-general of a foreign government, resident in the United States, agreed to use his influence with an agent of his government to induce him to purchase arms for it of a manufacturing company. The company contracted with the consul to give him a percentage of the profits. He claimed to have performed the service and sued for the

8. *Sale of Private Personal Influence.*—The rule is that one cannot barter his "persuasiveness" as a marketable commodity, and legally contract to sell it for a monetary or other consideration; for such agreements are held to be against public policy.¹ But it has been held that the services of a newspaper may be engaged to advocate a projected improvement (by showing that capitalists may profitably invest, etc.) without violating public policy; that a contract for such advocacy may be enforced.²

Voting Contracts.—Nor can one validly contract away his right and duty to exert his influence and vote according to his best judgments at the moment of acting or voting. Whether clothed with a public trust, or exercising rights and performing duties as a private citizen, he must be open to conviction up to the very point of time when it is his province to act. Whether as members of a legislative body, or as citizens voting at an election, two persons cannot legally contract to "pair off," as the phrase is, so that neither shall do his duty. Such agreements are absolutely void.³ No two persons can mutually sell their votes to each

stipulated compensation. It was not only held that he could not recover on such an agreement, but that the court was bound to refuse its aid in enforcing such a contract, even though the invalidity of it had not been specially pleaded, and might direct the jury to find for the defendant. *Oscanyan v. Arms Co.*, 103 U. S. 261; *Watson v. Murray*, 23 N. J. Eq. 257; *Hope v. Hope*, 8 De G., M. & G. 731.

A contract by a consul of Great Britain, residing in this country during the rebellion, to protect cotton of an enemy from capture by the United States, is void, as against public policy. *Coppell v. Hall*, 7 Wall. (U. S.) 542.

1. *Sale of Personal Influence.*—One who sold his "influence" in procuring sales, etc., could not recover. *Atlee v. Fink*, 75 Mo. 100; s. c., 42 Am. Rep. 385.

Nor one who did so to procure for another a contract for work from a railroad company. *Davidson v. Seymour*, 1 Bosw. (N. Y.) 88.

Nor can a bidder at a sheriff's sale of real estate recover for doing so, on a contract promising pay. *Jones v. Caswell*, 3 Johns. Cases (N. Y.) 29; *Doolin v. Ward*, 6 Johns. (N. Y.) 194. Nor on a contract that he would not bid for a mail contract. *Gullick v. Ward*, 5 Halst. (N. J.) 87.

Persons contracted with the owner of a building that if he would offer it to the government for a post-office at a nominal rent, and use "proper per-

suasion" to have the offer accepted, they would pay him an annual sum, and give notes to that effect. Held, that the contract was against public policy, and the notes not legally collectible. *Elkhart County Lodge v. Crary*, 98 Ind. 238; s. c., 49 Am. Rep. 746.

One who recommended a builder, who had promised to pay him therefor, could not recover, because the agreement was against public policy. *Holcomb v. Weaver*, 136 Mass. 265.

2. A newspaper proprietor recovered of a corporation for advocating the building of a bridge as a good investment, etc. *Liebke v. Knapp*, 79 Mo. 22; s. c., 49 Am. Rep. 212.

3. An agreement between two voters to "pair off" is void. 6 Am. & Eng. Ency. of L. 445. In *McCrary on Elections*, § 193: The author was not speaking of legislators pairing; but if it is wrong for suffragans at an election to contract not to vote, how much aggravated is the evil when grave senators agree to "pair off," entering into the nefarious agreement days before the pending bill, on which they promise to abstain from voting, is brought to vote? As members of a deliberative body, they cannot know, while discussion of the measure is yet going on, that their minds may not be convinced of the incorrectness of their opinion upon it before the question is submitted. Conviction may strike them at any time before the moment of voting. To cut themselves off from keeping their oath

other with any more plausibility of legality than could a bankrupt and a creditor contract that the latter should vote the former's discharge for a moneyed consideration.¹

And yet a court saw no illegality in an agreement between stockholders that they should all vote together in all corporation matters, binding themselves in advance without regard to what might be the individual judgment of any stockholder when questions afterwards should arise. And doubt is expressed, in the opinion, whether a party to such a contract can ever withdraw from it without the consent of the other stockholders. No very good reason seems to support such a doubt, if the contract itself be considered legal. But we may well doubt the correctness of a judicial deliverance which holds that a stockholder may contract away his right to vote on all questions in accordance with his judgment at the time they arise. Not only his right but his duty is traded off by such a combination as the facts of the case disclose.

The court, in giving as a reason to sustain the combination, that "each member has the clear right to cast his ballot as he pleases, wisely or unwisely," really gives the true reason why the combination to hamper that right is illegal. The court say that "it can make no difference if several stockholders uniformly vote together, or so vote in obedience to a prior agreement that they will do so."

There is this great difference: uniformly voting together may be an expression of each individual will at the time of voting; while voting together, to obey a previous agreement to do so, cuts off volition.

The vote cast in the latter way is not necessarily "expressed wish of the stockholders;" and there is no abridgment of "the voter's right to cast his ballot as he pleases," in holding this to be the law. In justice to the court, the reader should consult the authorities which he cites. Stockholders may be bound by their votes cast pursuant to a previous agreement, but public policy will not hold them to vote in accordance with such an agreement. It would seem to be no "problem," under the law of public policy, whether stockholders can debar themselves from exercising the right of casting a free ballot, by their prior conventions. There is little room for questioning what a court of chancery ought to

and rightly serving their constituency, is manifestly immoral and against public policy. By their "pairing off" contract, they are bound in dishonor rather than honor.

1. A bankrupt's promise to pay a creditor to vote for his discharge, is not enforceable. *Thunming v. Miller*, 13 Ill. App. 595.

A contract for pay for supporting a candidate for sheriff, is void. *Swayze v. Hull*, 3 Halst. (N. J.) 54.

For procuring an office for another,

and declining to be a candidate, one cannot recover on a contract to pay him. *Gray v. Hook*, 4 N. Y. 449. Nor for resigning a position to make room for another. *Eddy v. Capron*, 4 R. I. 395; *Parsons v. Thompson*, 1 H. Black. 332.

One who contracted to buy shares in a national bank on condition that he should be made cashier, cannot recover on a breach of the contract, because the condition is against public policy. *Noel v. Drake*, 28 Kan. 265; s. c., 42 Am. Rep. 162.

do when called upon to enforce such contracts.¹

It is not competent for the members of a corporation to bind themselves that they will not give a power of attorney to vote their stock, or that they will not sell their shares.²

It would seem superfluous to say that when a stockholder has entered into a contract of bribery, and has sold his vote thereunder, the void contract cannot be made valid by the assent of all the stockholders, had not such right of ratification been intimated, or, at least, been made a question by a court.³

V. Unlawful Agreements Relative to Marriage.—1. *To Prevent Marriage.*—Marriage is favored by the law, and contracts to prohibit it are illegal, as against public policy. No one can legally bind himself never to enter into matrimony; whatever may be stipulated as a consideration for such promised celibacy is futile, and creates no obligation that can be enforced in the courts. There has been difference of opinion as to whether the condition is valid when bequests in a will have been made which are to be operative only in case the legatee shall remain single. The better opinion is that the bequest will hold, but that the condition need not be observed. The general rule is that contracts to restrain marriage are void.⁴

1. In *Moses v. Scott*, (84 Ala. 608, 611) STONE, C. J., said for the court: "We cannot say there is anything *per se* illegal in an agreement entered into by and between certain stockholders, in a joint stock company, by which they promise to vote together as a unit in all matters pertaining to the government of the corporation. Each member has the clear right to cast his ballot as he pleases, wisely or unwisely, and no other stockholder can control his conduct or gainsay his discretion. And it can make no difference if several stockholders uniformly vote together, or so vote in obedience to a prior agreement that they will do so. The vote, when cast, is but the expressed wish of the stockholder, or, at least, must be so regarded, and no other stockholder can be supposed to be injured thereby. To hold otherwise would greatly abridge the voter's right to cast his ballot as he pleases." In support of this, he cites *Cook on Stocks and Stockholders*, § 618; *Faulds v. Yates*, 57 Ill. 416; s. c., 11 Am. Rep. 24; *Barnes v. Brown*, 80 N. Y. 527; *State v. Smith*, 48 Vt. 266; *Woodruff v. Wentworth*, 133 Mass. 309; *Pender v. Lushington*, L. R., 6 Ch. Div. 70. CHIEF JUSTICE STONE adds: "Whether an agreement to vote as a unit or as an agreed majority may dictate, for any given length of time, is a contract so binding in its terms that no

party to it can withdraw from it, or disregard it, without the consent of his fellows, may be a very different question. Possibly public policy may exert an influence in the solution of this problem. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; *Miss., etc., R. Co. v. Cromwell*, 91 U. S. 643; *Moon v. Crowder*, 72 Ala. 79; *Danforth v. Phila., etc., R. Co.*, 30 N. J. Eq. 12.

"And even if such contract be lawful, and, upon its naked face, exert a continuing force, the grave question comes up, will a court of chancery, in its enlightened discretion, lend its aid in the enforcement of a contract of so doubtful a policy? *Fisher v. Bush*, 51 Super. Ct. N.Y. 641; *Miss., etc., R. Co. v. Cromwell*, 91 U. S. 643."

2. Stockholders agreed that they would not sell their stock, nor give anyone power to vote it. This was held to be an illegal restraint of trade. *Fisher v. Bush*, 35 Hun (N. Y.) 641.

3. A stockholder was bribed to sell his vote at a corporation election. The court held the contract void, *unless assented to by all the stockholders*, and questioned whether it would be valid in such case. *Woodruff v. Wentworth*, 133 Mass. 309.

4. Contracts are generally unlawful when the object is to prohibit marriage. *Williams v. Cowden*, 13 Mo. 211;

The rule extends to all restraints upon the right of selecting a marital partner. The agreement is illegal because of the unlawful object of the contract, whether the obligation sought to be imposed is not to marry at all, or not to wed a designated person.¹

The limitation of the restraint as to time will not relieve the contract of its illegality.²

2. Marriage Brokerage Contracts.—All arguments to pay for bringing about a marital alliance are void, whether the payment is to be made to one of the parties, or to a third person (a professional marriage broker or anyone), for effecting a marriage. All undertakings of such go-betweens as these mercenary match-makers are reprobated by the law.³ And this is so, whatever

Mandlebaum v. McDonell, 29 Mich. 78; Baker v. White, 2 Vern. 215.

Lowe v. Peers, 4 Burr. 2225; Hartley v. Rice, 10 East 22; Morley v. Ren-noldson, 2 Hare 570; Bellairs v. Bellairs, L. R., 18 Eq. 510; Jones v. Jones, L. R., Q. B. D. 279; Barlow v. Bate-man, 3 P. Williams 65; Leigh v. Leigh, 15 Ves. 92; Bellairs v. Bellairs, L. R., 18 Eq. 510; Perrin v. Lyon, 9 East 170; Harvey v. Aston, 1 Atk. 261.

"Any contract which contemplates an entire or practically entire restraint upon the liberty of a person to marry, either for all time or for a limited period, although the party to be restrained has been married before, is void.

... LORD MANSFIELD said [Lowe v. Peers, 4 Burr. 2225] that when a couple fix upon a future time for marriage, instead of making immediate disposition of the matter, there is always some reason against it, and that such covenants, being capable of abuse, in putting the virtue of the young woman in danger, were not to be extended by implication; that the covenant [under consideration] was not a promise to marry the covenantee, but one not to marry anyone else." Greenhood's Doctrine of Public Policy, p. 480.

Partial restraints of marriage, in relation to property, have been allowed. Allen v. Jackson, L. R., 1 Ch. D. 399; Jones v. Jones, L. R., 1 Q. B. D. 279.

"Conditions annexed to gifts, legacies and devises, in restraint of marriage, are not void if they are reasonable in themselves, and do not directly or virtually operate as an under restraint upon the freedom of marriage. If the condition is in restraint of marriage generally, then indeed, as a condition against public policy, and the due economy and morality of domestic life, it

will be held utterly void." 1 Story Eq. Jur. (13th ed.), § 281.

1. All agreements to restrain the freedom of marriage, or the right of choice, are illegal. Hartley v. Rice, 10 East 22; Lowe v. Peers, 4 Burr. 2225; Weeks v. Hill, 38 N. H. 199, 204; Crawford v. Russell, 62 Barb. (N. Y.) 92; Sterling v. Sinnickson, 3 South. (N. J.) 756; Chalfant v. Payton, 91 Ind. 202; Mandlebaum v. McDonell, 29 Mich. 78; Knowlton Anson's Contracts) 2nd Am. ed.), pp. *187-8; Key v. Bradshaw, 2 Vern. 102.

2. A contract to pay money to one if he abstain from marriage for two years, and a further sum *per diem* thereafter while he shall remain single, is void. If executed, the money cannot be recovered. Chalfant v. Payton, 91 Ind. 202; s. c., 46 Am. Rep. 586.

3. **Marriage Brokerage Contracts.**—A promise to pay a man to marry a designated woman within a given time, in consideration of "the exclusive right to carry marriage benefit insurance" on the marital parties, was held void, though the ground was that the contract was one of wager. James v. Jellison, 94 Ind. 292; s. c., 48 Am. Rep. 151.

A contract to pay for services to be rendered in obtaining a wife cannot be enforced. Johnson v. Hunt, 81 Ky. 321; Chalfant v. Payton, 91 Ind. 202; 1 Story Eq. Ins., § 260, 264.

A woman deposited money with a marriage broker to pay him for his efforts to obtain a husband for her. A contract was entered into in which it was stipulated that if she married a person introduced to her by the broker the money should go to compensate him, but if she should voluntarily relinquish the acquaintance of all those introduced by him, within a specified time, the money should be returned to

may be the stipulated reward for the undertaking.¹

3. *Contracts to Induce Divorce.*—If the object of the contract is to divorce man and wife, or to effect their separation, the agreement is against the policy of the law, and is a nullity.² And the illegal character of such a device is aggravated when the element of fraud enters into it.³

The reason of the repugnance with which the law views all contracts with the purpose of dissolving the marriage relation, may be found in its regard for virtue, the good order of society, the welfare of the children as the fruitage of the marriage, and the sacred character of the conjugal relation. It will not permit marital parties to dissolve, of their own accord, a contract which is, in its nature, indissoluble except so far as legislative will has allowed it to be otherwise, and then only by the method authorized.⁴

To induce a wife to sue for a divorce, by a promise on the part of the husband to remunerate her for it by the payment of a price,⁵ or for a husband and wife to agree that one of them shall

her. The woman assigned the contract, and her assignor sued the broker for the money, but it was *held* that both parties were *in pari delicto*, and no relief could be granted. *Duval v. Wellman*, 1 N. Y. Supp. 70.

The English authorities condemn all such contracts. *Roberts v. Roberts*, 3 P. Williams 66; *Hall v. Potter*, 3 Lev. 411; *Keat v. Allen*, 2 Vern. 588; *Chitty on Contracts*, vol. 2 (11th Am. ed.) 988; *Coke upon Littleton*, 206 b, note.

1. Monetary or other considerations to promote marriage with a designated person are not regarded as lawful by the courts. *Crawford v. Russell*, 62 Barb. (N. Y.) 92; *Johnson v. Hunt*, 81 Ky. 321; 22 Am. Law Reg. 777; *Fuller v. Dame*, 18 Pick. (Mass.) 472, 481.

"Any contract to do anything in consideration of the promisee's consent to the marriage of any one, or of his efforts in procuring a marriage for the promisor or a third person, is void." *Greenhood's Doctrine of Public Policy*, p. 478; *Scribblehill v. Brett*, 4 Brown's Parliamentary Cases, 144; *Arundel v. Trevillian*, 1 Ch. Rep. 47.

2. *Divorce.*—All agreements having divorce for the object are void. *Daggett v. Daggett*, 5 Paige (N. Y.) 509; s. c., 28 Am. Dec. 442; *Cross v. Cross*, 58 N. H. 373; *Muckenburg v. Holler*, 29 Ind. 139; *Hamilton v. Hamilton*, 89 Ill. 349; *Phillips v. Thorp*, 10 Oreg. 494; *Speck v. Dausman*, 7 Mo. App. 165; *Belden v. Munger*, 5 Minn. 211; *Comstock v. Adams*, 23 Kans. 513; *St. John*

v. St. John, 11 Ves. 526; *Goodwin v. Goodwin*, 4 Day (Conn.) 343; *Hardy v. Smith*, 136 Mass. 328; *Viser v. Bertrand*, 14 Ark. 267; *Perry on Trusts*, § 672. Parties may agree to discontinue a divorce suit. *Adams v. Adams*, 91 N. Y. 381.

3. If fraudulent marriage or divorce is the purpose of a contract, the agreement is void. *Cole v. People*, 84 Ill. 216; *Goodwin v. Goodwin*, 4 Day (Conn.) 343; *State v. Murphy*, 6 Ala. 765; *Com. v. Waterman*, 122 Mass. 43.

4. "The object of the agreement was to bring about a dissolution of the marriage contract, and to put an end to the various duties and relations resulting from it. Any contract, having any such purpose, object and tendency, cannot be in law sustained, but must be regarded as being against sound public policy, and consequently illegal and void. The marriage relation is one to be encouraged and maintained when formed. Such is the well settled policy of the law; and its dissolution or determination is not to be left to depend upon the caprice of the parties. If determined, it must be done in accordance with some positive enactment of law, and in due course of judicial proceedings." *Sayles v. Sayles*, 21 N. H. 312.

5. "Whatever apology may be made for this contract, it must, from its nature, operate a gross fraud on the court; and if such friendly arrangements [a husband had agreed to pay

bring a suit for divorce, and the other not to defend,¹ is directly against the ethical spirit of the law which recognizes and upholds the sanctity of marriage, and is void, whether tested by its letter or spirit. On the other hand, since applications for divorce are legal when made in the way pointed out by the legislature, it is not competent for the plaintiff to contract to pay for the withdrawal of the pleaded defence. The law will not tolerate such means of defeating the ends of justice and such collusion between marital litigants, by enforcing contracts of that kind.²

VI. Immoral Contracts.—Since the promotion of public and private virtue is one of the chief purposes of the law, no countenance can be given to agreements which would defeat that end under legal forms. If the object of the agreement be to induce immorality, no technical nicety in the instrument, no stipulation of moneyed consideration, no observance of the usual essentials of a contract can give it validity; such agreements are wholly void.³ If the consideration be not a pecuniary reward for crime and infamy, but a promise of matrimony, the effect is the same.⁴ Whatever may be the inducement offered,

to have his wife sue him for a divorce] are allowed, they must very much interfere with the regular administration of justice." *Goodwin v. Goodwin*, 4 Day (Conn.) 343.

1. A contract in which one of the parties obligates himself not to defend against the application of the other for divorce is illegal in its object, against public policy, and void. *Weeks v. Hill*, 38 N. H. 199; *Kilborn v. Field*, 78 Pa. St. 194; *Sayles v. Sayles*, 1 Fost. (N. H.) 312; *Everhart v. Puckett*, 73 Ind. 409; *Hamilton v. Hamilton*, 80 Ill. 349; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Comstock v. Adams*, 23 Kan. 513; *Speck v. Dausman*, 7 Mo. App. 165.

2. A contract to pay to have the defence of a pending divorce suit withdrawn is void, and a note given in furtherance of such a contract cannot be collected by suit. *Stilson v. Stilson*, 46 Conn. 15; *Weeks v. Hill*, 38 N. H. 199; *Sayles v. Sayles*, 21 N. H. 312; *Cross v. Cross*, 58 N. H. 373; *Sampson v. Cresson*, 6 Phila. (Pa.) 229; *Kilborn v. Field*, 78 Pa. St. 194; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Smith v. Smith*, *Wright (Ohio)* 643; *Belden v. Munger*, 5 Minn. 211; *Everhart v. Puckett*, 73 Ind. 409; *Beard v. Beard*, 65 Cal. 354; *Phillips v. Thorp*, 10 Oreg. 495.

An agreement by which a father means to effect the purpose of relieving himself of all care, duty and responsibility with respect to his children is repulsive to natural law, null and void

Farnsworth v. Richardson, 35 Me. 267; *Richardson v. Richardson*, 35 Me. 560; *Chapsky v. Wood*, 26 Kan. 650; *Wishard v. Medaris*, 34 Ind. 168; *Torrington v. Norwich*, 21 Conn. 543; *Johnson v. Terry*, 34 Conn. 259; *Wodell v. Coggeshall*, 2 Met. (Mass.) 89; *Allen v. Affleck*, 64 How. (N. Y.) Pr. 380; *People v. Mercein*, 3 Hill (N. Y.) 399; *Mercein v. People*, 25 Wend. (N. Y.) 64; *In re Scarritt*, 76 Mo. 565; *Gates v. Renfroe*, 7 La. Ann. 669; *Byrne v. Love*, 14 Tex. 81.

3. When the object is to induce immorality, the contract is void. *Forsythe v. State*, 6 Ohio 19; *Bredin's Appeal*, 92 Pa. St. 241; *White v. Bank*, 22 Pick. (Mass.) 184; *Lowell v. Boston, etc., R. Co.*, 23 Pick. (Mass.) 32; *Belding v. Pitkin*, 2 Cal. (N. Y.) 149; *Trovinger v. McBurney*, 5 Cow. (N. Y.) 253; *Printing Co. v. Sampson*, L. R. 19 Eq. 465; *Howson v. Hancock*, 18 T. R. 577; *State v. Savoye*, 48 Iowa 562; *Com. v. Waterman*, 122 Mass. 43; *Cole v. People*, 84 Ill. 216; *State v. Murphy*, 6 Ala. 765; *Walker v. Gregory*, 36 Ala. 180; *Wilson v. Ensworth*, 85 Ind. 399; *Winebrinner v. Weisiger*, 3 T. B. Mon. (Ky.) 32; *Sherman v. Barrett*, 1 McMull. (S. Car.) 147; *Singleton v. Bremer, Harp.* (S. Car.) 201; *Bishop on Contracts* (1887), § 509.

4. Whether there be a promise of marriage or any other consideration, the law abhors such agreements. *Greenwood v. Curtis*, 6 Mass. 358;

such an object is ever repugnant to the ethical spirit of the law.¹

It gives no sanctity to such a contract to observe all legal forms and execute it under seal.² However, the sale of real estate has been sustained, when the vendor sold and the purchaser bought it for an immoral use.³

The general rule is, a contract against good morals can have no aid from the courts, either to enforce it in the first instance, or to grant relief from it after it has been executed.⁴

The law will not help a landlord to recover rent for a house knowingly leased by him to a tenant for immoral use, nor aid a furniture dealer to recover the price of goods knowingly sold to furnish such an establishment;⁵ nor will it enforce a contract to induce the publication of immoral, indecent and libelous matter,⁶

Hanks v. Naglee, 54 Cal. 51; Steinfield v. Levy, 16 Abb. Pr. (N. Y.) N. S. 26; Forsythe v. State, 6 Ohio 19; Brown v. Langford, 3 Bibb. (Ky.) 497; Goodall v. Thurman, 1 Head (Tenn.) 209; Cusack v. White, 2 Mill. (S. Car.) 279; Baldy v. Stratton, 11 Pa. St. 316.

1. A contract to induce illicit sexual intercourse, whether the consideration be money, marriage, or any other, is repugnant to juridical morals, wholly void and unenforceable. Drennan v. Douglass, 102 Ill. 341; Coolidge v. Blake, 15 Mass. 429; Walker v. Gregory, 36 Ala. 180; Hanks v. Naglee, 54 Cal. 51; Trovinger v. McBurney, 5 Cow. (N. Y.) 253; Gray v. Mathias, 5 Ves. (Eng.) 286; Walker v. Perkins, 1 W. Bl. (Eng.) 517; Anderson v. Com., 5 Rand. (Va.) 627; State v. Savoye, 48 Iowa 562.

2. "A promise made in consideration of future illicit cohabitation is given upon an immoral consideration, and is void, whether made by parol or under seal." Knowlton's Anson on Contracts (2nd Am. from 4th Eng. ed.), *187, citing Ayerst v. Jenkins, 16 Eq. 275; and the following in Knowlton's Notes: Baldy v. Stratton, 11 Pa. St. 316; Hanks v. Naglee, 54 Cal. 51; Goodall v. Sherman, 1 Head (Tenn.) 209; Forsythe v. State, 6 Ohio 19.

3. It was held (though there was dissent) that a contract to sell a house, which the vendor knew to be purchased for use as a bawdy house, was not illegal. Sprague v. Rooney, 82 Mo. 493; s. c., 52 Am. Rep. 383.

4. A contract *contra bonos mores* will not be enforced. If such a contract has been executed, the courts will afford no relief. Hutchins v. Weldin, 114 Ind. 80; Root v. Stevenson's Admr., 24 Ind. 115; Dumont v. Dufore,

27 Ind. 263; Davis v. Leonard, 69 Ind. 213; Forsythe v. State, 6 Ohio 19; Merrick v. Bank of the Metropolis, 8 Gill (Md.) 59; 2 Kent's Com. 466; Fores v. Johnes, 4 Esp. 97; Jones v. Randall, 1 Cowp. 37.

5. The law will lend no aid for the recovery of a price knowingly paid to effect an immoral object, whether it be the rent paid for a house of prostitution or price paid for goods to furnish it. Pearce v. Brooks, L. R., 1 Ex. 213; Hamilton v. Grainger, 5 H. & N. 40; Jennings v. Throgmorton, Ry. & Moody 251; Appleton v. Campbell, 2 C. & P. 347; Riley v. Jordan, 122 Mass. 231; Com. v. Harrington, 3 Pick. (Mass.) 26; Smith v. State, 6 Gill (Md.) 425; Dyett v. Pendleton, 8 Cow. (N. Y.) 727; Mackbee v. Griffith, 2 Cranch (U. S. C. C.) 336; Hanauer v. Doane, 12 Wall. (U. S.) 342; State v. Potter, 30 Iowa 587; Smith v. White, L. R., 1 Eq. 626; Girardy v. Richardson, 1 Esp. 13; Bowry v. Bennet, 1 Camp. 348; 1 Bishop's Cr. L., §§ 1090-6; 2 Chitty on Con., (11th Am. ed.) 981.

"We understand it to be a first principle, not now to be assailed or even doubted, that where a contract, based on a consideration contrary to law, immoral, or opposed to public policy, has been fully and voluntarily executed, if the parties are *in pari delicto*, the courts will not interfere to disturb the acquired rights of either at the instance of the other. The result is the same if the contract had been originally legal and valid, and neither can recover the consideration which has been thus voluntarily parted with." JUDGE SOMERVILLE in Hill v. Freeman, 73 Ala. 200.

6. When the object of an agreement is to induce the making of a libelous,

ILLEGAL CONTRACTS—ILLEGAL SALES.

or grant relief to a wrong-doing party after such a contract has been executed, though one furnishing facts for such publication has been allowed to recover on contract.¹

ILLEGAL IMPRISONMENT.—See HABEAS CORPUS.

ILLEGAL SALES.—(See GAMBLING CONTRACTS.)

1. *Illegal Sales in General*, 923.
2. *Seller's Knowledge of Buyer's Unlawful Purpose*, 924.
3. *Sale for Unlawful Use in Another State*, 924.
4. *Sales Illegal at Common Law*, 926.
5. *Sales Against Public Policy*, 926.
6. *Sales for Future Delivery*, 927.
7. *Sale of Good-will*, 927.
8. *Sales in Violation of Statutes*, 928.
9. *Sunday Sales*, 928.
10. *Sales of Intoxicating Liquors*, 929.
11. *Sales of Fertilizers*, 930.

1. **Illegal Sales in General.**—*Effect of Illegality in Sales.*—A contract of sale which the law makes illegal is not merely voidable, as it is when infected with fraud, but is utterly void and cannot be enforced on either side (see Story on Sales (4th ed.), § 485); so that an innocent person who has been led into a bargain which he finds to be illegal, has no option but to drop it, as he can neither defend nor sue upon the bargain, and may render himself criminally liable if he goes on with the transaction.² And neither law nor equity will reopen the transaction whenever an illegal contract of sale has been carried out fully,³ all acts of delivery completed, and the price paid.⁴

Furtherance of Buyer's Illegal Purpose.—But the doctrine said to be sustained by the great weight of authority is to the effect that knowledge alone by the vendor of the intended unlawful use of the property by the vendee, is not sufficient to defeat the vendor's action against the vendee for the purchase price of goods sold and delivered,⁵ but that it must further be shown that the vendor sold the goods for the purpose that the law should be violated, or that he had some interest in the violation of the law, or that he participated in some manner in the unlawful purpose.⁶

sedition, or indecent publication, the contract is void, and cannot be enforced. *Gale v. Leckie*, 2 Stark. 96; *Stockdale v. Onwhyn*, 5 B. & C. 173; *Poplett v. Stockdale*, Ry. & Moody 337.

1. One who furnished facts to a publisher, who was to pay a royalty therefor on the sales, was allowed to recover the royalty, though the publication itself was a fraud on the public. *James v. Chambers*, 18 Mo. App. 331.

Authorities.—Bishop on Contracts (1887); Anson on Contracts (2nd Am. from 4th Eng. ed.) with Knowlton's Notes (1888); Greenwood's Doctrine of Public Policy (1887); Parsons on Contracts (7th ed.); Wharton on Contracts; Addison, Bingham, Chitty, Dewey, Fry, Hare, Hilliard, Jones, Langdell, Metcalf, Pollock, Pomeroy,

Pothier, Ralston, Smith and Story on Contracts; Waples on Proceedings in Rem., book 2, THINGS GUILTY.

2. 2 Schouler on Pers. Prop. (2nd ed.), § 617. And see Newmark on Sales, § 362, referring, in regard to an illegal sale as a consideration for a note, to *Bowen v. Webber*, 69 Iowa 286.

3. See *Distilling Co. v. Nutt*, 34 Kan. 724, 731.

4. 2 Schouler on Pers. Prop. (2nd ed.), § 618; Newmark on Sales, § 366, citing *White v. Buss*, 3 Cush. (Mass.) 448, and Story on Sales (4th ed.), § 488.

5. *Distilling Co. v. Nutt*, 34 Kan. 724, 730, 731.

6. *Distilling Co. v. Nutt*, 34 Kan. 724, 731.

Domestic Sardines with Deceptive Labels.—The principle that where it is

2. Seller's Knowledge of Buyer's Unlawful Purpose.—Want of Knowledge.—The seller of goods may recover therefor, if he had no knowledge whatever of the buyer's guilty purpose, or merely reasonable cause to believe therein,¹ even although the seller may be aware of the unlawful nature of the occupation of the buyer.²

Insufficiency of Mere Knowledge.—And the doctrine of the insufficiency of mere knowledge by the seller of the buyer's guilty purpose, as depriving the former of his legal remedies against the latter, is involved in the ruling that mere knowledge by the vendor of goods lawfully sold in one State, that the vendee intends to use them in violation of law in another State, will not defeat an action brought in such other State by the vendor against the vendee for the purchase price of the goods.³

Restrictions upon Requirement of more than Knowledge.—But it is said that the best of the late English and American cases utterly repudiate the qualification in favor of requiring something more than guilty knowledge on a seller's part, save as applied to contemplated acts of inferior criminality, and completed criminal acts which the party sanctions, not assists, by his conduct.⁴

3. Sale for Unlawful Use in Another State.—Mere knowledge by the vendor of goods lawfully sold in one State, that the vendee

part of the contract of sale that an unlawful object was intended, to which both parties were cognizant, the contract is contrary to public policy, and the courts will not aid either party in carrying out the fraudulent purpose, has been applied so as to deny a recovery of damages for failure to accept and receive a number of cases of domestic sardines, having "fancy labels" similar to imported goods, and intended to deceive the consumers and obtain higher prices. *Materne v. Horwitz*, 101 N. Y. 469, affirming 50 N. Y. Super. Ct. 41.

Intoxicating Liquors for Use in Another State.—So the doctrine has been applied to enforce a sale of intoxicating liquors made in one State for disposal in another, contrary to the laws of the latter, that there must be not merely knowledge of the illegal purpose of the buyer, but active promotion thereof or participation therein. *Feineman v. Sachs*, 33 Kan. 621; s. c., 52 Am. Rep. 547. See, also, ruling that a contract to sell a house to one who intends to keep it as a bawdy house is not illegal merely because the vendor knows the intentions, in *Sprague v. Rooney*, 82 Mo. 493; s. c., 52 Am. Rep. 383.

1. 2 Schouler Pers. Prop. (2nd ed.), § 617, referring to *Kottwitz v. Alexander*, 34 Tex. 689; *Prescott v. Norris*, 32 N. H. 101; *Buck v. Albee*, 26 Vt. 184.

and *Hotchkiss v. Finan*, 105 Mass. 86.

2. 2 Schouler Pers. Prop. (2nd ed.), § 617; *Newmark on Sales*, § 363, citing *Story on Sales* (4th ed.), § 488, and *Bowry v. Bennett*, 1 Camp. 348. But see *Pearce v. Brooks*, L. R., 1 Ex. 212.

3. *Distilling Co. v. Nutt*, 34 Kan. 724, distinguishing the authorities seemingly contrary to this proposition. See, also, *Feineman v. Sachs*, 33 Kan. 621, 625, 626; s. c., 52 Am. Rep. 547.

4. 2 Schouler Pers. Prop. (2nd ed.), § 619; *Newmark on Sales*, § 363, stating that upon this distinction, whereby those sales alone are upheld in which the seller may possess knowledge of the buyer's illegal purpose and yet sell without aiding to accomplish some heinous offence, are founded decisions, which render the seller's guilty knowledge fatal to his rights where he sells poison knowing that the buyer means to drug another with it (*Langton v. Hughes*, *Maule & S.* 593. And see *McFarland v. Taylor*, L. R., 1 H. L. Sc. App. 245), or supplies goods for sustaining rebels in arms (*Martin v. McMillan*, 65 N. Car. 109; *Hanauer v. Doane*, 12 Wall. (U. S.) 342, 347. And see *McGavock v. Puryear*, 6 Coldw. (Tenn.) 34, or vends a carriage to a prostitute to be used in aid of her vocation (*Pearce v. Brooks*, L. R., 1 Ex. 12).

intends to use them in violation of law in another State, will not defeat an action brought in such other State by the vendor against the vendee for the purchase price of the goods.¹ And authorities of an apparently contrary tendency have been explained as not in special conflict with this doctrine.²

If the vendor, however, in any way aids the vendee in his unlawful design to violate the laws of the other State, such participation will prevent the vendor from maintaining an action.³

1. *Distilling Co. v. Nutt*, 34 Kan. 724; relying upon *Feineman v. Sachs*, 33 Kan. 621, 625, 626; s. c., 52 Am. Rep. 547, and cases there cited, to wit: *Hill v. Spear*, 50 N. H. 253; s. c., 9 Am. Rep. 205; *Holman v. Johnson*, 1 Cowp. 341; *Gaylord v. Soragen*, 32 Vt. 110; *McIntyre v. Park*, 3 Met. (Mass.) 207; *Smith v. Godfrey*, 28 N. H. 379; *Orcutt v. Nelson*, 1 Gray (Mass.) 536; *President, etc., v. Spalding*, 12 Barb. (N. Y.) 302; and *Tracy v. Talmage*, 14 N. Y. 162; s. c., 67 Am. Dec. 132; and referring also upon this subject, and as supporting the proposition of the text, to the following authorities: *Webber v. Donnelly*, 33 Mich. 469; *McKinney v. Andrews*, 41 Tex. 363; *Dater v. Earl*, 3 Gray (Mass.) 482; *Tegler v. Shipman*, 33 Iowa 195; *Pellecat v. Angell*, 2 Crompt. M. & R. 311; and *Sortwell v. Hughes*, 1 Curt. (U. S.) 244.

2. *Distilling Co. v. Nutt*, 34 Kan. 724, where VALENTINE, J., said: "About the only authorities which are seemingly opposed to the foregoing proposition are the following: *Territt v. Bartlett*, 21 Vt. 184; *McConihe v. McMann*, 27 Vt. 95; *Webster v. Munger*, 8 Gray (Mass.) 584; *Adams v. Coulliard*, 102 Mass. 167; *Davis v. Bronson*, 6 Iowa 411; *Second Nat. Bank v. Curren*, 36 Iowa 555; *Banchor v. Mansel*, 47 Me. 58. But these authorities last cited do not furnish much opposition to the general doctrine above enunciated. The Vermont decisions, for instance, make a distinction as between mere knowledge by the vendor of the illegal purpose of the vendee and knowledge *with the intent by the vendor to assist in carrying out such unlawful purpose*. See 21 Vt. 189, 190; 27 Vt. 99; and the later case of *Gaylord v. Soragen*, 32 Vt. 112, where the following language is used: 'Mere knowledge by the vendor of goods, selling them in a foreign State, that the vendee intends to use them in violation of the laws of this State, is not sufficient to invalidate the contract, when it is sought to be enforced

in our courts. Our own courts have recognized this rule (*McConihe v. McMann*, 27 Vt. 95), and it is now generally adopted in this country and in England, though the contrary doctrine has received the support of some eminent judges and jurists.' The decisions in Massachusetts, reported in *Webster v. Munger*, 74 Mass. 584, and *Adams v. Coulliard*, 102 Mass. 167, do not purport to overrule the previous decisions made in that State, but attempt to make a distinction. It is not *held* in that State that knowledge alone of the intended illegal sale will defeat the action, but is knowledge of such intended illegal sale, 'with a view' that the intended illegal sale shall be consummated. *Webster v. Munger*, 74 Mass. 584. And 'reasonable cause of belief,' of such intended illegal sale is not sufficient. *Adams v. Coulliard*, 102 Mass. 167. The decisions in Iowa are made under a special statute; but even in that State it is *held* that mere knowledge of the law alone will not render the contract invalid (*Second Nat. Bank v. Curren*, 36 Iowa 555); and in the case of *Tegler v. Shipman*, 33 Iowa 195, 200, it is stated that it is not *held* that mere knowledge on the part of the seller of the intended violation of the laws by the purchaser would necessarily vitiate or avoid the contract. The case of *Banchor v. Mansel*, 47 Me. 58, is also decided under an express statute; but in that case it was merely *held* that knowledge on the part of the vendor, and 'acts beyond the mere sale, which aided the purchaser in his unlawful design,' would defeat the vendor's action. See, also, *Torrey v. Corliss*, 33 Me. 333."

3. *Fisher v. Lord*, 63 N. H. 514, further stating that the participation must be active, to some extent, and the vendor must do something in furtherance of the vendee's design to violate the laws of the State where the sale is illegal, though positive acts in aid of the unlawful purpose, even if slight, are sufficient.

4. Sales Illegal at Common Law.—There are illegal sales at the common law, and illegal sales founded in statute,¹ the effect of the illegality in the latter sense merely being liable to special regulation.²

Various Classes of Sales Illegal at Common Law.—There are a number of classes of sales which may be pronounced illegal at common law, although the offence may likewise be recognized in statutory enactments.³

Immoral Objects, Dangerous Articles, and Sales for Purposes Adverse to Government.—Thus whatever contravenes public decency and good morals, as sales for purposes of prostitution,⁴ and sales of obscene books or pictures,⁵ must be pronounced clearly illegal and void;⁶ and so the sale of poison, or of murderous or burglarious implements, is illegal when in aid of felonious designs against life or property.⁷

5. Sales Against Public Policy.—*Contract to Purchase Soldiers' Land Scrip.*—It is against the plain intent and policy of congress for anyone to negotiate and transfer "soldiers' additional homestead scrip," as the right to make entries of public land and to take the benefit thereof belongs to the soldier alone; and an action cannot be maintained to recover money paid upon a contract to purchase such scrip, at least in the absence of equitable grounds for relief.⁸

"Gold Sales" and Stock Sales.—But the classes of transactions

1. See Story on Sales, § 486.

2. 2 Schouler on Pers. Prop. (2nd ed.), § 617; Newmark on Sales, § 362. The doctrine that contracts made in violation of a statute, whether the prohibition be express or implied, are void, unless the language of the statute shows a contrary intention, has been applied so as to permit recovery upon a note given in payment for the price of slaves charged to have been brought into a State as merchandise, in contravention of the statute regulating the importation of them. *Harris v. Runnels*, 12 How. (U. S.) 79; s. c., 8 Myer's Fed. Dec. 187.

3. 2 Schouler on Pers. Prop. (2nd ed.), § 621; Newmark on Sales, § 367.

4. See *Pearce v. Brooks*, L. R., 1 Ex. 213. Compare *Bowry v. Bennett*, 1 Camp. 348, and consult Story on Sales (4th ed.), §§ 206, 488.

5. See *Poplett v. Stockdale*, Ryan & M. 337; *Fohres v. Johnes*, 4 Esp. 497.

6. 2 Schouler on Pers. Prop. (2nd ed.), § 621; Newmark on Sales, § 367. And see *Bennett's Benj. on Sales* (4th Am. ed.), § 504; *Campbell on Sales* 146; *Story on Sales* (4th ed.), § 488. Concerning knowledge of purpose in sale

equivalent to lease of bawdy house, see *Sprague v. Rooney*, 82 Mo. 493; s. c., 52 Am. Rep. 383.

7. See *Langton v. Hughes*, 1 Maule & S. 593; *Roberts v. Egerton*, L. R., 9 Q. B. 494; as cited in 2 Schouler's Pers. Prop. (2nd ed.), § 621; Newmark on Sales, § 367; further stating that among other classes of sales void at common law, though concerning offences largely regulated by statute, are sales to a public enemy (see *Brandon v. Nesbitt*, 6 Term Rep. 23), or in aid of treason (see *Hanauer v. Doane*, 12 Wall. (U. S.) 342; *Hanauer v. Woodruff*, 15 Wall. (U. S.) 439; *Spratt v. United States*, 20 Wall. (U. S.) 459), as well as smuggling contracts of sales (see *Pellicat v. Angell*, 2 Crompt. M. & R. 311; *Creekman v. Chitwood*, 7 Bush (Ky.) 317; *Story on Sales* (4th ed.), §§ 507, 508). Consult further *Campbell on Sales*, 146; *Bennett's Benj. on Sales* (4th Am. ed.), §§ 510, 511; citing *Biggs v. Laurence*, 3 Term Rep. 454; *Clugas v. Pentaluna*, 4 Term Rep. 466; *Holman v. Johnson*, 1 Cowp. 341; *Waymell v. Reed*, 5 Term Rep. 599; and *Pellicat v. Angell*, 2 Crompt. M. & R. 311.

8. *Mackintosh v. Renton*, 2 Wash. Ty. 121.

void as against public policy do not include "gold sales" in a period of paper money as legal tender, or stock sales, though these are sometimes akin to gambling.¹

6. Sales for Future Delivery.—Present Prevailing View.—It is the present prevailing view that a contract for the sale of property which the vendor does not possess, to be delivered in future, is not illegal, unless both parties understood it to be a mere speculation in the future price, with no intention of delivering or accepting. (See GAMBLING CONTRACTS.)²

Speculative Contract.—Where, however, certain parties made a contract to buy for another a certain quantity of cotton for future delivery, and it appeared that such parties were members of the New Orleans cotton exchange; that they had bought, in the year preceding this contract, 300,000 bales of cotton, and were under contract to take 60,000 bales, worth \$200,000, at the time of this contract while they were worth only \$75,000, it was held that these circumstances showed the cotton contracted to be bought was on speculation only, and no future actual delivery was intended;³ and that the contract was, therefore, against public policy and void, notwithstanding a rule of the exchange provided that actual delivery of the cotton might be exacted.⁴

7. Sale of Good-will.—Not Illegal.—A sale of one's "good-will" is not illegal;⁵ nor even, as it is held, is the promise to influence

1. See *Brown v. Speyers*, 20 Gratt. (Va.) 296, and *Appleman v. Fisher*, 34 Md. 540, as cited in 2 Schouler Pers. Prop. (2nd ed.), § 621; Newmark on Sales, § 368.

2. *Conner v. Robertson*, 37 La. Ann. 814; s. c., 55 Am. Rep. 521, 524, stating systematically the governing principles derivable from the decisions in regard to wagering contracts and sales of goods for future delivery. See, also, full discussion of trading in options and buying what are called "futures," and of the distinction between intent to make actual delivery or to settle by payment of differences in marginal contracts, with review of many cases in *Whitesides v. Hunt*, 97 Ind. 191; s. c., 49 Am. Rep. 441. Consult further, *Wall v. Schneider*, 59 Wis. 352; s. c., 48 Am. Rep. 520; *Porter v. Viets*, 1 Biss. (U. S.) 177; *Pence v. Langdon*, 9 Otto (U. S.) 578. See GAMBLING CONTRACTS, vol. 8.

"The law is now well settled," says the court, through BLACK, J., in *Crawford v. Spencer*, 92 Mo. 498; s. c., 1 Am. St. Rep. 745, 748, "that a sale of goods to be delivered in future is valid, . . . though there is an option as to the time of delivery, and though the seller has no other means of getting them than to go into the

market and buy them; but if, under the guise of such a contract, valid on its face, the real purpose of and intention of the parties is merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but the difference between the contract and market price only to be paid, then the transaction is a wager and the contract is void. It is not enough to render the contract void that one party only intended by it a speculation in prices; it must be shown that both parties did not intend a delivery of the goods, but contemplated and intended only a settlement of differences. The burden of showing the invalidity of the contract rests upon the party asserting it. *Irwin v. Williar*, 110 U. S. 499; *Cockrell v. Thompson*, 85 Mo. 510." For extended discussion of contracts for sale of personal property to be delivered in future, see note to this case. *Crawford v. Spencer*, 92 Mo. 498; s. c., 1 Am. St. Rep. 752, 766.

3. *Beadles v. McElrath*, 3 S. W. Rep. (Ky.) 152.

4. *Beadles v. McElrath*, 3 S. W. Rep. (Ky.) 152, discussing marginal contracts and speculations in futures, with note 156, collecting various recent cases.

5. Concerning good-will in general,

the public to deal with the buyer as the seller's successor.¹

Engaging in Same Business.—And the right of one who has sold out the good-will of his business to carry on the same business in the buyer's immediate vicinity is a matter for reasonable interpretation, according to the sense of the parties, with the qualification that the seller should not be allowed to overreach the buyer in such a bargain.²

8. Sales in Violation of Statutes.—Sales whose illegality depends more especially upon legislation, include various classes, such as those in violation of acts against lotteries,³ acts requiring licences,⁴ or otherwise imposing taxes, acts regulating the sale of noxious articles; acts enforcing certain requirements as to weight and measure; inspection acts, and the like, some of which pursue a theory of law and morals which the common law did not sanction, while others are rather to facilitate the operations of government.⁵

9. Sunday Sales.—*Like Sunday Contracts in General.*—The law concerning Sunday sales follows that concerning Sunday contracts in general. See SUNDAY LAWS.⁶

Subsequent Re-affirmation.—And the doctrine that a contract made on Sunday may be re-affirmed upon a week day, and is thereby made valid, has been applied to a sale on Sunday of

see discussions of subject in 14 Am. L. Reg. N. S. 1, 329, 649, 713, and in 19 Cent. L. J. 362. Consult, also, *Barber v. Conn. Mutual Life Ins. Co.*, 15 Fed. Rep. 312, with note 315; *Wallingford v. Burr*, 17 Neb. 137, 138, 139; *Bergamini v. Bastian*, 35 La. Ann. 60; s. c., 48 Am. Rep. 216, with note 223. "It is well settled that the good-will of a business may have a property value and form the subject-matter of contract and sale. *Cruess v. Fessler*, 39 Cal. 336; *Morse v. Hutchins*, 102 Mass. 439; *Herford v. Cramer*, 7 Colo. 483.

1. See *Hoyt v. Hall*, 39 Conn. 326; *Warfield v. Booth*, 33 Md. 63, as cited in 2 Sch. Pers. Prop. (2nd ed.), § 623; *Newmark on Sales*, § 373.

2. See *Mouffet v. Cole*, L. R., 7 Ex. 70; *Bradford v. Peckham*, 9 R. I. 250; *Labouchere v. Dawson*, L. R., 13 Eq. 322, as cited in 2 Schouler Pers. Prop. (2nd ed.), § 373; *Newmark on Sales*, § 373. The rule precluding the seller of a good-will from soliciting former customers does not extend to compulsory sales, such as those made by trustees in bankruptcy. *Walker v. Mottram*, L. R., 19 Ch. D. 355. *Remedies*: A breach of stipulations in an agreement for the sale of a business, assuming that they amount to a parting with the good-will and a covenant

not to engage in business again, is no ground for rescinding the contract and suing in tort for deceit in making it, but the remedy is by action for damages for breach of contract. *Taylor v. Saurman*, 110 Pa. St. 3. Concerning evidence of damages by impairment of good-will, see *Burckhardt v. Burckhardt*, 42 Ohio St. 474; s. c., 51 Am. Rep. 842.

3. The doctrine that an action cannot be maintained on a transaction prohibited by law has been so applied as to prevent a recovery upon a due bill given for the payment of the proceeds of lottery tickets sold by one party for another. *Lanahan v. Pattison*, 1 Flip. (U. S.) 410; s. c., 8 Myers Fed. Dec. 186.

4. Concerning illegal sales without license see *Mandelbaum v. Gregovich*, 17 Nev. 87; s. c., 45 Am. Rep. 433. For a decision sustaining a sale to a licensed Indian trader, see *Dunn v. Carter*, 30 Kan. 294.

5. 2 Schouler Pers. Prop. (2nd ed.), § 624; *Newmark on Sales*, § 374. And see generally, *Story on Sales* (4th ed.), § 499; *Bennett's Benj. on Sales* (4th Am. ed.), § 540; and *Campbell on Sales* 152, 153.

6. See 2 Schouler Pers. Prop. (2nd ed.), § 625; *Newmark on Sales*, § 376.

cattle subsequently delivered.¹

10. Sales of Intoxicating Liquors.—What Constitutes Such Sale.—A sale of intoxicating wines has been held to be prohibited by a statute (see INTOXICATING LIQUORS)² prohibiting the sale of spirituous liquors.³

In Violation of License Law.—A contract for the sale of liquor in violation of the license law is illegal, and cannot be enforced.⁴

For Resale in Another State.—If a wholesale liquor dealer in Missouri enters into an agreement with a citizen of Kansas to sell and ship intoxicating liquors to him in Kansas for the express purpose of enabling the purchaser there to resell the liquors, contrary to the laws of the State, and actively aids the purchaser in the illegal traffic, he is not entitled to the assistance of the Kansas courts in recovering the price of the liquors thus sold; but mere knowledge of the illegal purpose of the buyer, without any participation or interest on the part of the seller in the illegal transaction, is not sufficient to invalidate a sale made in Missouri, which is in conformity with the laws of that State.⁵

By Club to Its Members.—In regard to the question, which has

1. Van Hoven v. Irish, 3 McCrary (U. S.) 443; s. c., 8 Myers Fed. Dec. 182.

2. N. H. Gen. Laws, ch. 109, § 13.

3. Jones v. Surprise, 9 Atl. Rep. (N. H.) 384.

Bitters.—Under the Arkansas act prohibiting the sale of "any compound or preparation" of "ardent spirits," commonly called "tonics," "bitters," etc., without first procuring a license, a contract between the manufacturers of certain bitters containing intoxicating liquors as the chief ingredients, and a licensed liquor dealer, whereby the latter is supplied with the bitters which he sells, with a warranty that they may be sold without a license, is contrary to public policy and void, and the manufacturers cannot maintain an action for their price. O'Bryan v. Fitzpatrick, 48 Ark. 487, 489, discussing various phases of illegal transactions.

4. Bach v. Smith, 2 Wash. Ty. 145.

5. Feineman v. Sachs, 33 Kan. 621; s. c., 52 Am. Rep. 547. In this case JOHNSTON, J., said: "In order to render the sale void and defeat a recovery of the price of the liquors there must be some participation or interest of the seller in the act itself. Hill v. Spear, 50 N. H. 253; Holman v. Johnson, Cowper 341; Gaylord v. Soragen, 32 Vt. 110; Aiken v. Blaisdell, 41 Vt. 656; McIntyre v. Parks, 3 Met. (Mass.) 207; Smith v. Godfrey, 28 N. H. 379; Orcutt

v. Nelson, 1 Gray (Mass.) 536; Merchant's Bank v. Spalding, 12 Barb. (N. Y.) 302; Tracy v. Talmage, 14 N. Y. 162. If, however, there has been any participation on the part of the plaintiffs,—as, for instance, if the liquors were packed by the plaintiffs in such a manner as to conceal the contents of the packages, and thus enable the defendant to accomplish his unlawful purpose, no recovery can be had; and if the illegal disposition of the goods by the purchaser in any way entered into the contract, and a greater price was agreed to be paid for them; or if the plaintiffs were to derive any advantage or share in the fruits of the defendant's wrong—the contract should be held void, and not enforceable by the courts." As to sale of liquors in one State to be used in another, see, also, Daniels v. McCabe, 3 Cliff. (U. S.) 114; s. c., 8 Myers Fed. Dec. 182.

A person who solicits orders for spirituous liquors in New Hampshire, where the sale of them is prohibited, to be delivered outside of the State, having reasonable cause to believe that if so delivered they will be transported for illegal sale into the State, cannot recover the price of such liquors in the New Hampshire courts, although the contract of sale may have been lawful in the State where it was made. Jones v. Surprise, 9 Atl. Rep. (N. H.) 385, reviewing various cases and discussing the subject.

II. ILLEGAL SALES—ILLEGITIMATE CHILDREN.

been the subject of divergent decisions, as to whether a furnishing of liquor by a club to its members constitutes a sale which is illegal under restrictive enactments, it has recently been held that there was a sale subject to the penalties of a local option act, where a number of persons organized and incorporated a club for social and literary purposes, where the members, but no other persons, were permitted to purchase from its steward, meals, cigars and liquors, which were furnished by the club at a price fixed by its officers, simply sufficient to cover the cost.¹

11. Sales of Fertilizers.—*Under Georgia Laws as to Analysis, etc.*—Under the provisions of the Code of Georgia requiring that commercial fertilizers shall be "branded or tagged with the manufacturer's guaranteed analysis," showing the percentages of certain ingredients specified in the statute,² it has been held that if the analysis branded on the packages shows the percentage of ingredients the fertilizer is guaranteed to contain, it need not specify other ingredients mentioned in the statute, about which there is no guaranty;³ and it has further been held that if the manufacturer's guaranteed analysis is branded on the sacks, and it appears that the fertilizer has been inspected, it does not invalidate the sale that tags, showing the inspection and analysis, were not appended.⁴

Guano Not Analysed and Tagged as Required by Alabama Statute.—In Alabama, a party who sells Bahama soluble guano without having it analyzed by the agricultural commissioner, and having the bags in which it is sold tagged, as required by the statute,⁵ cannot recover in an action on a note given for the price thereof, although the guano was delivered to the purchaser from the vendor's warehouse, and he promised to call at the vendor's office and have the tags attached but failed to do so.⁶

ILLEGITIMATE CHILDREN.—Persons who are begotten and born out of lawful wedlock.⁷ (See also BASTARDY.)

1. *State v. Lockyear*, 95 N. Car. 633; s. c., 59 Am. Rep. 287. *Compare contra*, *Com. v. Pomphert*, 137 Mass. 564; s. c., 50 Am. Rep. 340.

2. Ga. Code, §§ 1533 a, 1533 b.

3. *Williams v. Barfield*, 31 Fed. Rep. 398; following *Hamlin v. Rogers*, (Ga.) 3 S. E. Rep. 259.

4. *Williams v. Barfield*, 31 Fed. Rep. 398.

There can be no recovery of the balance of the purchase price of a commercial fertilizer by a manufacturer, though he is not within but outside of the State of Georgia, and ships the fertilizer into that State, where such fertilizer is not inspected or analyzed, tagged or branded, as required by the laws of that State. *Baker v. Burton*, 31 Fed. Rep. 401.

5. Act of Feb. 23, 1883; Sess. Acts 1882-3, p. 190.

6. *Campbell v. Segars*, 81 Ala. 259.

7. 2 Kent Com. 208. Illegitimate is not a term confined to any particular class of bastards, it includes every child born out of lawful wedlock, irrespective of the character of the connection to which it owes its birth. For example, a child owing its birth to an adulterous intercourse is just as properly denominated illegitimate as a child begotten by an unmarried man upon an unmarried woman. *Gera v. Cianbar*, 57 Law Times (N. S.) 822.

So far as the legitimacy of a child is concerned, it is wholly immaterial whether the parents before its birth had sought to unite themselves in a marriage which was void, or had

ILL FAME.—See DISORDERLY HOUSE.

ILLICIT TRADE.—See MARINE INSURANCE.

ILLUSION.—See INSANE.

ILLUSORY APPOINTMENT.—See APPOINTMENT.

IMBECILE.—See INSANE.

IMBECILITY.—See note 1.

IMMATERIAL AVERMENT.—See PLEADING.

IMMATERIAL ISSUE.—See PLEADING.

IMMEDIATELY.—See note 2.

wholly ignored every pretence of marriage. *Brown v. Belmarde*, 3 Kan. 52.

By a statute of *New York* it is enacted that "children and relatives who are illegitimate shall not be entitled to inherit" real estate. A and B had a bastard child. Subsequently to the birth of the child, while they were domiciled in Pennsylvania, the child being a minor and residing with them, they were married. By this marriage, according to the laws of Pennsylvania, the bastard became entitled to all the rights and privileges of children begotten and born in lawful wedlock. Afterwards the parents and child removed to New York, where they continued to reside up to the time of the father's death. He died, seized of real estate in the State of New York, intestate. In an action of ejectment brought by the child to recover the said real estate, it was *held* that, having been born out of lawful wedlock, he was "illegitimate," within the meaning of the statute above quoted; and that, therefore, he had no title to the land in dispute. Said the court: "The word 'illegitimate,' when used in this connection, has, by the common law, and the law of this State, a well defined meaning, which is begotten and born out of wedlock. . . . This has been the meaning of the word since the common law was reduced to writing." *LEARNED, P. J.*, dissented. Said he: "As they [the parents] were at the time of such marriage domiciled in Pennsylvania, and as he, their minor child, was also domiciled with them there, the law of Pennsylvania declaring him to be legitimate, governs his status. . . . The meaning of the word [legitimate] has reference to the law of the State which can create the status." *Miller v. Miller*, 18 Hun (N. Y.) 507.

In a will "a gift to children means legitimate children only, unless it ap-

pears from the context or from circumstances that illegitimate children must have been intended. The same rule applies to gifts to sons, issue, and terms of relationship generally." *Hawk on Wills*, p. 80. See *CHILD*.

1. **Corporal Imbecility**.—A wife's petition for divorce alleged that, at the time of the marriage, "the respondent was, ever since has been, and still is, laboring under a corporal imbecility, and never has had, or attempted to have, sexual intercourse with the petitioner, although," etc. It was *held* that, in order for a wife to get a divorce on the ground of impotency, to consummate the marriage in the husband, it is necessary to show an impotency confirmed and incurable; that the term "corporal imbecility" does not, *ex vi termini*, impart such an impotency; and that, therefore, the petition was insufficient. *Ferris v. Ferris*, 8 Conn. 166; s. c., 4 Wheel. Am. C. L. 514.

2. "The word 'immediately,' although in strictness it excludes all mean times, yet to make good the deeds and intents of parties, it shall be construed such convenient time as is reasonably requisite for doing the thing. *Pybus v. Mitford*, 2 Lev. 77; *Thompson v. Gibson*, 8 M. & W. 281; *Page v. Pearce*, 8 M. & W. 677; *Christie v. Richardson*, 10 M. & W. 688; *Snowball v. Dixon*, 4 Younge & Coll. 511; *Hoggins v. Gordon*, 3 Q. B. 466; *Grace v. Clinch*, 4 Q. B. 606; *Toms v. Wilson*, 4 B. & S. 440 (Queen's Bench); affirmed by the Exchequer Chamber, 4 B. & S. 454; *Forsdike v. Stone*, L. R., 3 C. P. 607; *McLure v. Colclough*, 17 Ala. 100; *Gaddis v. Howell*, 31 N. J.-(L.) 313; *Richardson v. End*, 43 Wis. 316.

"It is impossible to lay down any hard and fast rule as to what is the meaning of the word 'immediately' in all cases. The words 'forthwith' and 'immediately' have the same meaning.

They are stronger than the expression 'within a reasonable time,' and imply prompt, vigorous action without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case." *COCKBURN, C. J., Queen v. Justices, L. R., 4 Q. B. Div. 469; King v. Justices, 5 Dowl. & Ry. 588.*

A, being in possession under a lease of premises owned by B, agreed that upon the execution and delivery of certain promissory notes, to be drawn in his favor, he would "immediately" surrender possession of the demised premises to B. In an action brought by A on these notes, in which it was contended by the defendant that A had failed to comply with his part of the agreement, the court instructed the jury that the word "immediately," as used in the plaintiff's contract to surrender the possession of the premises, meant "as soon as could practicably be done." On appeal, this was *held* error. Said the court: "Without insisting that the term 'immediately' shall, in legal parlance, be confined to the same strictness, as, by the correct rules of philology it seems to be confined, we are unable to understand that the use, by the court, of the word 'practicably,' conveyed to the jury the sense and meaning of the word 'immediately,' as used in the agreement. The former contemplates action much less speedy than the latter, and the intervention of many things not contemplated, it would seem, by the use of the latter word. They are not convertible words, while 'immediately' includes 'practicably,' the latter does not include the former; and they are not synonymous." *Streeter v. Streeter, 43 Ill. 155.*

The statute 9 Geo. IV, ch. 31, upon a conviction for an assault, empowers the justices to commit, if the fine and costs shall not be paid, either immediately after the conviction or within such period as the justices shall at the time of the conviction appoint. Said *COLERIDGE, J.*, in a case arising under the statute: "Here the justices have ordered immediate payment; that must mean 'directly.' If not, we should be holding that the word 'immediate' necessarily means within some limited time." *Arnold v. Dimsdale, 2 El. & Bl. 580.*

Immediately After Judgment.—A statute of Missouri provides that "any person convicted before a justice of the peace may appeal, if he shall, immediately after judgment is rendered, file an

affidavit," etc., and "shall also enter into recognizance in such sum as the justice shall deem proper, with good and sufficient sureties to be approved by him." etc. Upon an information filed by the prosecuting attorney before a justice of the peace, the defendant was convicted of selling liquor without a license. On the next succeeding day he filed an affidavit and bond for appeal, and was granted an appeal to the circuit court. It was *held* that the appeal was *prima facie* taken within the required time. Said the court: "The context shows that the word immediately does not mean then and there, but is equivalent to the words, with all convenient speed. An appeal perfected, within the next succeeding day after the judgment is rendered, would *prima facie* satisfy the statute. The burden of proof would lie with the State, to show that it was not taken with all convenient speed. If the appeal is not taken on the day succeeding the judgment, the burden to show that it was taken within such time as was reasonably requisite for satisfying the appeal, would lie with the appellant." *State v. Clevenger, 2 West. Rep. (Mo.) 588.*

Immediately Apprehended.—The 28th § of statute 7 & 8 Geo. IV, ch. 30, against malicious and willful injuries to property, provides as follows: "Any person found committing any offence against this act . . . may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, and forthwith taken before some neighboring justice of the peace, to be dealt with according to law." It was *held* that under this section a person "found committing" an offence against the act, might, upon immediate pursuit, be apprehended and taken before a magistrate, although he had gone off to the distance of a mile. Said *TINDAL, C. J.*: "The words of the present statute must not be taken so strictly as to defeat its reasonable operation. Suppose a party seen in the act of committing the crime were to run away, and immediate and fresh pursuit to be made, I think that would be sufficient. So in this case, the party is actually seen in the commission of the act complained of; as soon as possible an officer is sent for, and he is taken as soon as possible. No greater diligence could be required, and that being the case, I think it must be treated as an 'immediate apprehension.'" *Hanway v. Boulbee, 1 Mood & Rob. 15; s. c., 1 Chit. Gen. Pr. 625;*

Griffith v. Taylor, L. R., 2 C. P. Div. 194.

Immediate Pursuit.—A statute of California provides that when an officer arrests a person without a warrant, he must inform him of his authority, and the cause of arrest, "except when he is in the actual commission of a public offence, or when he is pursued immediately after an escape." The court, in construing this statute, said: "The word *escape* we do not understand to be used in the technical sense of an escape from custody, but rather in the sense of flight from the scene of the crime to avoid being arrested and brought to justice. . . . What is meant by pursuit immediately after an escape, or immediately after the commission of an offence? Immediate pursuit is substantially the same as fresh pursuit, so frequently used in common law phrase in criminal cases." *People v. Pool*, 27 Cal. 579.

Immediate Delivery of Personal Property Under a Contract of Sale.—An act of Montana makes sales of personal property, "unless accompanied by immediate delivery and followed by actual and continued change of possession," "conclusive evidence of fraud as against creditors." A bill of sale of personal property was made at nine o'clock in the evening. The property was twenty-three miles distant. Possession was delivered at four o'clock in the morning of the next day. It was *held* that there was an "immediate delivery." Said the court: "It appears that there was not a single hour in which business could be, or was usually transacted, that intervened between the execution and delivery of the bill of sale and the transfer of the possession of the property. This was certainly an immediate delivery of possession under the statute." *Kleinschmidt v. McAndrew*, 117 U. S. 282; *Richardson v. End*, 43 Wis. 316.

Immediate Notice of Loss or Death in Insurance Policy.—If a policy of insurance requires that notice of the event upon the happening of which the insurers are to pay the policy shall be given immediately, the requirement of the policy will be met, if the notice be given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, of which the jury are ordinarily to be the judges. *May on Insurance*, §§ 462, 536. See, also, in addition to the cases there cited, the following: *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388;

Rokes v. Amazon Co., 51 Md. 512; s. c., 34 Am. Rep. 323; *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 64; *Lockwood v. Middlesex Mut. Ass. Co.*, 47 Conn. 553.

Immediate Payment in a Contract for the Sale of Real Estate.—A contract for the sale of land that provides that a certain portion of the purchase money shall be paid "immediately" imports only that such payment shall be prompt in contradistinction to a credit payment. A tender of such portion of the purchase money, therefore, without any unreasonable delay is sufficient under the contract. *Fitzhugh v. Jones*, 6 Munf. (Va.) 83.

Immediate Delivery in a Contract for the Sale of Coal Between Dealers.—A contract for the sale of coal, dated July 28, made between dealers, which provides for "immediate delivery," it seems would be complied with by a delivery in the following August. Said the court: "The words 'immediate delivery' in ordinary language mean to deliver forthwith, but this expression is explained in the testimony as having a trade meaning among coal shippers and dealers, to which latter class the plaintiff and defendant belong. It means a delivery during the current month in which the offer is made and accepted, unless the contract is made on the last day of the month, or within such limited time that it cannot be shipped, and then the whole of the following month may be given." *Neldon v. Smith*, 36 N. J. (L.) 148.

Immediate Danger.—An act of Kentucky makes it unlawful for any person to carry concealed deadly weapons, except *inter alia*, "when the person has reasonable grounds to believe his person, or the person of some of his family, is in immediate danger from violence or crime." Said the court in construing this provision: "Immediate is defined 'having nothing intervening, either as to place, time or action; instantaneous.' (Worcester). Webster defines immediate as 'instant. present, without the intervention of time.' . . . [It] is not a technical word, and we do not find that it has acquired a peculiar meaning in the law different from its common and approved popular signification. . . . When used in the law of self-defence [it] generally signifies present in time and place. . . . [Now] one who leaves his home to go to a place where it is probable or even certain that he

will meet his adversary, whom he has reasonable ground to believe will attempt to take his life whenever opportunity is presented, cannot at the moment of leaving his home, or at any time before he comes into the presence of his enemy, be said to be in 'immediate danger,' in the sense in which that phrase is ordinarily used, . . . and therefore [if it be construed to have its ordinary meaning as used in the statute under consideration] such person could not lawfully carry concealed weapons while going from his home to the place of anticipated meeting, but must go unarmed or with his arms exposed to view, until, meeting his enemy, he is in present danger; and when again out of his enemy's presence he can no longer lawfully carry them concealed. . . . [But] we cannot presume that the legislature intended such absurd consequences. Thus construed, the statute would be a delusion and a trap for the unwary; and we prefer rather to presume that the word 'immediate' was inadvertently used, or that it was used in some other than its ordinary sense. . . . We are, therefore, of the opinion that when a person has reasonable ground to believe that his person or the person of some member of his family will be in immediate danger of violence or crime at the hands of another, whenever that person is present, then he may lawfully carry concealed weapons whenever and wherever he has reasonable ground to apprehend that he will encounter such person and be exposed to the apprehended danger." *Bailey v. Com.*, 11 Bush (Ky.) 688.

When an Averment that One Thing Was Done Immediately After Another Thing Is Not Sufficiently Definite.—Where, on an indictment for highway robbery, the special verdict found the forcible assault, and then in a distinct sentence that the prisoners "then and there immediately" took up the prosecutor's money, this was *held* to be insufficient to fix the prisoners with the offence of robbery, because the word "immediately" has great latitude, and is not of any determinate signification, and is frequently used to import "as soon as it conveniently could be done." 1 Chitty Cr. L., p. 220, citing *Rex v. Francis*, Comyns 478; s. c., *Strange* 1015.

An indictment for murder alleged that the deceased, as a result of the wounds inflicted by the defendant, the

state of which was specified, "immediately died." It was *held* that it did not sufficiently charge the time of death. Said the court: "In case of murder the time of the death must be laid within a year and a day after the mortal stroke was given. The date of the death, as well as that of the mortal stroke, must, therefore, distinctly appear. In *Lester v. State*, 9 Mo. 658, the indictment alleged that 'the said Scott did *instantly* die,' and this was *held* insufficient. . . . If the word *instantly* is *held* not to supply the place of 'then and there' in an indictment, the word 'immediately' cannot be said to do so." *State v. Reakey*, 1 Mo. App. 3; *State v. Sides*, 64 Mo. 383.

A statute of *Wisconsin*, conferring criminal jurisdiction upon justices' court, enacts that the justice, on the return of the warrant with the accused, shall proceed to hear, try, and determine the case, within one day, unless continued for cause. The return of a justice to the circuit court, by which it appeared that the papers in the cause were received by the justice on March 16, and which did not expressly state that there had been any continuance in the case, contained the following: "Having heard the allegations and proofs, the court finds the defendant guilty of the offence charged in the complaint. Whereupon I immediately (on the 19th day of March, 1877) rendered judgment against the defendant," etc. It was *held* that the return failed to show a compliance with the statute. Said the court: "The justice's docket here shows an interval of some three days between the return (of the warrant) and the judgment, and does not show any continuance. . . . The justice indeed, undertakes to connect the day of his judgment with the day of the return by stating that he rendered judgment *immediately*. It is but the justice's application to the case of a very elastic word; and can be *held* to signify no more than that the justice did, in what he considered a reasonable time, that which the statute requires him to do on the day of the return (of the warrant)." *Hepler v. State*, 43 Wis. 479.

Immediately Adjoining Owners.—By the act of 8 & 9 Vict., ch. 18, "for consolidating in one act certain provisions usually inserted in acts authorizing the taking of lands for undertakings of a public nature," it is provided that before the promoters of the undertaking

dispose of any land which shall have been acquired for the purposes of the undertaking, but which shall not be required for such purposes, they shall, under certain conditions, offer to sell the same "to the person or to the several persons whose lands shall immediately adjoin the lands so proposed to be sold." It was *held* that lessees of lands separated from such superfluous land by a private road, of which they had the exclusive right of user during their tenancies, were owners of "immediately adjoining land," within the above provision. *Coventry v. London, etc., Ry. Co., L. R., 5 Eq. 104.*

Immediate Descent.—"Descents are, as is well known, of two sorts; lineal, as from father or grandfather to son or grandson, and collateral, as from brother to brother, and cousin to cousin, etc. They are also distinguished into mediate and immediate descents. But, here, the terms are susceptible of different interpretations; which circumstance has introduced some confusion into legal discussions, since different judges have used them in different senses. A descent may be said to be mediate or immediate, in regard to the mediate or immediate descent of the estate or right; or it may be said to be mediate or immediate, in regard to the mediateness or immediateness of the pedigree or degree of consanguinity. Thus, a descent from the grandfather, who dies in possession, to the grandchild (the father being then dead), or from the uncle to the nephew (the brother being dead), is in the former sense in law an immediate descent, although the one is collateral and the other lineal, for the heir is in the *per*, and not in the *per* and *cui*. And this is the opinion of LORD CHIEF JUSTICE BRIDGMAN, *Collingwood v. Pace*, Bannister's Rep. of Sir O. Bridgman, 410, 418, is the true meaning and appreciation of the terms. So they are used by LORD COKE in his first Institute, Co. Litt. 10, b. On the other hand, with reference to the line of pedigree or consanguinity, a descent is often said to be immediate, when the ancestor, from whom the party derives his blood, is immediate, and without any intervening link or degrees, and mediate when the kindred is derived from him *mediante altero*, another ancestor intervening between them. Thus, a descent in lineals from father to son is, in this sense, immediate; but a descent from grandfather to grandson

(the father being dead), or from uncle to nephew (the brother being dead), is deemed mediate; the father and the brother being in these latter cases the *medium deferens*, as it is called, of the descent or consanguinity. And this is the sense in which LORD HALE uses the words, assigning as a reason, that he calls it a mediate descent, because the father or brother is the medium through or by whom the son or nephew derives his title to the grandfather or uncle. *Collingwood v. Pace*, 1 Vent. 413, 415; s. c., 1 Keble, 671." STORY, J., *Levy v. McCartee*, 6 Pet. 112.

Immediate Descendants.—By a statute of Ohio it is enacted that "no estate in fee simple, fee tail, or any lesser estate in lands or tenements, lying within this State, shall be given or granted, by deed or will, to any person or persons, but such as are in being, or to be the immediate issue or descendants of such as are in being, at the time of making such deed or will." A testator seized of lands in Ohio devised real estate to his daughter, E, for life, with remainder over at her death to "her child or children living, and the descendants of those who may be dead, equally to be divided *per stirpes*; if none living, then" over, etc. At the time of the making of the will E was unmarried; but subsequently she married and had children, two of whom died in her lifetime leaving children. It was contended that these great grandchildren of the testator could not take on the death of E, despite the provisions of the will, because they were not, within the meaning of the meaning of the act above quoted, "immediate issue or descendants" of E. But the court *held* that while they were not "immediate issue," that term properly signifying "children," they were "immediate descendants," which includes all those upon whom a descent would be immediately cast by the statute of distribution; and that, therefore, they were entitled to take under the will. Said the court: "There is a plain and broad distinction between the terms 'children' and 'descendants.' The one indicating only lineal descendants, while the other includes both lineal and collateral relations—all, in short, that would then take the estate under the statute of descents, if [the testator] had died intestate. All such persons may not be *in fact*, but they are *in law*, the descendants of the persons

IMMIGRATION.

1. Definition, 936.
2. Regulation of Immigration, 936.
3. Aliens Under Contract to Labor, 938.
4. Immigration of Chinese Laborers Inhibited, 941.

1. **Definition.**—Immigration is moving into one place from another. In law it is the moving of a person into a country to reside therein. The word is employed in this article to indicate the coming of persons from foreign countries to the United States for the purpose of settlement here. This is the usual signification of the term when used in digests, law reports and legal treatises.

The term ordinarily implies a voluntary migration, distinguishing it from "importation," which has reference to goods or to persons involuntarily brought, such as slaves, prisoners and insane persons.¹

2. **Regulation of Immigration.**—*Statutory Provisions.*—Congress, by an act "to regulate immigration,"² has charged the secretary of the treasury with the duty of executing it and of supervising immigration, and has authorized him to contract with State boards or commissioners appointed or designated by the governor of any State in which the ports of arrival are situated, to effect the purposes of the act. The State commissioners (or board or designated officers) are required to examine into the condition of the passengers of any vessel arriving at their port, and report to the collector any convict, idiot, lunatic, or any person unable to take care of himself. Such persons are prohibited from being landed. They must be returned whence they came, under the direction of the secretary.³

The right to regulate immigration is in congress and not in the State legislatures.⁴

from whom they receive the estate. Upon the same principle, it has repeatedly been held in Ohio, that the term 'ancestor,' as used in the statute of descents and distribution, means him from whom the estate was inherited, whether father, uncle, nephew, younger or elder brother, and the like.

So a devise 'to my relations,' is in construction limited to such relations as would be entitled to take under the statute of distributions. . . . The superadded word 'immediate,' merely requires that the person entitled to take must be one to whom in case of intestacy the estate would immediately descend, and this a statute designed to prevent perpetuities should very properly require." *Turley v. Turley*, 11 Ohio St. 173.

1. Immigration: "The removing into one place from another." *Bouvier's Law Dict.* "The act of immigrating; the passing or removing into a country

for the purpose of a permanent residence." *Webster's Dict.* The distinction between "immigration" and "importation," suggested in the text, was made in argument before the U. S. Supreme Court in *Passenger Cases*, 7 How. (U. S.) 283.

2. "An Act to Regulate Immigration," Aug. 3, 1882, 22 U. S. Stat. 214.

3. **Return of Convicts, etc.**—An immigrant cannot be denied the right to land, under the act of Aug. 3, 1882, unless the commissioners have found him to be a convict, a lunatic, an idiot, or a person incapable of caring for himself so as not to become a public charge. If he is none of these, his right to land may be enforced by *habeas corpus*. *Re O'Sullivan*, 31 Fed. Rep. 447.

4. **Duty on Passengers.**—The provision in the constitution of the United States, conferring power on congress to regulate commerce, includes persons in relation to commerce, as well as

Immigrant Fund.—A duty of fifty cents is levied for every foreign passenger coming by steam or sail vessel to the United States from any foreign port. It must be paid by the master, owner, agent or consignee of the vessel to the collector of the port at which it arrives with such passenger. In default of payment, the sum due becomes a debt operating as a lien upon the vessel. The object of the duty is the creation of an "immigrant fund," to be expended in caring for destitute immigrants, and in carrying out the act to regulate immigration.¹

State Commissioners.—The commissioners which are charged with this duty, under contract with the secretary of the treasury of the United States, are State officers, accountable to the State for fees collected under the immigration act of congress.² Yet, when they have found that persons on board are such as the act forbids from being landed, and have so reported to the collector, it seems that the federal courts will not interfere, by the writ of *habeas corpus*, with the collector's decision.³

property. *Lin Sing v. Washburn*, 20 Cal. 534. A State has no authority to impose a tax *per capita* on foreign passengers. *Passenger Cases*, 7 How. (U. S.) 283, 349; *People v. Raymond*, 34 Cal. 492; *State v. Steamship Constitution*, 42 Cal. 589; Annotation of the Head Money Cases, 18 Fed. Rep. 146; *Henderson v. Wickham*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275. A State statute discriminating against Chinese immigration is void. *Lin Sing v. Washburn*, 20. Cal. 534. Such statute fixing a sum per passenger for inspection to ascertain whether he is leprous is void. *People v. Pacific Mail Steam Ship Co.*, 8 Sawy. (U. S.) 640; s. c., 16 Fed. Rep. 344. Such statute imposing a dollar on each alien passenger to execute the State inspection laws is unconstitutional. *People v. Campagnie Generale Transatlantique*, 10 Fed. Rep. 357. A tax demanded of the master or owner of a vessel for every passenger is a regulation of commerce which cannot be imposed by State statute. *Henderson v. Wickham*, 92 U. S. 259. Head Money Cases, 18 Fed. Rep. 146.

1. Constitutionality of the Head Money Provision.—The act of Aug. 3, 1882, "to regulate immigration," which imposes, upon owners of vessels fifty cents for each foreign passenger imported, "is a valid exercise of the power to regulate commerce with foreign nations." The contribution is designed to mitigate the evils of immigration by providing a fund; it is not a tax subject to the limitations imposed by the constitution on the general taxing power of

congress. Authority to enact statutes of this kind was vested exclusively in congress by the constitution. State laws of this character have been held void. *Edye v. Robertson* (Head Money Cases), 112 U. S. 580.

"A tax upon the masters of vessels engaged in foreign commerce, of a certain sum on account of every passenger brought from a foreign country into the State, is a tax upon commerce." *Cooley on Taxation*, (2nd ed.) 97.

2. Commissioner's Fees.—Fees collected by the commissioner of immigration must be paid into the State treasury. He cannot withhold them on the plea of the unconstitutionality of the act of congress fixing a capitation tax on foreign passengers. Nor can he, on the ground that no lazaretto or lepers' quarters have been erected as contemplated by the act. He cannot credit himself with the salaries of his deputies' or attorney's fees which are yet unpaid. *Dunn v. Bunker*, 70 Cal. 212.

His own salary and office expenses can be paid only out of the money received into the State treasury after the passage of the act of March 15, 1883, relative to immigration, if he took his office subsequently to that date. *Forrester v. Dunn*, 65 Cal. 562.

3. Habeas Corpus No Relief.—Eight children, ranging in age from twelve to fifteen years, were brought as passengers on a steamer from England. They had been committed as truants to an industrial reform school in Bristol, whence to this country their passage

3. Aliens Under Contract to Labor.—Statutory Inhibition.—The importation of foreigners, under contract to labor in the United States, is prohibited by the act of 1885, and its amendment of 1887. By the former it was declared unlawful for any person, company, partnership or corporation to prepay the transportation or assist the importation of foreigners to this country, coming under previous contract to labor here. Such contracts are declared void if made after the passage of this act. Whether express or implied, written or verbal, they are rendered null if they have merely "reference to the performance of labor or service by any person in the United States, its territories, or the District of Columbia, previous to the migration or importation of the person or persons whose labor or services is contracted for into the United States."

Penalty.—The person, company, corporation or partnership—the contracting party for the foreign labor—shall incur the penalty of a thousand dollars fine for each offence, recoverable by the United States, or by any person who may sue therefor, in a circuit court of the United States. An imported foreigner, brought in under contract to labor, may bring such suit. The sum recovered must be paid into the treasury of the United States. There may be separate suits against the contracting party for each foreigner thus imported under previous contract to labor. The prosecution of the suits is made the duty of the attorney of the United States for the district in which such suits are instituted.

The master of the importing vessel who shall land any alien laborer, mechanic or artisan under contract to labor here, made previous to embarkation, or who shall permit such to be landed, "shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than five hundred dollars for each and every such alien laborer, mechanic or artisan so brought as aforesaid, and may also be imprisoned for a term not exceeding six months." The penalty, however, is applicable to those only who "knowingly" offend; and contracting parties are liable only when they "knowingly" assist, encourage or solicit the migration in violation of law.

had been paid. It had also been paid, for some to Manitoba and others to Kansas, where situations for them on farms or in vocations of some sort, had been already secured.

The immigration commissioners in New York, on the arrival of these passengers, decided that they were "unable to take care of themselves without becoming a public charge," and so reported to the collector who forbade their landing. Thereupon, *habeas corpus* was sued out. Written obligation by a responsible resident of New York, for each of the children, "furnishing indemnity against any charge that might

be incurred on their account for a period of two years," and other facts not previously presented to the commissioners, were before the court. But the court said that the statute of 1882 makes no provision for any review of the decision of the commissioners upon the evidence before them. No such review can therefore be had upon a writ of *habeas corpus*." *In re Day*, 27 Fed. Rep. 678.

The court, in the *Day* case, after quoting the section of the statute which requires that the commissioners shall go on board of ships and examine whether persons, interdicted by the act, have been imported, etc. (§ 2, Act to

Exceptions.—Artists, lecturers, domestic servants and skilled workmen engaged to labor “upon any new industry not at present established in the United States,” if “skilled labor for that purpose cannot be otherwise obtained,” are excepted from the inhibition. Private secretaries engaged by resident foreigners are also excepted. And any one may aid his relative or friend to immigrate hither for the purpose of settlement, without incurring any of the penalties of this act.

Amended Statute.—This act was amended in 1887 by the insertion of the provisions of the act of 1882, “to regulate immigration,” so as to make the offence of importing foreign laborers, previously contracted with, the same as that of importing foreign convicts, etc., regulating the immigration in the same way; entrusting the execution to the secretary of the treasury and authorizing him to contract with local State boards or commissioners, etc., with like authority; requiring such laborers to be returned to the country whence they came, under the same conditions as those prescribed for the return of convicts under the former act.

It will be observed that the penalties apply only to the persons introducing the laborers under prior contract, and to the carriers importing such laborers. There is no penalty against the party of the second part to the contract—the laborers themselves. Hence it has been contended that as the act prescribes no penalty against the immigrant, the amendment, which directs that he shall be sent back to the nation whence he came, is void for punishing in the absence of any offence. But the court before which this point was raised construed both acts together, and, admitting that they were “inartificially drawn,” held that they plainly indicate an intention to prohibit the importation of foreigners under a contract to labor; and that “in view of the phraseology of the title to the act, congress seems to have prohibited their landing with sufficient clearness.” It will be seen that the argument was not met. The landing of the passenger, under the circumstances, was forbidden, and the master was rendered liable for landing him; but where is found any penalty against the passenger for being landed, or for voluntarily leaving the ship and going ashore? Whether the taking of him back was a penalty or punishment inflicted upon him, is another question. If so, has it any warrant as a penalty in the original or the amendatory act? Is any “offence” created?¹

Regulate Immigration), said: “The provisions above quoted manifestly impose upon the commissioners the duty of determining the facts upon which the refusal of the right to land depends. The general doctrine of the law in such cases is that where the determination of the facts is lodged in a particular officer or tribunal, the decision of that officer or tribunal is conclusive, and cannot be reviewed except as authorized by law. *Foley v. Harrison*, 15 How.

(U. S.) 433; *Dorsheim v. U. S.*, 7 Wall. (U. S.) 166; *Goodyear v. Providence Rubber Co.*, 2 Cliff. (U. S.) 351, 375; *affirmed*, 9 Wall. (U. S.) 788, 798; *Martin v. Mott*, 12 Wheat. (U. S.) 19; *Clinkenbeard v. U. S.*, 21 Wall. (U. S.) 65, 70; *Phila., etc., R. Co. v. Stimson*, 14 Pet. (U. S.) 448, 458. See *U. S. v. Leng*, 18 Fed. Rep. 15-20, and cases there cited; *U. S. v. McDowell*, 21 Fed. Rep. 563.”

1. *In re Cummings*, 32 Fed. Rep. 75.

Domestic Servants.—The exception in favor of domestic servants received an interpretation in the same case in which the above point was before the court. The question was, whether an alien brought to this country as an immigrant under a contract to conduct a dairy, was such a laborer as the act inhibited from being landed, or was a domestic servant? The court held that the relator (the laborer) was not within the exception, "because it appears that his labor will (in part at least) be devoted to the production of merchandise (the surplus dairy products of the herd being sold upon the market), which competes with the products of others whose entire attention is given to manufacturing such products." Doubtless this may be said of the products of the labor of many servants unquestionably domestic (since the sale of butter from the product of one or two cows is not uncommon), but the court assigned no other reason. It would seem, however, that there are reasons for holding a dairyman, charged with such general duties, to be not a domestic servant, within the meaning of the act.¹

Power of Commissioners and Collector.—The authority vested in the local commissioners or State board, appointed by the governor, has received judicial recognition. It has been held that under their authorization to board the vessels and ascertain whether there are any inhibited persons among the passengers, under the act of 1882 (which is now incorporated into the later acts), it is the business of the commissioners, and not of the court, "to ascertain the facts and to determine whether or not any particular passenger comes within the provisions of the statute, so as not to be entitled to land." And they refused to review the collector's action.²

1. *Domestic Servant.*—The facts of the case were that the relator, Cummings, having contracted when in a foreign country, being himself an alien, with a gentleman of Kentucky to keep his dairy in that State, came over in a steamship, to labor under his contract. His passage was paid by an agent of his employer. He was to take charge of twenty-five Jerseys. The collector of the port of New York, to which the ship had brought Cummings, decided that he was prohibited from landing by the act of Feb. 26, 1885, and the amendment of Feb. 23, 1887. The circuit court for the southern district of New York sustained the collector on the grounds stated above in the text; but, as additional testimony had been adduced before the court, it ruled that the relator might again present the case to the collector, at his option. There is an intimation in the opinion that the collector's decision, in

such case, is conclusive; and perhaps the third head note of the reported case is authorized by the opinion, when it says: "The decision of the collector upon the *status* of an immigrant whose right to land in the United States is challenged on the ground that he is under a contract to labor, is conclusive, and not open to review in the courts on *habeas corpus*, if there was competent evidence before the collector on which to exercise his judgment; and, if *habeas corpus* proceedings are resorted to, and facts not previously placed before the collector are therein disclosed, the whole case may afterwards be again presented to the collector." *In re Cummings*, 32 Fed. Rep. 75.

2. *The Commissioners' and Collector's Power.*—The authority for the collector's action, which has been held to give him jurisdiction, etc., is as follows: "It shall be the duty of such State commissioners, board, or officers so

4. Immigration of Chinese Laborers Inhibited.—*Prohibition.*—Con-

designated by [the governor], to examine into the condition of passengers arriving at the ports within such State in any ship or vessel, . . . and if, in such examination, there shall be found among such passengers any person included in the prohibition in this act, they shall report the same in writing to the collector of such port, and such persons shall not be permitted to land." Act of 1885, § 6, in the addition made by the amendment of 1887.

Personal and Domestic Servants—Collector's Decision.—On the question whether an immigrant came under the exception favoring domestic servants, the court held that the collector's decision on that point could not be judicially investigated: "There was before the collector when he made his decision legal and competent evidence of the facts on which to exercise a judgment as to the *status* of the relator. Under these circumstances, the matter being within the jurisdiction of the collector under the act, further consideration of the case might be dispensed with, under the authority of *In re Day*, 27 Fed. Rep. 678, and cases there cited." The court went on to say, by way of passing upon the facts: "I am of opinion that the relator is not within the exception;" and to assign a reason for the opinion—"because his labor will (in part at least), be devoted to the production of merchandise . . . which competes with the products of others. . . ." But the court ordered, at the end, that "the whole case may be again presented" to the collector, "if the relator so desires." *In re Cummings*, 32 Fed. Rep. 75.

JUDGE HOFFMAN, in the district of California, when the right of the collector to decide upon the liberty of a Chinaman, to the exclusion of the court's right to do so, had been urged, made the following remarks, among others, which are pertinent to the case of any foreign laborer restrained of liberty, so far as the reasoning is concerned: "Difficult questions of fact may arise for determination. The collector who, it is suggested, is charged with the exclusive decision of these questions, is not of necessity a lawyer. He discharges his duties by deputy. He is not authorized to administer oaths to witnesses, nor to compel their attendance. The discharge

by him of the duties heretofore supposed to belong to the judicial department of the government would be almost impracticable, unless the other duties of his office be neglected. It is believed that in this class of cases the collector has rarely personally concerned himself with their examination. If I am right in the opinion that a Chinese person, like any other human being in this country, is entitled to the benefits of the writ of *habeas corpus*, in order that it may be judicially ascertained whether the restraint of his liberty be lawful or unlawful, to require the court in its investigation to be governed by the decision of an executive officer, acting under instructions from the head of the department at Washington, would be an anomaly wholly without precedent, if not a flagrant absurdity. The right to a writ of *habeas corpus* is the right to have the lawfulness of the restraint, to which the petitioner is subjected, inquired into by the courts; to be adjudged and determined by the law of the land." *In re Jung Ah Lung*, 25 Fed. Rep. 141, 143.

Court Jurisdiction Not Expressly Conferred.—"The statute of 1882 ('to regulate immigration') makes no provision for any review of the decision of the commissioners upon the evidence before them. No such review can therefore be had upon a writ of *habeas corpus*. That subject was elaborately considered by BLATCHFORD, J., in the case of *Stupp*, 12 Blatchf. (C. C.) 501, 519, who had been held by a U. S. commissioner for extradition under the treaty with Belgium. The rule deduced from an examination of the authorities, and of the statutes in reference to the powers of a federal court under a writ of *habeas corpus* is that 'the court issuing the writ must inquire and adjudge whether the commissioner acquired jurisdiction of the matter by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him on which to exercise a judgment.' . . . This rule has been since repeatedly applied and must govern the present case. See *In re Fowler*, 18 Blatchf. (U. S.) 430, 443; s. c., 4 Fed. Rep. 303, and cases there cited; *In re Wadge*, 15 Fed. Rep. 864; *In re Byron*, 18 Fed. Rep. 722;" *In re Day*, 27 Fed. Rep. 678.

gress, having declared in a preamble that "the coming of Chinese laborers to this country endangers the good order of certain localities," thus planting the law upon the police power, enacted that their immigration should be suspended for ten years, beginning ninety days after the passage of the act. It was declared unlawful for them to come, but no penalty against them for coming was prescribed. The master of a vessel who should import them, however, was declared guilty of a misdemeanor, to be punished on conviction by a fine not exceeding five hundred dollars for each such laborer brought by him, with further liability to a year's imprisonment. The vessel also was to be forfeited. And any person bringing in any such laborer by land, or aiding therein, was made liable to a thousand dollars fine and a year's imprisonment.¹

Exceptions.—Chinese laborers who were in this country at the time of the making of the Chinese treaty of November 17, 1880, or who should come within ninety days after the passage of the act, May 6, 1882, were exempted from the inhibition. They were required, however, before they could re-enter the country after having left it, to produce to the collector of the port at which they should be about to land, a certificate evidencing their right to return under such exemption.² It was made the duty of the collector to issue such certificate to any such laborer prior to his departure from the country; and, for this purpose, to go personally, or by deputy, on board of every vessel having Chinese laborers as passengers bound for a foreign port, and there make a list of such laborers entitled to return, with their description, and to issue to them the certificates.³

The interdicted laborers are not merely those imported from China. If from any foreign port or place they are held to be within the inhibition, if they are Chinese, according to the amendment of 1884, to the original Restriction Act of 1882.⁴

The interdiction, however, is not so broad as to cover all who are of Chinese extraction. A native of this country may come and go at will, whatever his nationality. He is not affected by the restriction acts, though he be a "laborer" and belong to the

1. "An act to execute certain treaty stipulations relating to Chinese." 22 U. S. Stat. 58, ch. 126, §§ 1, 2, 10, 11.

2. §§ 3, 4, 5.

3. *Construction of Act of 1882 Relative to Certificates.*—The requirement of a certificate of Chinese landing in the United States must be construed as referring to Chinese laborers who might leave this country, or Chinese who might leave China after the law went into effect. It does not refer to such laborers who left this country before. Their case is not provided for in the act. *In re Chin A On*, 18 Fed. Rep. 506; *Chew Heong v. U. S.*, 112 U. S. 536.

When one entitled to a certificate left the country without it, though then knowing the law requiring its production on his return, he was *held* to have renounced his right under the treaty. *In re Pong Ah Chee*, 18 Fed. Rep. 527.

Chinese laborers who were in this country when the treaty of 1880 was made, and left before the act requiring a certificate took effect, have the right to land without the production of a certificate, under the act of 1882. *In re Tung Yeong*, 19 Fed. Rep. 184.

4. 23 U. S. Stat., p. 115, ch. 220, § 1.

proscribed race. He is not a "Chinese laborer" in the sense employed in the act and in the treaties with the emperor of China. It has been held that this term means laborers who are subjects of the government of China, and not those whose race and language evince Chinese extraction or nativity; and that the children of that race, born in this country, require no certificate to enable them to return to it after having gone abroad.¹ Whether a laborer of the Chinese race, not a subject of China, is interdicted, has been differently decided.²

1. Natives of Chinese Extraction.—One born in this country is a citizen, though his parents be Chinese residing in the United States. If the parents are not residents but representatives of the Chinese government in a diplomatic or any other capacity, their children would not become citizens by reason of birth in this country.

Children of Chinese residents, born here, are not affected by the restriction acts, but may leave the country and return to it at pleasure without any certificate, just as any other citizen may. *Re Look Tin Sing*, 21 Fed. Rep. 905.

The term "Chinese laborers" must be understood as used in the treaties with China of 1868 and 1880, since the purport of the act of May 6, 1882, was "to execute the treaty stipulations relating to the Chinese." It is the term, as employed in that act, which is to be defined. "It must be held to mean the subjects of the government of China to which the provisions of the treaty relate; and the inhibitions of the act cannot be construed to exclude from our shores laborers who are Chinese by race and language, but who are not, and never were, subjects of the emperor of China or resident within his dominions." *United States v. Douglas*, 17 Fed. Rep. 634.

2. British Subject—Chinese Laborer.—A native of Hong Kong, born after its cession to Great Britain, was held a "Chinese laborer," within the act of May 6, 1882. The object of the act was held to be the exclusion of such laborers, subject to the treaty of 1880, coming from China or any other country.

Courts are bound by an act of congress as much as by a treaty, it was said. Conflict between the two are to be treated like conflicting acts—the latest governs. It is not a judicial question whether congress has violated a treaty. *In re Ah Lung*, 18 Fed. Rep. 28.

"Before a court will impute to congress an intention to violate an important article of a treaty with a foreign power, that intention must be clearly and unequivocally manifested, and the language of the law which is supposed to constitute the violation must admit of no other reasonable construction." *In re Chin A. On*, 18 Fed. Rep. 506.

The Restriction with Reference to Chinese Subjects.—The court said in the *Douglas* case, "§ 6, [of the Restriction Act] provides 'that in order to the faithful execution of articles one and two of the treaty in this act before mentioned' Chinese persons who, by the treaty, were entitled to come to this country, shall be identified by certificates issued by the Chinese government, which, among other things, shall state the 'former and present occupation or profession, and place of residence in China, of the person to whom the certificate is issued.' These provisions, as well as many others that might be cited to the same effect, show conclusively that the act was passed to carry into effect the right acquired under the last treaty to exclude Chinese laborers who were subjects of the Chinese government. The same view is taken of the statute by the learned judges of the ninth circuit. In the case of *The Chinese Merchant*, it is said by MR. JUSTICE FIELD, that 'the act of May 6, 1882, was framed in supposed conformity with the provisions of this supplemental treaty. In the inhibitions which it imposes upon the immigration of Chinese, there is no purpose expressed in terms to go beyond the limitations prescribed by the treaty.' In the case of *George Moncan*, 14 Fed. Rep. 44, it is said by JUDGE DEADY, that 'this act was passed in pursuance with the treaty with China of November, 1880, supplementary to that of July 28, 1868,' and that 'it is not to be presumed that congress intended to trench upon the treaty of 1868 as modi-

Status of Seamen.—The rights of "Chinese laborers" on ships, as seamen, has been the subject of judicial exposition. The term *laborers*, as used in the Restriction Act, has been construed to include skilled as well as unskilled workmen. The right of sailors (not coming to the United States as immigrants, but merely as employes on shipboard and designing to depart with the ship) to land at any of our ports, has been denied on the ground that they were Chinese.¹

But a Chinaman residing in this country was held privileged to embark as an employe on an American vessel, and to return and land in this country. The laborer had been under the nation's flag both in going out and in coming in, as though on American soil. He had not been imported from "any foreign port or place," and therefore his captain could not lawfully refuse him the right to land, nor would he incur the penalties of the act by permitting it.²

And, though never previously in this country, a Chinese sailor who shipped upon an American vessel in London, and who arrived in this country without a certificate, after the expiration of the ninety days following the passage of the Restriction Act—the limit beyond which immigration was inhibited—was held entitled to land. The court said that he must be deemed to have been on

fied by that of 1880.' See, also, *In re Ah Sing*, 13 Fed. Rep. 286; *In re Ah Tie*, 13 Fed. Rep. 291; *In re Ho King*, 14 Fed. Rep. 724.

"The term 'Chinese laborers' as used in the act must, therefore, have the same signification as when used in the treaty, and must be *held* to mean the subjects of the Chinese government, to which the provisions of the treaty relate." *U. S. v. Douglas*, 17 Fed. Rep. 634.

1. *Chinese Sailor.*—The supreme court of New York *held* that Chinese seamen are excluded from the country by the act of 1882; that they are laborers; that the act was meant to embrace both skilled and unskilled workmen, and was designed to prevent their introduction into the United States. The court *held* that they cannot be landed at any port of the country without giving them the opportunity and privilege of going at will to any part of it. "The result," said the organ of the court, "would be a practical and effectual evasion of the law in question. I do not think a court or judge, whatever he may think of the policy of a law, should issue a mandate which, if carried into execution, would nullify a law of congress, subject the respondent to criminal prosecution, to be followed by fine and imprisonment, and render the petitioner

himself also a violator of the law or congress and his contract to serve the respondent upon his vessel for twelve months." *Matter of Fook*, 65 How. Pr. (N. Y.) 404.

2. *Sailor Leaving and Returning on an American Ship.*—A subject of the Chinese emperor, residing in California, shipped as a seaman on board an American steamship, on a voyage to Australia. On his return to San Francisco, the captain refused to allow him to land—fearing the penalties of the act of May 6, 1882. Whether he was right was the question in court—and it was said: "The master of the vessel is prohibited from bringing within the United States, and landing, or permitting to be landed, any Chinese laborer *from any foreign port or place*; and that means, from bringing any Chinese laborer embarking at a foreign port or place. The prohibition does not apply to the bringing of a laborer already on board of the vessel when it touches at a foreign port. . . . We are of opinion that the petitioner [the sailor] is not within the prohibition of the act of congress, and that his restraint by the captain of the steamship is unlawful." *Case of In re Ah Sing*, 7 Sawyer (U. S.) 536; *Reaffirmed in In Re Ah Tie*, 7 Sawyer (U. S.) 542.

American soil from the date of shipment, which was within the legal limit.

The court held to a liberal construction of the inhibitory act with reference to the rights of the laborer; at least it deprecated, "spitefully straining it to cover a few doubtful or extreme cases," and took occasion to remark that "the act is unfavorably regarded by a large portion of the most intelligent and influential people of the country."

The general principle of construction, that statutes affecting human right and liberty are not to be extended beyond their plain import, to the possible injury of those thereby affected, seems to have prevailed in this decision.¹

Habeas Corpus.—Whether an immigrant of the class prescribed, on account of nationality and vocation, be rightfully or wrongfully detained on shipboard after his arrival at an American port, he is entitled to have his claim to liberty judicially settled.

The prior decision of the collector of the port against the laborer's right to land, is no impediment to the judicial investigation. The jurisdiction over such a question is vested in the court and not in the collector. Although section 3, both of the original and the amended Restriction Act, provides that the "evidence" of right to land shall be presented to the collector, etc.; yet the court held it an "extraordinary pretension" that the federal courts should be controlled by his decision.²

1. Chinese Sailor on American Vessel.—Whoever is on board an American vessel is deemed to be on the soil and under the flag of the United States; and therefore it was *held* that a Chinese laborer who had shipped as a sailor on such vessel at London, prior to the passage of the Restriction Act of 1882, but reached this country not till after the expiration of the ninety days prescribed as the time to elapse before the act should go into effect, was entitled to land and to reside in the United States. The court, in its opinion upon the case of Moncan, who had come to the country under the above circumstances, said: "For many purposes, in contemplation of law, Moncan has been within the territory and jurisdiction of the United States ever since he sailed from England on the *Patrician*, and I think this ought to be considered one of them. He joined the crew of an American vessel, bound for a port of the United States, before the passage of the act, and while in that condition is brought within the actual territorial limits of the country. To drive him back now from our shores as a person prohibited by this act from residing within the United States, would, it seems to me, be

giving it a narrow and harsh construction, utterly at variance with the spirit and intent of our treaty stipulations.

"This act may be enforced so as, for all practical purposes, to exclude Chinese laborers from coming here and entering into competition with the labor of the inhabitants of the country, without spitefully straining it to cover a few doubtful or extreme cases, and thereby eventually bringing it into deserved odium and disrepute. Nor should it be forgotten by those who favor the exclusion of Chinese laborers from the country, and wish to see the experiment fairly tried, that the act is unfavorably regarded by a large portion of the most intelligent and influential people of the country 'as being the servile echo of the clamors of the sand-lot—as fraught with danger to our commercial relations with China, as inconsistent with our national policy, as obstructing the spread of Christianity, and as violative, not only of the treaty, but of the inherent rights of man.' *HOFFMAN, D. J., In re Low Yam Chow*, 13 Fed. Rep. 616." *In re Moncan*, 14 Fed. Rep. 44; s. c., 8 Sawyer (U. S.) 350.

2. Habeas Corpus—Detained Chinaman's Right to.—One is restrained of

Under the act forbidding the ingress of immigrants coming under contract to labor in this country, a different rule with regard to the collector's power, and the jurisdiction of the courts to *decide* questions of personal liberty, after his action, seems to have prevailed.¹

Statutory Differences Relative to Jurisdiction.—There is, however, this difference between the Chinese Restriction Act and the Act to Regulate Immigration. The former provides that "any Chinese person found unlawfully within the United States shall be removed therefrom to the country whence he came, and at the cost of the United States, *after having been brought before some justice, judge or commissioner of a court of the United States* and found to be one not lawfully entitled to be or remain in the United States." The latter has no similar provision. But whether a person be restrained of his liberty under the one act or the other, it would seem that the restraint is "under color of United States' authority," and therefore that he would be entitled to the writ of *habeas corpus* by virtue of the U. S. Revised Statutes, section 193, in the absence of the decisions to the contrary. When judicially found to be unlawfully within this country, any "Chinese person" must be sent back to the place of his departure, as required by section 12 of both the original and the amended Restriction Act.²

his liberty when kept on shipboard against his will, and denied the right to land. He is restrained of his liberty within the meaning of the *habeas corpus* act. It is the duty of the court to which application for the writ of *habeas corpus* is made, to issue it unless there are reasons to the contrary in the petition.

"It has never been suggested by any judge or district attorney that the refusal to allow a Chinese passenger to land was not a restraint of his liberty, the lawfulness of which was to be inquired into by the courts; nor has the still more extraordinary pretension until now been set up that in such inquiry the court, whether the supreme court of the United States, the circuit court or the district court, was to be controlled by the decision rendered by the collector of the port or his deputy."

In re Jung Ah Lung, 25 Fed. Rep. 141, Revised Stat. U. S., § 755; *Ex parte Watkins*, 3 Pet. (U. S.) 193; *Ex parte Milligan*, 4 Wall. (U. S.) 2.

1. *In re Cummings*, 32 Fed. Rep. 75, in exposition of the "Act to Regulate Immigration," 12 Stat. U. S., ch. 376.

Same.—A Chinese laborer refused the right to land in this country, is re-

strained of his liberty and entitled to the writ of *habeas corpus*. This is true, whether the master detains him on board under the Restriction Act, or because of the collector's refusal to issue a landing permit. In either case, the immigrant is restrained of his liberty under color of United States authority, and is therefore entitled to the writ that the court may decide upon the validity of his detention. When he is brought into court, he may be committed to the custody of the marshal, or held to bail, for the court has jurisdiction of his person. He may be remanded back to the vessel, or discharged. The court cannot require the ship to remain in port pending the trial in order to take the man to the country whence we came, in case he should be remanded to custody. *In re Chow Goo Pooi*, 25 Fed. Rep. 77.

2. *President's Order of Removal.*—When a Chinese laborer has been remanded to the custody of the ship which imported him, for the purpose of being returned to China, if the marshal's return shows that the ship has already sailed, the court may direct that officer to hold the laborer till the president shall have had reasonable time to make an order in his case. The order may be general with refer-

The Certificate.—The requirement that the immigrant must produce the certificate showing his right to land, is made the only evidence of such right by the act. And the courts have refused to allow secondary evidence, even when there were facts tending to show that the certificate had been issued.¹

This requirement is inapplicable to Chinese residing in the United States when the treaty of 1880 was made with China, and who left before the Restriction Act was passed.² Nor is it applicable to a Chinaman who merely lands temporarily, not designing to enter into competitive labor with residents of the country, but to go hence without delay. A sailor, though a "Chinese laborer," may land at one of our ports for the purpose of engaging a berth, to pursue his calling, on an outward-bound vessel, without violation of the law. "Chinese laborers," as the words are used in the act, are construed to mean those who come to this country to labor therein.³

ence to all persons in custody for being unlawfully in the country, under a judgment by a "justice, judge or commissioner." The marshal or collector may be instructed in such order to procure tickets for the return of such laborers and facilitate the passage. Restriction Act, § 12; *In re Chow Goo Pooi*, 25 Fed. Rep. 77; s. c., 9 Sawyer (U. S.) 666; *Re Chia Ah Sooy*, 21 Fed. Rep. 393. *Compare Re Ah Moy* 21 Fed. Rep. 808.

In the amended act, 1884, the clause, "by direction of the president of the United States," is omitted from the 12th section, 23 Stat. U. S. 117.

1. *Act of 1884—Certificates.*—Chinese laborers whose landing is not suspended by the act of 1884 are of two classes: 1st. Those who were here at the making of the treaty, Nov. 17, 1880, or who arrived before the passage of the Restriction Act of May 6, 1882, or, whether ninety days thereafter. 2nd. Those who, having left this country after the passage of the act of 1882, produce the evidence required by the act of 1884. *Re Shong Toon*, 21 Fed. Rep. 386.

The provision of the act of 1884, that the certificate shall be the only evidence of the laborer's right to return, was held applicable to a certificate issued under the act of 1882; so that the tag from the custom house book entitling the holder to a certificate which he had neglected to obtain, was held not sufficient to entitle him to re-enter the country. He had left in 1883. *Re Ah Kee*, 21 Fed. Rep. 701.

And when the collector, in another

case, took up the tag but gave no certificate, the Chinese laborer was not allowed to re-enter on exhibition of the tag. *Re Kew Ock*, 21 Fed. Rep. 789.

2. *Chinese Treaty—When Certificates are Not Required.*—The treaty of 1880 reserved to the United States the regulation, limitation or suspension of Chinese immigration, so far as laborers are concerned. But it forbade the absolute prohibition of Chinese immigration. The act of 1882, as amended in 1884, makes the certificate the only evidence of the right of re-entry accorded to a laborer who has left the United States but desires to return; but this provision was held inapplicable to one who was in this country Nov. 17, 1880, and left it prior to May 6, 1882. *Chew Heong v. U. S.*, 112 U. S. 536; *Re Ah Ping*, 23 Fed. Rep. 329. The latter is the case of a Chinese merchant who left before the passage of the former act and returned afterwards; no certificate was required. But when a Chinese laborer left this country after the act went into effect, with knowledge of the law, he was held not entitled to return, in the absence of a certificate. *Re Tong Ah Chee*, 23 Fed. Rep. 441.

3. *Chinese Seaman's Right to Land.*—A Chinese sailor discharged in New York went ashore to get a new berth, and was there arrested by the marshal, under the Restriction Act of July 5, 1884. The court held, on *habeas corpus*, that he did not violate the act by landing temporarily for the purpose stated; that he need not get the certificate prescribed in section 6 of that statute; that the petitioner must be discharged. "Sea-

Non-laboring Chinese.—Only physical toilers were meant by the term "laborers" in the act of 1882. Construing the word as it is used in common parlance, it is held inapplicable to professional performers in theaters. And though the certificate has been decided to be the exclusive evidence of the right of a Chinese laborer to enter this country, yet when the immigrant was admitted to be an actor, the court considered the admission equivalent to a concession that no such certificate was required. The reasoning was, that the Restriction Act was made to protect our laborers against Chinese competition, not to protect professional, mercantile or non-laboring classes against it.¹

It is true that a foreign certificate is required of non-laboring Chinese, but it is merely to "facilitate proof of their not being within the prohibited class" (the courts say) and limited to those coming from China. None was required, under the original act, from merchants and other non-laborers, coming from other foreign countries if they were not residents of China when the statute was enacted. And such professional or commercial persons could prove their calling by other evidence than the certificate.²

men are neither within the letter nor the spirit of the act. The language throughout has evidently in contemplation persons coming within the United States as laborers. It intends nothing beyond that. The limitation of the treaty is express that the restrictions shall apply only to Chinese who may come to the United States as laborers; that is, to be laborers within the United States. Chinese seamen, therefore, who only land temporarily in the ordinary pursuit of their calling, for the purpose of shipping on a return voyage as soon as possible, are, in my judgment, wholly outside of the act." *In re Ah Kee*, 22 Fed. Rep. 519; s. c., 2 Blatchf. (U. S.) 520; *In re Moncan*, 14 Fed. Rep. 44; *In re Ho King*, 14 Fed. Rep. 724.

1. *Evidence—Laborer.*—The word "laborer" is used in the treaty of '80 and the Restriction Act of '82, has the same meaning as in common parlance. It signifies one who toils physically for wages. It does not embrace actors. They are *held* to belong to "the privileged class;" and they are "therefore entitled to come to and reside in the United States at pleasure," so far as any inhibition in that act is concerned. A theatrical performer is not limited to the certificate required of laborers by the act, as evidence of his right to enter the country. If it be admitted that he is an actor, that is *held* equivalent to an admission that he is not a laborer, and

therefore not one whose competitive labor was discriminated against by the act. "Neither the treaty nor the act have in view the protection of what are called the professional or mercantile classes, or those engaged in mere mental labor, from competition with the Chinese. No grievance of this kind was ever complained of, and the language of the remedy provided plainly indicates that it was not contemplated." *In re Ho King*, 14 Fed. Rep. 724; s. c., 8 Sawyer (U. S.) 438.

2. *Chinese Who are Not Laborers.*—*Habeas Corpus* was sued out by a merchant who alleged that he was restrained of his liberty on the American Steamship City of Rio de Janeiro, in San Francisco, by the captain, under the claim that his landing would be violation of the act of May 6, 1882, "to execute certain treaty stipulations relating to Chinese." The merchant, still a subject of the emperor of China, had been doing business, as a member of his firm in San Francisco, for several years; and he had been to Panama on business, when, upon his return, the captain refused to land him.

The court *held*: "1. That the certificate of the government required for others than laborers coming to the United States from China was intended to facilitate proof of their not being within the prohibited class, and not as a means of restricting their coming. 2. That the certificate is not required

The amended act, however, makes the foreign certificate the "sole evidence permissible" (on the part of Chinese merchants and others not engaged in manual toil) "to establish a right of entry into the United States." The "certificate may be controverted, and the facts therein stated disproved by the United States authorities."

Every Chinese person, not a laborer, entitled by treaty or statute to come to this country, must obtain a certificate of his government, whether a subject of the emperor of China or of any other foreign power, to enable him to land here. It must be in English, issued by his government, contain his signature, describe his person, give his "individual family and tribal name in full," age, height, title, rank, "physical peculiarities," "former and present occupation, when and where and how long pursued," his place of residence and his right to come.

This certificate must be indorsed by the diplomatic representative of the United States in the country where it is issued, or by our consul at the port whence such Chinese is about to depart of this country.

It is provided that no huckster, peddler or person engaged in catching, drying or preserving fish for either home consumption or exportation, shall be classed with "merchants," as the latter word is employed in the act.¹

The certificates sometimes take the name of the place where they are issued. They may be called by the general name of foreign certificates, to distinguish them from those issued by collectors of customs in this country to Chinese going abroad, to enable them to land upon returning. Both are important documents to the respective holders, to enable them to land at any of our ports. As before observed, however, Chinese persons, though laborers, have been allowed to establish the fact of their previous residence by parol, if they left the United States to return again prior to the passage of the law exacting certificates.²

from merchants and others, not laborers, domiciled out of China when the act of congress was passed, and coming from the foreign jurisdiction. 3. Proof of the occupation of such persons may be made by parol." *In re Low Yam Chow*, 7 Sawyer (U. S.) 546; s. c., 13 Fed. Rep. 605.

1. Act of 1884, 23 Stat. U. S. 116, § 6.

2. **Canton Certificates.**—Merchants from China are entitled to land on their Canton certificates. These are *held* to be evidence of the mercantile character of such immigrants coming hither to follow their calling. *In re Tung Yeong*, 19 Fed. Rep. 184.

U. S. Certificates.—"The act of May 6, 1882, restricting Chinese immi-

gration permits all laborers who were in this country at any time before the expiration of ninety days after the passage of the act, and who shall produce the certificate provided for by the act, to go and come at pleasure; and no evidence of previous residence, except the prescribed certificate, can be received from those laborers who quitted the country since the certificates were obtainable; but those who went away before the act was passed, or before the certificates were to be had, must be allowed to prove their previous residence by any competent evidence." *In re Leong Yick Dew*, 19 Fed. Rep. 490; *in re Chin A. On*, 18 Fed. Rep. 506; *re Ah Quan*, 21 Fed. Rep. 182. The last case is to the effect that the certi-

IMMORAL CONSIDERATION—IMPANEL.

IMMORAL CONSIDERATION.—See **CONTRACTS, ILLEGAL CONTRACTS.**

IMMORAL CONTRACTS.—See **ILLEGAL CONTRACTS.**

IMPAIRING CONTRACTS.—See **CONSTITUTIONAL LAW.**

IMPANEL.—To enter the names of jurors on a panel, which, in English practice, is an oblong piece of parchment annexed by the sheriff to a writ of *venire*, and returned with it. In American practice, the term is applied not only to the general list of jurors returned by the sheriff, but sometimes also to the list of jurors drawn by the clerk for the trial of a particular cause.¹

cate does not enable the holder to bring his wife and children.

Wife of Chinese Laborer.—The certificate required for her is prescribed in section 6 of the act of 1884. She cannot be landed in the United States on her husband's certificate entitling him to re-enter the country. If not a laborer before her marriage, she takes her husband's *status* when she marries a Chinese laborer. *Re Ah Moy*, 21 Fed. Rep. 785.

Importation of Immoral Women.—The importation of women for the purposes of prostitution is forbidden, whatever the country whence they propose to come. 18 U. S. Stat. 477. Their importation from China, Japan, etc., is forbidden; and that is in accord with the rule, which is general. It is *held* that in an indictment under section 3 of the act of March 3, 1875, "it is not necessary to set forth the acts constituting the importation." *U. S. v. Johnson*, 19 Blatchf. (U. S.) 257.

1. Burrill's Law Dict. See, also, *Bouv. Law Dict.*

A statute of New York required a county judge, upon traverse being made in a cause, to issue a precept to the sheriff or constable, commanding him to summon "twelve qualified jurors" to come before him at a time and place therein to be specified, "to try the same traverse." It further provided, section 9, that the jurors should "be summoned, returned and impanelled in the same manner as provided by law in civil actions before justices of the peace, and shall be sworn by such judge," etc. By the statute here referred to it was enacted that a justice should draw six jurors from those summoned by the constable and swear them as the jury to try the cause for which they were summoned. In a case arising under the statute first quoted it was contended that "impanelling in the same manner as provided by law in civil actions

before justices of the peace" meant drawing six from the list returned to constitute the jury to try the traverse. "But," said the court, "this depends upon the legal signification of the term 'impanel.' Bouvier says, 'to impanel is to write the names of a jury on a schedule by the sheriff or other officer lawfully authorized.' (*Bouv. Law Dict.*) 'Panel, a schedule or roll containing the names of jurors summoned.' (*Bouv. Law Dict.*, tit. **PANEL.**) Webster defines 'impanel' to mean 'to write or enter the names of a jury in a list or piece of parchment called a panel, to form, complete or enroll a *list* of jurors in a court of justice.' Thus it will be seen that the act of impanelling has nothing to do with that of drawing, selecting or swearing those who are to serve as jurors, but simply making the list of those who have been selected; and section 9 expressly provides for their being sworn after they shall have been impanelled. . . . Twelve are to be summoned to try the traverse, and the judge is to swear the jurors summoned, impanelled and returned. Consequently twelve are to be sworn, as no provision is made for any less number. *Porter v. People*, 7 How. Pr. (N. Y.) 441.

The only reference to the organization of a grand jury that had presented a bill of indictment against A for selling liquors to minors, contained in the record of the court to which the bill had been presented, was the following: "And now on this day came the grand jury heretofore impanelled for this term of the court, in answer to their respective names; and here in open court through their foreman present the following bills of indictment." The indictment against A was one of those presented at this time. On appeal from the conviction of A on the indictment, the judgment of the lower court was reversed on the ground that the record

IMPEACH—See note 1.**IMPEACHMENT.**

1. Definition, 951.
2. What Crimes Are Punishable by Impeachment, 952.
3. By What Authority Impeached, 955.
4. How and in What Manner Tried, 956.
5. What Is Required to Impeach, 958.
6. Sentence of the Court of Impeachment, 959.

1. **Definition.**—Impeachment is a process against a person accused of treason, or of high public crimes and misdemeanors.² By the constitution and laws of the United States, impeachment may be defined to be written accusations, by the house of representatives of the United States to the senate of the United

did not affirmatively show that the grand jurors had been sworn, although it showed that the jury had been impanelled. Said the court: "To impanel," says Bouvier, is 'the writing the names of a jury on a schedule by the sheriff or other officer lawfully authorized.' No inference can therefore be drawn from the use of the word 'impanelled' in the record that the jurors were sworn." *Lyman v. People*, 7 Bradw. (Ill.) 345.

1. A statute of Maine providing for the recovery of damages sustained by the owners of land by having their land overflowed by a mill dam, enacted that in actions brought for the recovery of such damages, under certain conditions, "the court shall appoint three or more disinterested persons of the same county, commissioners, who shall go upon and examine the premises and make a true and faithful appraisement under oath of the yearly damages, if any, done to the complainant by the flowing of his lands," etc. Upon the coming in of the report, if it were accepted by the parties, judgment was rendered upon it; but to either party was given the right to demand a jury trial. In case a jury was impanelled to try the cause, it was provided that the report of the commissioners should, "under the direction of the court, be given in evidence to the jury, subject to be impeached by evidence from either party." In a case under this statute, the court used the following language in regard to the effect that was to be given to this report on the trial before the jury: "The language used implies that the report is to be decisive of the rights of the parties, until its decisive effect is removed by its being impeached by

evidence. To impeach, as applied to a person, is to accuse, to blame, to censure. It includes the imputation of wrong doing. To impeach his official report or conduct is to show that it was occasioned by some partiality, bias, prejudice, inattention to or unfaithfulness in the discharge of that duty; or, that it was based upon such error that the existence of such influences may be justly inferred from the extraordinary character or grossness of that error. The word can have no less forcible meaning as used in the statute, without considering it to have required proceedings suited to occasion much delay, expense and trouble, without any important purpose or result." *Bryant v. Gildden*, 36 Me. 36.

To Impeach a Witness.—"The word impeach, as applied to witnesses, is capable of two significations: one is the charge or accusation of want of veracity, the other is the establishment of the charge. The last sense is shown in the common phrases 'attempt to impeach' or 'a failure to impeach,' which imply that, though the charge has been made it has not reached a result." *White v. McLean*, 47 How. Pr. 193.

In *Baker v. Robinson*, 49 Ill. 299, the plaintiff requested the court to charge the jury that if any of the defendant's "witnesses had been successfully impeached, the jury were at liberty to disregard their testimony unless corroborated by other testimony." It was *held* that, although there was great conflict of evidence, there was no evidence in the case upon which to base this instruction, conflict of evidence not being what is called impeaching evidence.

2. Worcester's Dict.

States, against an officer. They are called articles of impeachment.¹ But in England impeachment is defined to be the preparation of articles by the house of commons, and trial by the house of lords. In a State, it is such an accusation of an officer by the representatives of the State before the senate.²

2. What Crimes Are Punishable by Impeachment.—Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The offences punishable by impeachment are treason, bribery and other high crimes and misdemeanors.³ The constitution of the United States defines the crime of treason, but recourse must be had to the common and parliamentary law for the definition of bribery⁴ and other high crimes and misdemeanors.⁵

It has been held that "in treason all the *particeps criminis* are principals; there are no accessories in the crime. Every act which, in the case of felony, would render a man an accessory, will, in the case of treason, make him a principal."⁶

"If a rebellion should be so extensive as to spread through every State in the Union, it will scarcely be contended that every individual concerned in it is legally present at every (open) or overt act committed in the course of that rebellion."⁷

High crimes and misdemeanors are punishable by impeachment when committed by civil officers of government. These terms are used to express every offence inferior to felony, punishable by indictment; in its common acceptation it is applied to all those crimes and offences for which the law has not provided a particular name. Misdemeanors comprehend all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies and public nuisances. The constitution resorts to the common and parliamentary law for its definition;⁸ and by the constitution of *Massachusetts*, the senate is to hear and determine all impeachments made by the house of representatives against any officer of the commonwealth for misconduct and maladministration in office. These words "high

1. Bouvier's Law Dict., title Impeachment.

2. See the constitutions and laws of the States.

3. Art. 2, § 4, Const. of U. S.; Art. 3, §, same; U. S. v. The Insurgents, 2 Dall. (U. S.) 335; U. S. v. Mitchell, 2 Dall. (U. S.) 348; *Ex parte* Bollman and Swartwout, 4 Cranch (U. S.) 75; U. S. v. Aaron Burr, 4 Cranch (U. S.) 469.

4. See BRIBERY; ELECTIONS.

5. Story's Const., § 795.

6. JUDGE CHASE, in trial of Fries, 198; JUDGE GRIER in Hanway's Case, 2 Wall.

(U. S.) 144; MARSHALL, C. J., in the trial of Aaron Burr, and Bollman and Swartwout, Boston L. Rep. of 1851, vol. 14, 416; Burr's Trial, vol. 3, 152.

7. MARSHALL, C. J., in his opinion in the case of Aaron Burr, 3 Boston L. Rep. 152.

8. Bouvier's Law Dict., title Misdemeanor; 2 Chase's Trial 383; Wickliffe on Peck's Trial 309; Wharton's State Trials, 289. See p. 99 by Harper; 4 Hattell's Precedents 73-76; Trial of Andrew Johnson, vol. 1, 125, notes; 4 Bl. Com. 260.

crimes and misdemeanors," have the same import as the words *misconduct* and *maladministration*, and the same as are employed by the constitution of Great Britain in its description of impeachable offences, but they are subject to the limitation of the State law and constitution.¹

The house of representatives, by a majority vote, elect, usually, seven managers to conduct the impeachment. The senate shall have the sole power to try all impeachments, and when sitting for that purpose, shall be on their oaths or affirmations. When the president of the United States is tried, the chief justice shall preside; and no conviction shall be had without the concurrence of two-thirds of the members present, while in England a majority of the lords impeach, and twelve must concur. The trial of all crimes, except in cases of impeachment, shall be by jury.²

All the king's subjects in Great Britain are impeachable in parliament, while in the United States, according to the received construction, "none are liable to impeachment except *officers* of the government."³

Impeachment, in England, may be regarded, in a certain degree as a mode of trial, to punish crime, though not wholly so, since a judgment on an impeachment is no answer to an indictment in

1. Prescott's Trial 117, 118; Pennock v. Dialogue, 2 Pet. (U. S.) 2-18; U. S. v. Jones, 3 Wash. (U. S.) 209; *Ex parte* Hall, 1 Pick. (Mass.) 261; Sedgwick on Stat. Law 262, 426; Story on Const., § 797; Rawle on Const. 200; 3 Wheaton 610.

2. Art. 1, § 3 Const. of U. S.; Art. 3, § 2 Const. U. S.; Trial of Andrew Johnson, vol. 1, p. 123; 5 Comyn's Digest 308; Parliament. L.

3. Wooddeson's Lectures; 602. In Chase's Trial, Mr. Rodney disclaimed this.

Wharton says, in reference to Blount's Trial: "In a legal point of view all that this case decides is that a senator of the United States who has been expelled from his seat is not, after such expulsion, subject to impeachment, and perhaps from this the broader proposition may be drawn that none are liable to impeachment except officers of the government, in the technical sense, excluding thereby members of the national legislature. Afterwards, from the expulsion of Mr. Smith, a senator from Ohio, for connection with Burr's conspiracy, instead of his impeachment, the same application arises." (Wharton's State Trials, 317 note.)

In this case Mr. Bayard maintained "that *all persons* . . . are liable to impeachment;" that the constitution

does not define the cases or describe the persons designed as the objects of impeachment. "We are designedly left to the regulations of the common [parliamentary] law." This view is confirmed by the fact that art. 2, § 4, *imperatively* requires "removal from office" in case of the president, vice-president and officers, while art. 1, § 3, seems to admit of less punishment than this, and must, therefore, apply to persons other than officers. See Wickliffe's argument, Peck's Trial 309. The constitution of *New York*, of 1777, is said to have been the model from which the impeachment clauses of the constitution of the United States were copied. 6 Am. Law Reg., N. S. 277. That of *New York* limits impeachments to officers in terms; that of the United States does not. There may be agents and others for whom impeachment would be salutary. In *England*, military and naval officers are impeachable. If a military or naval officer here should conspire with the president to overthrow congress, the impeachment of both would be a necessary protection, which it may be doubted if the constitution intended to surrender. In such case a court-martial could not, against the president's will, remove from office; impeachment alone would be effectual. (Wharton's State Trials 290.)

the king's bench.¹ The design of impeachment in the United States is to remove unfit persons from office; and the party convicted is subject to indictment, trial and punishment in the proper courts; hence impeachment here is not designed for the punishment of crime, when the constitution declares its object to be the *removal from and disqualification to hold office*, and that "the party convicted shall be liable and subject to indictment, trial, judgment and punishment, according to law, for his crime." "Impeachment is a proceeding purely of a political nature."²

In order to accomplish the purposes of its framers, impeachment remains in the United States, as it was recognized in England at the time of the adoption of the federal constitution. These limitations to impeachment were imposed in consequence of the abuses of the power of impeachment in English history.³

In 1821, James Prescott, judge of probate of wills for the county of Middlesex, Massachusetts, was impeached, charging him with misconduct and maladministration in office. Fifteen articles of impeachment were exhibited and read.

These articles charged him with holding probate courts for transacting business at other times than those authorized by law, demanding and taking illegal fees, and acting as counsel, and receiving fees as such, in cases pending in his own court, before him as judge. He was removed.⁴

In the impeachment trial of Andrew Johnson (1868), president of the United States, for high crimes and misdemeanors, the house of representatives exhibited eleven articles to the senate in the name of themselves and all the people of the United States,

1. Fitzharris' Case, 6 Am. Law Reg., N. S. 262.

2. Bayard's Speech on Blount's Trial; Wharton's State Trials 263.

3. "The earliest recorded instance of impeachment by the commons at the bar of the house of lords, was in the reign of Edward the Third, in 1376." "Before this time the lords appear to have tried both peers and commons for great public offences, but not upon complaints addressed to them by the commons. During the next four reigns cases of regular impeachment were frequent; but no instances occurred in the reigns of Edward the Fourth; Henry the Seventh; Henry the Eighth; Edward the Sixth; Queen Mary, and Queen Elizabeth." "The institution had fallen into disuse," says Hallam (1 Const. Hist. 357), "partly from the loss of that control which the commons had obtained under Richard the Second, and the Lancastrian kings, and partly from the preference the Tudor princes had given to bills of attainder or of pains and penalties, when they wished

to turn the arm of parliament against an obnoxious subject. Prosecutions in the star chamber, during that time, were perpetually resorted to by the crown for the punishment of state offenders. In the reign of James the First, the practice of impeachment was revived, and was used with great energy by the commons, both as an instrument of popular power and for the furtherance of public justice. Between the year 1620, when Sir Giles Mompesson and Lord Bacon were impeached, and the revolution in 1688, there were about 40 cases of impeachment. In the reigns of William the Third, Queen Anne and George the First, there were 15; and in the reign of George the Second none but that of Lord Lovat, in 1746, for high treason; the last memorable cases are those of Warren Hastings in 1788, and Lord Melville in 1805." (May on Parliament 49-50; Ingersoll's Speech on Blount's Trial; Wharton's State Trials 285; 4 Hatsell *passim*.)

4. Prescott's Trial, 117, 118; Daniel Webster's Works, vol. 5, p. 502.

in the maintenance and support of their impeachment against him for high crimes and misdemeanors in office, which are substantially as follows: for unlawfully and in violation of the constitution, removing Edwin M. Stanton from the office of secretary of war, and appointing Lorenzo Thomas secretary of war *ad interim*; charging the president with unlawfully conspiring with said Thomas, and with others, to prevent said Stanton from holding said office, in violation of the constitution and laws of the United States; and the unlawfully controlling the disbursements of the moneys appropriated for the military service of the department of war; and charging that, unmindful of his high duties, the president did attempt to bring into disgrace, ridicule, hatred and contempt the laws of the United States; and that he reproached congress and the branches thereof, in his public speeches, to prevent the execution of the laws of congress.

Thirty-five senators pronounced Andrew Johnson, president of the United States, guilty; nineteen pronounced him not guilty. *Two-thirds* not having pronounced him guilty, Chief Justice Chase proclaimed that the president of the United States stands acquitted upon the articles of impeachment.¹

3. By What Authority Impeached.—When a person has committed an impeachable crime, or is supposed to have been guilty of some fraudulent practice in public office, a resolution is usually brought forward by a member of the house of representatives, either to accuse the person or party, or for a committee of inquiry. If the committee report against the party accused, they give a statement of the charges, and recommend that he be impeached; if the resolution is adopted by the house, a committee is appointed to impeach the party at the bar of the senate, and to state that the articles of impeachment will be exhibited against him in due time, and made good before the senate; and to demand an order for his appearance to answer to the impeachment. The same or some other committee is instructed to prepare articles of impeachment, which being approved by the house, are committed to the senate by a committee appointed to conduct the trial on the part of the house, who are styled the managers of the impeachment. The summons for the appearance of the accused before the bar of the senate is served by its sergeant-at-arms; then the senate resolves itself into a court of impeachment; all the senators are sworn to do justice according to the constitution and laws. The person impeached is then called upon to appear and answer; if he does not appear, the senate proceeds *ex parte*. If he appears by himself or attorney and denies the charges, and puts himself

1. Trial of Andrew Johnson, vol. 1, pp. 3, 4, 5, 6, 7 & 8; Trial of Andrew Johnson, vol. 2, 496, 497; Trial of Andrew Johnson (1868); Trial of Judge Samuel Chase (1804); Bouvier Law Dict., title IMPEACHMENT; Art. 1, § 2, Constitution of U. S.; Trial of Aaron Burr, 1807; Trial of Judge James Prescott, 1821; Daniel Webster's Works, vol. 5, 502; U. S. v. Jones, 3 Wash. C. R. 209; *Ex parte* Hall, 1 Pick. (Mass.) 261; Sedgwick on Stat. Law

on trial, an issue is formed, and a time appointed for trial, when they proceed according to law and usage, and much in the same way as in common judicial trials.

When any question arises among the senators who act as judges, it is considered with closed doors, and is decided by yeas and nays. The decision only is made public. The constitution of the United States, art. 1, § 2, provides that no person shall be convicted without the concurrence of two-thirds of the members.

4. How and in What Manner Tried.—In most of the States of the Union there is a constitutional provision which substantially enacts that the senate shall be a court, with full authority to hear and determine all impeachments made by the house of representatives against any officer or officers of the commonwealth, for misconduct and maladministration in their office. But previous to the trial of every impeachment the members of the senate shall respectively be sworn truly and impartially to try and determine the charge in question, according to evidence.¹

It may be claimed that one good article of impeachment will sustain a conviction, by way of analogy to the doctrine that one good count in an indictment, notwithstanding the presence of bad ones, will sustain a sentence; however, this is not the law in *England*.²

Impeachment is to be governed by great, general principles of right, and it is less probable that the senate will depart from these, than that the whole legislature would in the enactment of a law, or than courts in establishing the common law.³

262, 426; Story on Const., § 797; Rawle on Const. 200; 3 Wheaton 610; 1 Wood. & M. (U. S.) 448.

1. Constitution of *Massachusetts*, ch. 1, art. 8; 2 Hale Pl. Crown, ch. 20, 150; 6 Howell St. Trials 313, note; Stafford's Trial, 7 Howard's State Trials 1297; 6 Am. Law Reg. N. S. 262.

2. *Regina v. O'Connell*, 11 Clark & Fin. 15; 9 Jurist 30; Whart. Cr. L., § 3047.

3. "The constitution has made the senate, like the house of lords, sole judge of what the law is, assuming their wisdom to be equal to that of the common law courts." 2 Hale's P. C. 275; Barclay's Digest 140; Constitution, art. 1, § 3. "This is necessarily so; for though some statutory and common law crimes are impeachable, yet not all of them are, and the senate decides which are and are not. It is said if the impeachable crimes are not defined by law the power of impeachment will be undefined and dangerous." "The power to determine impeachable crimes by the senate is no more undefined than the power of the common law courts to de-

termine common law crimes." "Impeachment is regulated by principles as well defined and permanently settled as the fundamental doctrines of right, reason, and justice pervading the parliamentary jurisprudence of civilized nations, and like the common law, it has emerged from primeval errors and adapted itself to an advanced civilization. The danger of imperilling the safety of nations in measuring parliamentary law by the rule which defines wrongs to individuals is infinitely greater than the evils which can flow from recognizing the law of impeachment as a parliamentary system resting upon its own solid foundation. The rule which allows impeachments for indictable acts, enables the legislative department or the senate alone to declare trivial offences impeachable, while the parliamentary law limiting impeachable offences to misdemeanors affecting the nation is less latitudinarian and attended with less danger of abuse. When impeachment is employed to remove officers for willful violations of the constitution or laws, for exercising the

By far the most notable trial by impeachment in history was that of Warren Hastings, extending from 1787 to 1795, the period of its termination, the trial itself covering 148 days. He was tried in the great hall of William Rufus, which had witnessed the inauguration of thirty kings. In 1769 Warren Hastings was appointed second in council at Madras, and was subsequently appointed president of the supreme council of Bengal. In 1774 he was governor-general and supreme head of all the Indian dependencies. He gave dissatisfaction to the English administration and the court of directors. The public ear was offended by rumors of cruelty, corruption and unjust aggression. Frequent attempts were made to obtain his dismissal, but these were uniformly defeated by the court of proprietors. He carried matters with a high hand; refused to obey the orders of the directors; overruled the opposition of the council, of which a majority was, in the first instance, opposed to the views of Sir Philip Francis; he exercised an absolute and irresponsible power until 1785, when he resigned his office and set sail for England, knowing that a storm awaited him. In the session of 1786, articles of impeachment were brought forward by Edmund Burke, charging him with the oppression and final expulsion of the *raja* of Benares; the maltreatment and robbery of the princesses of the house of Oude; and the charges of receiving presents and conniving at unfair contracts and extravagant expenditures. But Hastings was acquitted by a large majority on every separate article charged against him.¹

The first trial by impeachment before the bar of the senate of the United States was that of William Blount, a senator of the United States from Tennessee, in 1797, which simply decided that none but civil officers can be impeached, and that a senator is not such civil officer. There have been seven impeachment trials before the senate of the United States.²

powers of congress or the judiciary for performing acts affecting the nation unauthorized by law, for refusing to execute laws requiring that duty, for a perversion of lawful powers to accomplish unconstitutional objects"—"these are offences as tangible and as capable of being measured by fixed rules as any felony defined in criminal law." Peck's Trial, 10 Selden, Judicature in Parliaments 6; 2 Hale P. C. 275; Barclay's Digest 140; Trial Judge Prescott in 1821, Wheat.

1. *Memoirs of the Life of Warren Hastings*, first governor-general of Bengal, compiled from original papers, by Rev. G. R. Gleig, M. A., 3 vols. 8vo. London, 1841. Article on Warren Hastings, page 460 of Macauley's *Miscellaneous Writings*. Article on War-

ren Hastings in the *National Cyclopædia*, Boston, 1853, vol. 7.

2. William Blount, U. S. Senator from Tennessee, July 1797 to January 1798; Wharton's *State Trials* 200. John Pickering, District Judge, New Hampshire, 1803-4; *Annals of Congress*; 2 Hildreth's *Hist.* 518; Samuel Chase, Associate Justice of the Supreme Court of the United States, 1804-5. (Trial of Chase, by Smith & Lloyd, 2 vols.); Aaron Burr's Trial, by J. J. Coombs, Washington, D. C., 1864; James Peck, District Judge of Missouri, 1826, 1831 (Peck's Trial, by Stansbury, 1 vol.); West W. Humphrey, District Judge of Tennessee, 1862; *Congressional Globe*, vols. 47, 48, 49, 2nd Session 37th Congress, report No. 44; 2nd Session 37th Congress, vol. 3, Re-

5. What is Required to Impeach.—The constitution of the United States, as well as the several States, contain inherent power to impeach their civil officers for cause; and the senate is made the exclusive judge of what is impeachable.¹

An impeachment may involve an inquiry, whether a crime against any positive law has been committed, but it is not exclusively a trial for crime. The objects of impeachment lie wholly beyond the penalties of the statute. The purpose of this proceeding is to discover whether a cause exists for removing a public officer from office.²

"The constitution confers on the house of representatives the sole power of impeachment, and on the senate the sole power of trial." A majority of the house may impeach, yet it takes two-thirds of the senate to convict.³

"Our national government is complete in itself, with powers which neither depend on nor can be abridged by State laws."⁴

It is not always necessary that an act to be impeachable must violate a positive law, and there are many misdemeanors which are repugnant to the moral sense, and yet do not violate any positive law.⁵

ports of Committees. Andrew Johnson, 2 vols. 1868.

There were five articles of impeachment in the William Blount case: 1. That in 1797, Spain, owning the Floridas and Louisiana, was at war with England, and Senator Blount "did conspire and contrive to create, promote, and set on foot . . . in the United States, and to conduct and carry on from thence a military, hostile expedition against . . . the Floridas and Louisiana . . . for the purpose of wresting the same from Spain, and of conquering the same for Great Britain, in violation of the obligations of neutrality of the United States.

2. "That by the treaty of October 27, 1795, the United States and Spain agreed to restrain Indian hostilities in the country adjacent to the Floridas, yet Blount, in 1797, did conspire and contrive to excite the Creek and Cherokees Indians" in the United States "to commence hostilities against the subjects and possessions in the Floridas and Louisiana, for the purpose of reducing the same to the dominion of . . . Great Britain," in violation of the treaty, the obligations of neutrality, and his duties as senator. The last three articles are substantially the same as the first two.

1. Bishop's MS. letters to a member of the judiciary committee, citing 1 Bishop Cr. Law, 3rd ed., §§ 187, 535.

The term *misdemeanor* covers every act of "misbehavior," in the popular sense.

Misdemeanor in office and misbehavior in office mean the same thing (7 Dane Abr't 365). Misbehavior, therefore, which is mere negation of "good behavior" is an express limitation of the office of a judge. See North Am. Review for October, 1862; Federalist, No. 81; Debates of the Virginia Convention (1805), 353-4; 11 Howell Stat. 7, 733; Federalist, No. 65, the views of Alexander Hamilton.

2. Curtis's Hist. of Const. 260-1; 5 Elliot 507-529; Gelden's Judicature in Parliament, London, 1681, p. 6; 1 Story on Const., § 799, 800, 797; Rawls on Const. 200. See 6 Wheaton 204; 1 Kent's Com. 289.

3. 4 Inst. 42; 5 Com. Digest 301; 2 Hale's P. C. Barclay's Digest 140; Regina v. O'Connell, 11 Cl. & Fin. 15; 1 Bishop on Cr. Law, § 167; (22) Du Ponceau on Jurisdiction 62-73; Kendall v. U. S., 12 Pet. (U. S.) 534-613; U. S. v. Watkins, 3 Cranch (U. S.) 441; Civil Right's Act, April 9, 1866, 14 Stat. 27.

4. Weston v. Charleston, 2 Pet. (U. S.) 449; McCulloch v. Maryland, 4 Wheat. (U. S.) 316; Osborn v. U. S. Bank, 9 Wheat. (U. S.) 738.

5. Per Nicholson, 2 Chase's Trial 339, 341; Peck's Trial 309; Peck's Trial 427.

In 1802, Judge Alexander Addison was impeached in Pennsylvania for directing a jury that the address of an associate judge to them "had nothing to do with the question before them," "and for irregularity in adjourning the court." His defence was that he had committed no act indictable at common law; but the senate convicted him, repudiating that as a defence.¹

An officer, who, charged by the constitution and his oath with the duty of executing the laws, intentionally suspends the operation of a particular statute, refuses to execute another, and violates a third, but does so with a view to promote the public interest, his motives being good, who is not impeachable.²

6. Sentence of the Court of Impeachment.—The constitution of the United States provides that the senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside, and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend farther than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment and punishment, according to law.

The several States have substantially the same provisions in their constitutions.³

A judge may be impeached and removed from office for an act or offence which may not be indictable by statute or common law.⁴

IMPEDE—IMPEDIMENT.—To render inconvenient; to obstruct. An obstacle.⁵

1. Impeachment of Alexander Addison, Judge of the Court of Common Pleas of Westmoreland and other counties, 1802-3 (Addison's Trial, by Thomas Lloyd, 2nd ed. Lancaster, 1803), Addison's Trial, 31, 70, 104, 118, 129; 4 Dall. (Pa.) 225. This case referred to, 2 Chase's Trial 396.

2. Bishop's Cr. Law 913, 537, 350, 349; Message of Abraham Lincoln, December 4, 1861.

3. Const. of the U. S., art. 1, § 3; Const. of Mass., ch. 1, § 8.

4. Chase's Trial 9-18 per Clark; per Lee 107, citing 2 Bacon 97; per Martin 137; per Harper 254-9; 1 Chase's Trial 47, 48; 1 Story on Const., § 795, note; 4 Elliott's Debates 262; 1 Chase's Trial 353, per Campbell; per Rodney, 378; 2 Chase's Trial 335, 339-340, per Nicholson; 1 Chase's Trial 335, 353; 2 Chase's Trial 351.

5. The access to a quarry may be impeded without being obstructed. "Any deposit would prevent passing over the

spot where it was made, but if sufficient room was provided to pass in and out of the quarry the access is not obstructed; which word does not include 'made a little more inconvenient.' Keeler v. Green, 21 N. J. Eq. 27. "The word 'impede' is almost synonymous with the word 'obstruct,' except that it is seldom, if ever, used to signify an entire blocking up of the way. It is an obstacle, not an impassable barrier." But the word was not given its literal meaning in an act providing that railroads, when it is necessary that they shall cross established roads, shall be so constructed as not to impede the passage or transportation of persons or property along the road crossed. Where the crossing is so constructed as not to endanger the reasonable passage of persons and transportation of property, or not to unnecessarily interfere with the public highway, the act is substantially complied with. App. of North Mannheim, (Pa.) 14 At. Rep. 145. And

IMPLEAD.—To sue or prosecute by due process of law.¹

IMPLEMENTS.—(See HUSBANDRY; TOOL.)—Tools: things necessary in any trade or mystery, without which the work cannot be performed; the furniture of a house.²

IMPLIED COVENANTS.—(See COVENANT; DEEDS; LANDLORD AND TENANT; WARRANTY.)

1. Definition, 960.

2. What Covenants are Implied, 962.

3. The Effect and Duration, 966.

4. Breach and Remedy, 968.

1. **Definition.**—An implied covenant, or, to express it more exactly, a covenant in law³ is one implied either by common law or

see *Com. v. E. & N. E. R. Co.*, 27 Pa. St. 354, 371.

In a statute making it a misdemeanor for one to solemnize a marriage, knowing that there is a legal impediment thereto, *impediment* includes whatever is in the way of a valid marriage, whether rendering it void or voidable. *Bonker v. People*, 37 Mich. 4.

In an act making it a misdemeanor "to obstruct a public road by a fence, bar, or other impediment," the latter term is to be given a construction, *ejusdem generis* with fence and bar, and does not include the overflowing of a road caused by the building of a mill dam. *Prim v. State*, 36 Ala. 244.

In Rev. Stats. U. S., § 1342, providing that no one shall be tried by court martial for an offence committed within two years, "unless by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period," the manifest impediments referred to are only such as operate to prevent the military court from exercising its jurisdiction. *In re Davison*, 4 Fed. Rep. 507.

1. *Turner v. Roby*, 3 Coms. (N. Y.) 195; *People v. Clarke*, 9 N. Y. 368; *Bennett v. Moody*, 2 Hall (N. Y.) 471; *Bouv. L. Dict.*; *Burr. L. Dict.*

2. *Jacob's L. Dict.* *Coolidge v. Choate*, 11 Metc. (Mass.) 79. "Implements of trade" in a statutory exemption from execution, mean the tools of a mechanic and not the machinery of a manufacturer. Their application is confined to tools used and in use in a handicraft business at which the individual labors. *Atwood v. DeForest*, 19 Conn. 513. And see *Smith v. Gibbs*, 6 Gray (Mass.) 208. The fact that the debtor is a manufacturer "does not prevent the statute from operating to exempt implements of his trade, so far as they are used by him in person. On the other hand, the fact that he is car-

rying on a trade will not extend the provisions of the statute to articles employed by him as a manufacturer merely." *Seeley v. Gwillim*, 40 Conn. 106. A piano, the property of a music teacher, is an implement of his profession or business. *Amead v. Murphy*, 69 Ill. 337. Horses and carts belonging to a man engaged in carting coal are not implements of trade, the transportation of merchandise not being the "business of a mechanic." *Enscoe v. Dunn*, 44 Conn. 93; s. c., 26 Am. Rep. 430. Nor is the horse of a tanner, though used in his business. *Wallace v. Collins*, 5 Ark. 41; s. c., 39 Am. Dec. 359. The word does not apply to animals. Game cocks are not implements of gaming, within the meaning of an act authorizing the seizure of such implements. The term is here synonymous with apparatus used in the same act. *Coolidge v. Choate*, 11 Metc. (Mass.) 79. "The proper tools or implements of a farmer" only include the ordinary and usual tools of husbandry, and not a threshing machine owned by the farmer, and used to thresh his own grain, and that of others for hire. *Meyer v. Meyer*, 23 Ia. 375. Sprags or props used in a mine are not tools or implements used by a miner in his occupation. *Cutts v. Ward*, 8 B. & S. 287.

3. **Distinction from Certain Express Covenants.**—Implied in the strict sense used in this article, *i. e.*, covenants in law, covenants must be distinguished from express covenants, informally stated. It is familiar that "any words in a deed which show an agreement to do a thing, make a covenant." *Com. Dig.* "Covenant" (A. 2); *Wright v. Tuttle*, 4 Day (Conn.) 321; *Mitchell v. Hazen*, 4 Conn. 508; *Randel v. Chesapeake, etc., Co.*, 1 Harr. (Del.) 233; *Marshall v. Craig*, 1 Bibb. (Ky.) 379; *Kendal v. Talbot*, 2 Bibb. (Ky.) 614; *Yocum v. Barnes*, 8 B. Mon. (Ky.) 490; *Hallett v. Wylle*, 3 Johns. (N. Y.)

by statute from certain words which do not themselves express it, or from the acts or relations of parties.¹

44; *Bull v. Follett*, 5 Cow. (N. Y.) 170; *Frey v. Johnson*, 22 How. Pr. (N. Y.) 316. As was said in a recent case: "There is no particular formula of words or technical phraseology, necessary to the creation of an express obligation to do, or forbear to do, a particular thing or perform a specified act. If, from the text of an agreement and the language of the parties either in the body of the instrument or in the recital or references, there is manifested a clear intention that the parties shall do certain acts, courts will infer a covenant in the case of a sealed instrument, or a promise if the instrument is unsealed, for non-performance of which an action of covenant or *assumpsit* will lie." *Booth v. Cleveland Mill Co.*, 74 N. Y. 15.

This is, however, a matter of the interpretation of express covenants, not of the legal implication of covenants. The distinction is very clearly stated by TINDAL, C. J., in *Williams v. Burrell*, 1 C. B. 402, 429. The covenant sued on was in the form of a warranty, but, being in a lease for a term of years, it was not strictly a warranty. The plaintiff contended that it amounted to an express covenant for quiet enjoyment, and, as such, it extended to protect the whole term purported to be granted. The defence claimed that it amounted to a covenant in law only, and only extended to protect the estate which the lessor could lawfully grant, *i. e.*, in that case, a term of years determinable with his own life. The court sustained the plaintiff, saying: "The only distinction (so far as relates to the present inquiry) we take to be this: [covenants] are either covenants by express words or covenants in law. Co. Lit. 139, b; *Hayes v. Bickerstaff*, Van. 118. . . . A covenant in law, properly speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate; so that, after they have had their primary operation in creating the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by those words already created. The argument of the defendants [is] that, as the clause in the lease is not in its form and

terms an express covenant for quiet enjoyment, but as such covenant can only be gathered and collected from the clause of warranty, so it must of necessity be ranked amongst implied covenants; and that, being an implied covenant only, it must be considered as a covenant in law; as if there were some rule or principle, that all implied covenants were covenants in law. But we think there is a fallacy in this argument from the use of the term 'implied covenant' in a sense which does not properly belong to it. . . . The legal effect and operation of the covenant, whether framed in express terms (*i. e.*, an express covenant), or whether the covenant be matter of inference and argument, is precisely the same, and an implied covenant, in this sense of the term, differs nothing in its operation or legal consequences from an express covenant. . . . [It] is to all intents and purposes an express covenant . . . [but] it is only those covenants which the law itself implies, that can be properly considered as covenants in law—a character and description which, as we have already seen, does not belong to the covenant now under discussion." As instances of an apparently incorrect use of the term "implied covenant," see *Tel. Desp. Co. v. McLean, L. R.*, 8 Ch. App. 658; *Anon. v. May*, 2 Hay. (N. Car.) 127; *Dummond v. Richards*, 2 Munf. (Va.) 337. See, also, *Taylor's Land & Ten.* (8th ed., 1887), § 252; but see, *infra*, as to effect of "yielding and paying."

1. *History*.—From very early times warranty was regarded by the common law as a necessary incident to the creation or transfer of every estate, in return for homage. On account of the feudal relation, the lord was bound to warrant or insure the fief against all persons claiming by title, and in case of its loss to replace it with another. So too the relation of landlord and tenant implied certain covenants. When charters or deeds came into use, the technical and indispensable words expressive of the creation or transfer of the estate in question were, of course, *held* to imply the covenants incident to the transactions signified by the deeds. Thus, *dedi*, the word of feoffment, implied a warranty; *concessi* and *demisi*, on the one hand, and "yielding and paying" on the other,

2. What Covenants are Implied, and When.—(1) *In deeds of conveyance of real estate*, certain covenants for title have been declared by statute in England,¹ and in many States,² to be implied from the use of certain words of conveyance. A *habendum* stating that the estate is to be held "subject to" or "under and subject to" an incumbrance, or to an estate reserved, or to the performance of any covenants, implies a covenant of indemnity by the grantee to the grantor, in respect of such incumbrance,

implied the respective covenants of a landlord and a tenant. Co. Litt. 45 b, 384 a, b; Rawle on Covts. (5th ed. 1887), §§ 270-272. There are a few *dicta* to the effect that other words than *dedi*, or its equivalent "give" in a conveyance of a freehold, imply a covenant of warranty at common law, *e. g.*, "grant" and "convey." Mann v. Ward, 2 Atk. 228; "grant, bargain, sell, enfeoff and confirm"; Browning v. Wright, 2 B. & P. 13; but the law is well settled the other way. Brown v. Haywood, 3 Keb. 617; s. c., Freem. 514; Gee v. Pharr, 5 Ala. 588; Allen v. Sayward, 5 Greenl. (Me.) 230; Bates v. Foster, 59 Me. 158; Deakins v. Hollis, 7 G. & J. (Md.) 311; Frost v. Raymond, 2 Cal. (N. Y.) 188; Rickets v. Dickens, 1 Murph. (N. Car.) 346; Huntly v. Waddell, 12 Ired. (N. Car.) 33; Young v. Hargrave, 7 Ohio 63; Black v. Gilmore, 9 Leigh (Va.) 449.

The act of 8 & 9 Vict., ch. 106, § 4, provided that in all deeds executed after the 1st Oct. 1845, the words "give" or "grant" should not imply any covenant in law in respect of any tenements or hereditaments except by force of any act of parliament.

1. The modern *covenants for title* were introduced in the latter part of the seventeenth century, and in 1707 the Stat. 6 Anne, ch. 35 (restricted in operation to parts of the county of York only), declared that in deeds of bargain and sale in fee the words "grant, bargain, and sell" should imply covenants for *seizin*, against incumbrances, for quiet enjoyment and for further assurance. This very limited use of implied covenants was not extended in England till 1881 (the act of 8 & 9 Vict., ch. 119, introducing "pattern covenants," left their use optional, and was of no effect), when the conveying and law of property act, 44 & 45 Vict., ch. 41, § 7, declared that covenants for right to convey, quiet enjoyment, freedom from incumbrance, and further assurance should be im-

plied in the cases of conveyance therein mentioned.

2. *In the United States*.—The Pennsylvania act of May 28, 1715, § 6, 1 Pur. Dig. 582, pl. 93, passed within eight days after the statute Anne, was the earliest. It provided that the words, "grant, bargain, and sell" should be adjudged express covenants for *seizin*, against incumbrances, and for quiet enjoyment. The first covenant was not in terms limited to the acts of the grantor and those claiming under him, but it was *held*, taken in connection with the other covenants, which were so limited, to be so likewise in fact. Gratz v. Ewalt, 2 Binn. (Pa.) 98; Funk v. Voneida, 11 S. & R. (Pa.) 111; Seitzinger v. Weaver, 1 Rawle (Pa.) 377; Whitehill v. Gotwalt, 3 P. & W. (Pa.) 323.

The Pennsylvania act has been almost literally followed in Alabama (Code of 1887, § 1889), Arkansas (Code of 1884, § 639), Illinois (Rev. Stats. 1887, ch. 30, § 8), and Mississippi (Rev. Code, 1880, § 1196); but in Alabama the same effect is now given to either of the three words of conveyance used alone. The Pennsylvania construction has also been followed in the first three States. Roebuck v. Duprey, 2 Ala. 541; Stewart v. Anderson, 10 Ala. 504; Winston v. Vaughan, 22 Ark. 72; Prettyman v. Wilkey, 19 Ill. 235. In California (Civil Code of 1885, § 1113), and Dakota (Rev. Code of 1883, § 628), the word "grant"; in Montana (Rev. Stats. 1887, p. 665, § 285), and Nevada (Gen. Stats. 1885, § 2618), the words "grant, bargain, and sell," and in Texas (Rev. Stats. 1888, art. 557), the word "grant," or "convey," in a conveyance in fee, imply a covenant that the grantor has not conveyed the estate or any right, title, or interest therein, and a limited covenant against incumbrances.

In Delaware, in the absence of express covenants, "grant, bargain, and sell," imply a special warranty against the grantee and his heirs and all claiming under him. Rev. Stats. 1874, p. 500.

estate, or covenants.¹ In executory agreements to convey, the

In Missouri, the same words, when used in a conveyance in fee, imply general covenants for seizin and for further assurance, and a limited covenant against incumbrances. Rev. Stats. 1879, § 675.

In New Mexico, the words "bargained and sold," or words of like effect, in conveyances of hereditary real estate, unless expressly restricted on the part of the grantor and his heirs, to the grantee and his heirs and assigns, imply covenants for seizin in fee and against incumbrances made or suffered by the grantor or persons claiming under him. Comp. Laws, 1884, § 2750.

In Wisconsin, the short form of conveyance provided by statute implies covenants for seizin, of right to convey, for quiet enjoyment, against incumbrances and of warranty by the grantor, his heirs, and personal representatives, against all lawful claims. Rev. Stats. Suppl. of 1883, § 2208.

In some States, while no covenants are implied from the mere words of conveyance, yet the use of the word "covenant" or "warrant" has a certain statutory significance. Thus, in Georgia, . . . "a general warranty of title against the claims of all persons includes in itself covenants of a right to sell, and of quiet enjoyment, and a freedom from incumbrances." Rev. Code of 1882, § 2703; *Burk v. Burk*, 64 Ga. 632.

In Iowa, the statutory words, "I warrant the title against," etc. (Rev. Code, 1884, § 1970), "implies all the usual covenants in deeds of conveyance in fee simple, including seizin, freedom from incumbrance, and right to convey." *Funk v. Cresswell*, 5 Iowa 62; *Van Wagner v. Van Nostrand*, 19 Iowa 422. And in Indiana, any conveyance worded in substance, "A conveys and warrants to B," are deemed covenants from the grantor and his heirs and personal representatives, for seizin, of right to convey, for quiet enjoyment, against incumbrances, and of warranty "against all lawful claims." Rev. Stats. 1881, § 2927.

In Maryland (Rev. Code 1878, p. 394, § 67), Virginia (Code of 1887, ch. 108), and West Virginia (Am. Code, ch. 62, § 12, *et seq.*), the effect of the various forms of covenant is defined by statutes copied from the 8 & 9 Vict., ch. 119.

In Tennessee, special forms of cove-

nant are provided. Code of 1884, § 2820.

In the New England States, Colorado, Florida, North Carolina, Ohio and South Carolina, there would seem to be no legislation on the subject. See *Allen v. Sayward*, 5 Me. 230; *Bates v. Foster*, 59 Me. 157. But in South Carolina, warranty has been applied to effect the real object of the parties. See *Biggus v. Brady*, 1 McCord (S. Car.) 500.

In New York (Rev. Stats. 1882, p. 2195), Michigan (Am. Stats. 1882, § 5956), Minnesota (Gen. Stats. 1881, p. 535, § 6), Oregon (Gen. Laws 1874, p. 516, § 6, but covenants were at one time implied there. Laws 1843-49, p. 139; *Fields v. Squires*, 1 Deady. (U. S.) 366, 390), Wisconsin (Rev. Stats. 1874, § 2204, except in the short form of deed, see *supra*), and Wyoming (Rev. Stats. 1887, § 5), it is enacted that no covenants shall be implied in any conveyance of real estate; but in New York, this does not apply to leases. *Mayor v. Mabie*, 3 Kern. (N. Y.) 160; *Boreel v. Lawton*, 90 N. Y. 293.

1. "Under and Subject."—*Walker v. Physick*, 5 Pa. St. 193; *Buckley's App.*, 48 Pa. St. 491; *Am. Acad.*, etc., *v. Smith*, 54 Pa. St. 130; *Moore's App.*, 88 Pa. St. 450; *Samuel v. Peyton*, 88 Pa. St. 465; *Thomas v. Wiltbank*, 6 W. N. C. (Pa.) 477.

But these words do not create any liability except to the immediate grantor. *Taylor v. Mayer*, 93 Pa. St. 42, and cases just cited.

Nor, except during the actual possession of the estate by grantee or assignee. *Wickersham v. Irwin*, 14 Pa. St. 108; *Hannen v. Ewalt*, 18 Pa. St. 9.

And it must be clear from the context that a covenant is intended, rather than a mere qualification of the estate or interest conveyed. *Wolveridge v. Steward*, 3 Moo. & Sc. 561.

In Pennsylvania, the act of June 12, 1878 (2 Pur. Dig. 1464, pl. 29) does away with all personal liability for the payment of a ground-rent, mortgage, or other incumbrance, on the part of the grantee of an estate subject to such ground-rent, etc., unless there be an express covenant or condition in the grant, and the act further provides that "under and subject" shall not be so construed as to cause a liability. But

words of conveyance imply covenants for title as if used in a deed,¹ and the words "subject to the payment of the purchase money," or like words, also imply a covenant to pay.² Where a deed describes land by reference to a plan, this implies a covenant by the vendor that the system of improvements shown in the plan shall be adhered to.³

(2) *In leases*, the technical words of leasing⁴ imply, by the common law, on the part of the landlord, covenants of power to demise, and for quiet enjoyment,⁵ but have no greater scope.⁶ In the absence of such words, as when the lease is by parol, the relation of landlord and tenant implies a covenant for quiet enjoyment.⁷ A covenant that the premises are fit for occupation seems

this act is not retrospective. *Merri-man v. Moore*, 90 Pa. St. 78.

1. *Seitzinger v. Weaver*, 1 Rawle (Pa.) 377.

2. *Campbell v. Shrum*, 3 Watts (Pa.) 60.

3. If the owner of real estate lays it out in blocks and lots on a map, and designates thereon certain portions to be used as streets, parks and squares, or for any particular purpose (e. g., as a camp-ground for religious services and for tenting purposes), and sells lots by reference to the map, a covenant is implied that the designated portions will only be used for the purposes stated. *Booraem v. North, etc.*, R. Co., 40 N. J. Eq. 557; *Lennig v. Ocean City Ass'n*, 41 N. J. Eq. 606.

But in Pennsylvania, in a case of a sale by reference to a plan, the deed stating the lot to be "on Washington street, as the same shall hereafter be opened . . . and bounded on the south by said Washington street," this was held to mean "as the same shall hereafter be opened, if it ever is so done, by the constituted authorities;" and, because public convenience might require the street either to be opened or vacated, it was said that "the words must be understood to have been intended to fix the terminus of the grant, and not a covenant that the public should keep the street open forever." Hence, when the street was afterwards vacated by ordinance under authority from the legislature, and the grantors, under like authority, entered upon and occupied the land over which the street had been laid out, they were not liable in covenant. *Bellinger v. Union Burial Ground Soc.*, 10 Pa. St. 135.

Such a sale does not imply a covenant for a right of way over ground on which a street, not yet opened, is laid

out, the lot being accessible by another street. *Case of Mercer St.*, 4 Cow. (N. Y.) 542.

4. These words are "*concessi*," "*demisi*"; Co. Lit. 45 b.; *Andrew's Case*, Cro. El. 214; *Nokes' Case*, 4 Co. 81; *Spencer's Case*, 5 Co. 16; or their English equivalents, "*demise*," "*grant*," *Style v. Hearing*, Cro. Jac. 73; *Line v. Stephenson*, 5 Bing. N. C. 183; "*let*"; *Bac. Abr. Covt.* 530; *Hart v. Windsor*, 12 M. & W. 68, 85; *Hemp-hill v. Eckfeldt*, 5 Whart. (Pa.) 274; "*lease*"; *Maule v. Ashmead*, 20 Pa. St. 482.

5. *Power to Demise*.—*Holder v. Taylor*, Hob. 12; *Cloak v. Harper*, Freem. 121; note to 1 Saund. 329; *Frazer v. Shey*, 2 Chit. 646; *Line v. Stephenson*, 5 Bing. N. C. 183; *Burnett v. Lynch*, 5 B. & C. 609; *Mostyn v. West Mostyn Co.*, L. R., 1 C. P. D. 145; *Wade v. Halligan*, 16 Ill. 508; *Streeter v. Streeter*, 43 Ill. 161; *Crouch v. Fowle*, 9 N. H. 219; *Grannis v. Clark*, 8 Cow. (N. Y.) 36.

But no such covenant is implied from the relation of landlord and tenant. *Bandy v. Cartwright*, 8 Exch. 913; *Gano v. Vanderveer*, 34 N. J. L. 293; *Baxter v. Ryerss*, 13 Barb. (N. Y.) 284.

Quiet Enjoyment.—*New York v. Mabies*, 3 Kern. (N. Y.) 160; *Vernam v. Smith*, 15 N. Y. 332; *Duff v. Wilson*, 69 Pa. St. 318.

6. *Hinde v. Gray*, 1 M. & G. 413; *Howard v. Doolittle*, 3 Duer (N. Y.) 464; *Carson v. Godley*, 26 Pa. St. 117; *Banks v. White*, 1 Sneed (Tenn.) 614.

7. *Bandy v. Cartwright*, 8 Exch. 913; *Dexter v. Manley*, 4 Cush. (Mass.) 14; *Maule v. Ashmead*, 20 Pa. St. 482; *Carson v. Godley*, 25 Pa. St. 117; *Ross v. Dysart*, 33 Pa. St. 453.

to be implied from the lease of a furnished house.¹ On the part of the tenant, covenants to pay rent² and to use the property in a tenant-like manner are implied.³ The assignment of a lease implies no covenants for title from the original lessee to the assignee,⁴ but the latter of course becomes bound by the implied covenants of the former to the lessor, as well as benefited by the latter's covenants.⁵

(3) *In exchanges*, warranty and condition of re-entry are implied by the common law, where it is still in force.⁶

1. *Smith v. Marrable*, 11 M. & W. 5; *Wilson v. Finch-Hatton*, L. R., 2 Ex. D. 336.

2. **To Pay Rent.**—This covenant is implied from the relation of landlord and tenant. *Taylor on Land. & Ten.* (8th ed.), § 371. And also from the words "yielding and paying" in the *reddendum*. Co. Lit. 384 a, *Butler's note*; Bac. Abr. Covt. B.; *Royer v. Ake*, 3 P. & W. (Pa.) 465. *Taylor's Land. & Ten.* (8th ed. 1887), § 252 n., applies the distinction noted *supra*, n. 1, to the case of these words, saying that they "are not properly an implied covenant, but an express one, by construction," and relying on *Hellier v. Caspard*, 1 Sid. 266; *Newton v. Orborn*, Sty. 387; the construction of "to be paid" in *Bower v. Hodges*, 13 C. B. 765, 774; and a *dictum* in *Kimpton v. Walker*, 9 Vr. 191, 200, that "the expression 'yielding and paying' expresses the thing to be done, and in that sense the contract is express." But the authority of the earlier cases was doubted even in their own day. *Anon.*, 1 Sid. 447; notes to *Thursby v. Plant*, 1 Saund. 241; *Harper v. Burgh*, 2 Lev. 206 and, later cases consistently hold the law to be as stated in the text. *Webb v. Russell*, 3 Term 383; *Vyvyan v. Arthur*, 1 B. & C. 410; *Iggulden v. May*, 9 Ves. 325; *Kunckle v. Wynick*, 1 Dall. (Pa.) 305; *Kimpton v. Walker*, 9 Vr. 191. The question is of practical importance on account of the duration of the covenant. See *infra*, n. 36.

3. **To Use in a Tenant-like Manner.**—*Horsefall v. Mather*, Holt 7; *Powley v. Walker*, 5 Term 373; *Leach v. Thomas*, 7 C. & P. 327; *Harnett v. Maitland*, 16 M. & W. 257; *Yellowby v. Gower*, 11 Ex. 294; *Walker v. Tucker*, 70 Ill. 527; *Lewis v. Jones*, 17 Pa. St. 262. In the case of farm property this amounts to a covenant to observe good husbandry according to the custom of that part of the country.

Legh v. Hewitt, 4 East 154; *Angerstein v. Handson*, 1 C. M. & R. 789; *Hallifax v. Chambers*, 4 M. & W. 662; *Martin v. Gilliam*, 7 A. & E. 450; *Wilkins v. Wood*, 17 L. J. Q. B. 319.

4. *Landydale v. Cheyney*, Cro. El. 157; *Waldo v. Hall*, 14 Mass. 486; *Blair v. Rankin*, 11 Mo. 442; *Woodburn v. Renshaw*, 32 Mo. 107. This is wholly apart from the implied contract, in an agreement to assign, to show a good title in the lessor and that the lessee has a right to assign. *Souter v. Drake*, 5 B. & Ad. 992; *Bensel v. Gray*, 38 N. Y. Super. 447.

5. Bac. Abr. Covt. E. 5; *Vyvyan v. Arthur*, 1 B. & C. 410. And also the assignee of a lease by several mesne assignments, is bound to indemnify the original lessee against breaches of express covenants in the lease, committed during the tenancy, irrespective of the assignee's covenants to his immediate assignor. This was stated to be *perhaps* on the ground of an implied covenant. *Moule v. Garrett*, L. R., 7 Ex. 101; and it seems to have been understood as such. *Hamilton on Covts.*

6. They were implied at first from the exchange itself; later from the use of the indispensable word *encambium*. Co. Lit. 51 b, 384 a; *Hart v. Windsor*, 12 M. & W. 68. But by the Stat. 8 & 9 Wit. c. 106, deeds of exchange made after that act do not create any implied warranty or right of re-entry or covenant.

In the United States, technical exchanges have fallen into disuse. *Dean v. Shelly*, 57 Pa. St. 427; *Gamble v. McClure*, 69 Pa. St. 282; *Walker v. Renfro*, 26 Tex. 142. But unless where the common law has been altered by statutes (see *supra* as to *New York*) or is regarded as obsolete, it is presumed to be still in force, at least theoretically. *Rawle on Covts.* (5th ed.), § 276.

(4) *In partitions*, the same is true as to coparceners, but warranty only is implied as between joint tenants or tenants in common.¹

(5) *In annuities*, a personal covenant of the grantor to pay is implied.²

(6) *In a deed of any kind*, a covenant that the grantor will do nothing in derogation of his grant, is always implied.³

(7) Covenants cannot be implied from a recital.⁴

3. The Effect and Duration.—The warranty implied from the word *dedi*, arising from tenure, was a real covenant in its strict sense. The warrantee received another feud in the place of that which was lost,⁵ and the covenant itself was not limited to the acts of the lord and those claiming under him,⁶ nor was it restrained by any express covenant the deed might contain.⁷ The covenants implied from words of leasing, as well as all modern implied cove-

1. Rawle on Covts. (5th ed.), § 277. This partition being by writ, the warranty was implied from the partition itself, and not from any particular words used. It was never implied in partition by deed. *Rector v. Waugh*, 17 Mo. 26; *Cashion v. Faina*, 47 Mo. 133; *Weiser v. Weiser*, 5 Watts (Pa.) 279; *Rountree v. Denson*, 59 Wis. 522. In Rawle on Covts. (5th ed.), § 278, the cases of *Morris v. Harris*, 9 Gill (Md.) 26; *Patterson v. Lanning*, 10 Watts (Pa.) 135; *Seaton v. Barry*, 4 W. & S. (Pa.) 184; and *Allen v. Gault*, 27 Pa. St. 475, which assumed that a warranty was implied in a partition by deed between coparceners, are said to be based on a misconception of the law.

In practice, however, a bill in equity would now be a better remedy in such cases than an action of covenant. *Walker v. Hall*, 15 Ohio St. 355; *Patterson v. Lanning*, 10 Watts (Pa.) 135; *Sawyers v. Catro*, 8 Humph. (Tenn.) 256, 287.

2. "The grant of an annuity in terms, out of whatever payable, *prima facie* binds the person; and the implication from it of a covenant to pay, can only be rebutted by a plain intent, apparent on the face of the instrument, that the annuitant should resort only to a specific fund." *Horton v. Cook*, 10 Watts (Pa.) 124.

3. *Seddon v. Senate*, 13 East 63. Thus, when, after an assignment of an insolvent's estate, the assignor undertook to interfere in certain legal proceedings by his assignee against a debtor to the estate, he was held liable in covenant. *Gerard v. Lewis*, L. R., 2 C. P. 305.

But merely joining in the execution

of a deed appointing the party a trustee, and declaring his acceptance of the trust, does not imply a covenant for the proper administration of the trust. *Holland v. Holland*, L. R., 4 Ch. App. 449.

4. Owing chiefly to a misapprehension of *Johnson v. Procter*, 4 Yelv. 175; s. c., 1 Bulst. 3, the contrary has been asserted. *Browning v. Wright*, 2 Bos. & P. 13; *Aspdin v. Austin*, 5 A. & E. N. S., 671, 683; *Christine v. Whitehill*, 16 S. & R. (Pa.) 98; 112. But the law is now settled as stated in the text. *Delmer v. McCabe*, 14 Ir. C. L. 377; *Ferguson v. Dent*, 8 Mo. 673; *Whitehill v. Gotwalt*, 3 P. & W. (Pa.) 313, 327; 2 Sug. on Vend. 524; *Rawle on Covts.* (5th ed.), § 280.

This is one of the distinctions between implied covenants and express covenants inferred from the language used. See *supra*, n. 1.

5. *Rawle on Covts.* (5th ed.), § § 2, 275.

6. *Shep. Touch.* 166, 167. But the lord was not bound to defend the fief against trespassers. *Rawle on Covts.*, (5th ed.), § 127.

7. "For, if a man make a feoffment by *dedi*, and in the deed doth warrant the land against J S and his heirs, yet *dedi* is a general warranty during the life of the feoffor." *Co. Lit.* 384, a; *Nokes' Case*, 4 Co. 80, b; *Rant v. Cock*, Cro. El. 864; *Trenchard v. Hoskins*, Litt. 64; *Johnson v. Procter*, 1 Bulst. 3; *Dow v. Lewis*, 4 Gray (Mass.) 473. The cases of *Morris v. Harris*, 9 Gill (Md.) 27; *Kent v. Welch*, 7 Johns. (N. Y.) 259; and *Bricker v. Bricker*, 11 Ohio St. 240, seem based on a misconception of *Nokes' Case*, 4 Co. 80, b

nants, arise from contract, and hence the covenantor is liable in damages only,¹ while the covenants themselves are modified by express covenants.² Implied covenants do not extend to things not *in esse* at the time the implication first arose.³ Whether they operate by way of estoppel or not, in those States in which express covenants for title have that effect,⁴ is not settled.⁵ Where there is more than one grantor, the covenants implied are, as regards the parties bound by them, co-extensive with the interest granted; that is, joint if a joint estate; several if a several interest.⁶

In England statutory implied covenants for title run with the land,⁷ but in the United States the general rule as to both ex-

1. Rawle on Covts. (5th ed.), § 275.

2. Thus in *Nokes' Case*, 4 Co. 80, b, the lessor, after employing the words "demise" and "grant," added a covenant for quiet enjoyment "without eviction by the lessor or any claiming under him," and it was *held* that "the said express covenant qualified the generality of the covenant in law, and restrained it by the mutual consent of both parties that it should not extend further than the express covenant." The reason is, that when a party employs a special covenant to limit his liability, the law will not render it useless and defeat his intention by over-riding it with the covenants of greater scope, implied by the law itself. *Deering v. Farrington*, 1 Mod. 113; *Frontin v. Small*, 2 Raym. 1419; *Schlencker v. Moxey*, 3 B. & C. 789; *Line v. Stephenson*, 5 Bing. N. C. 183; *Leonard v. Taylor*, 7 Ir. L. 207; s. c., 8 Ir. L. 300; *Kean v. Strong*, 9 Ir. L. (Q. B.) 74; *Mostyn v. W. Mostyn Co., L. R.*, 1 C. P. D. 145; *Dennett v. Ather-ton, L. R.*, 7 Q. B. 316; *Roebuck v. Duprey*, 2 Ala. 535; *Walker v. Brown*, 28 Ill. 378; *Blair v. Hardin*, 1 A. K. Marsh. (Ky.) 232; *Morris v. Harris*, 9 Gill (Md.) 19; *Gates v. Caldwell*, 7 Mass. 68; *Sumner v. Williams*, 8 Mass. 201; *Crouch v. Fowle*, 9 N. H. 219; *Kent v. Welch*, 7 Johns. (N. Y.) 258; *Vanderkarr v. Vanderkarr*, 11 Johns. (N. Y.) 122; *Looker v. Grotenkemper*, 1 Cin. S. C. (Ohio) 88; *Merritt v. Closson*, 36 Vt. 172.

In *Iowa*, under the old act, the words "grant, bargain and sell," raised general covenants by implication unless restrained by express words, and it was *held* that a special covenant of warranty did not expressly restrain the effect of the implied covenants. *Brown v. Tomlinson*, 2 Greene (Iowa) 525.

And in *Indiana*, the general covenant for seizin implied from the words "convey and warrant," is not limited by a clause declaring that the grantors will "warrant and defend the premises against all taxes against us, and against our own acts in the premises." *Jackson v. Green*, 112 Ind. 341.

3. Hence, where the tenant, in consideration of the lease, made a water-course through the premises and built a mill, and the lessor stopped the water-course, this was *held* no breach of the covenant implied from "grant and demise." *Huddy v. Fisher*, 1 Leon. 298.

4. See COVENANT; ESTOPPEL.

5. *Estoppel*.—In *Illinois*, the covenants implied from "grant, bargain and sell," are *held* to pass an after-acquired title. *D'Wolf v. Hayden*, 24 Ill. 525; *King v. Gilson*, 32 Ill. 325; *Pratt v. Pratt*, 96 Ill. 184.

But in *Missouri*, it is otherwise. *Chauvin v. Wagner*, 18 Mo. 531; *Gibson v. Chontreau*, 39 Mo. 566; *Butcher v. Rogers*, 60 Mo. 138.

6. *Coleman v. Sherwin*, 1 Show. 79; s. c., 1 Salk. 137; Rawle on Covts. (5th ed.), § 304.

7. Stat. 44 & 45, Vict. ch. 41, § 7 (6), provides that "the benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom the estate or interest is, for the whole or any part thereof, from time to time, vested; and section 59 (2) provides that though the covenant be not expressed to bind the heirs, it "shall operate in law to bind the heirs and real estate as well as the executors and administrators and personal estate of the person making the same as if heirs were expressed."

press and implied covenants for title is that covenants for seizin and of right to convey, and apparently that against incumbrances also, *are in præsenti* only, and broken, if at all, as soon as made.¹ A landlord's implied covenants last only during the continuance of the estate out of which the term of years is granted;² and, likewise, the tenant's implied covenants do not bind him until he has taken possession,³ nor after he has assigned the lease.⁴

4. Breach and Remedy.—As every implied covenant relates to matter that might be the subject of an express covenant, there is no difference between the two in regard to breaches or the remedy therefor.⁵

1. Rawle on Covts. (5th ed.), § 205. See COVENANT.

2. Hence, in case of a lease of a tenant for life, and eviction by the remainder-man on the lessor's death, the lessee has no remedy. *Swan v. Searles*, Dyer 257 a; *Hyde v. Canons of Wind-sor*, Cro. El. 553; *Cheiny v. Langley*, 1 Leon. 177; *Bragg v. Wiseman*, 1 Browl. 33; *Adams v. Gibney*, 6 Bing. 656; *Brookhaven v. Baggatt*, 61 Miss. 383; *M'Clowry v. Crogan*, 1 Grant (Pa.) 307, 311.

3. *Taylor v. Horde*, 1 Bur. 60, 125.

4. *Pitcher v. Towey*, 4 Mod. 71; s. c., 12 Mod. 23; *Treacle v. Coke*, 1 Vern. 165; *Staines v. Morris*, 1 V. & B. 11; *Taylor v. Shun*, 1 B. & P. 21; *Onslow v. Corrie*, 2 Mad. 330; *Dalston v. Reeve*, 1 Ld. Ray. 77; *Webb v. Russell*, 3 Term 402; *Iggulden v. May*, 9 Ves. 325; *Fanning v. Stimson*, 13 Iowa 42; *Walker v. Physick*, 5 Pa. St. 193; *Kimpton v. Walker*, 9 Vt. 191.

5. As to these, see COVENANT.

Authorities.—Rawle on Covenants for Title (5th ed., 1887); Hamilton on Covenants (Lond. 1888.)

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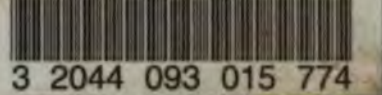
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